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The Cost of Legal Obstacles
to the Disadvantage of
Consumers in the Single Market

A Report for the European Commission
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TABLE OF CONTENTS

| | |
|--|----------|
| PART A: PREFACE..... | i |
| I. INTRODUCTION..... | 1 |
| II. METHODS OF RESEARCH..... | 5 |
| III. CONTENTS OF THE STUDY..... | 5 |
| PART B: REPORT ON THE COST OF JUDICIAL PROCEEDINGS IN THE EUROPEAN UNION..... | 8 |
| I. INTRODUCTION..... | 8 |
| II. COUNTRY REPORTS | 9 |
| <i>BELGIUM</i> | 9 |
| <i>DENMARK</i> | 18 |
| <i>GERMANY</i> | 25 |
| <i>GREECE</i> | 32 |
| <i>SPAIN</i> | 43 |
| <i>FRANCE</i> | 53 |
| <i>IRELAND</i> | 60 |
| <i>ITALY</i> | 66 |
| <i>LUXEMBOURG</i> | 72 |
| <i>NETHERLANDS</i> | 80 |
| <i>AUSTRIA</i> | 85 |
| <i>PORTUGAL</i> | 100 |
| <i>FINLAND</i> | 112 |
| <i>SWEDEN</i> | 117 |
| <i>UNITED KINGDOM</i> | 122 |
| III. SUMMARY OF THE COUNTRY REPORTS..... | 147 |
| 1 <i>The Civil Proceeding in the Member States</i> | 147 |
| 2 <i>Tables of Costs and Durations</i> | 153 |
| 3 <i>The Real World</i> | 166 |

| | |
|---|------------|
| IV. THE USE OF INTERNATIONAL CONVENTIONS..... | 173 |
| 1 <i>The role of Conventions</i> | 173 |
| 2 <i>Ratification of Conventions Concerning Civil Proceedings</i> | 173 |
| 3 <i>Application of the Conventions</i> | 174 |
| 4 <i>Commentary on the Convention's Use in General</i> | 187 |
| PART C: SPECIAL REPORTS | 191 |
| I. SHORTENED CIVIL PROCEDURE FOR CONSUMERS IN DENMARK? (BIRGIT FELDTMANN)..... | 191 |
| II. THE IMPUGNMENTS IN THE ITALIAN LAW (ROBERTA PIEROBON)..... | 211 |
| III. APPELLATE PROCEEDINGS IN AUSTRIA (WINFRIED SCHWARZ)..... | 225 |
| IV. CLIENTS, LAWYERS AND APPEALS IN FRANCE (ULRIKE BRANDT-MONGIN)..... | 240 |
| V. APPELLATE PROCEEDINGS IN A COMMON LAW ENVIRONMENT (MIRIAM BARTLETT)..... | 258 |
| PART D: CONCLUSIONS | 275 |
| I. ACCESS TO JUSTICE IN EUROPE - A SINGLE MARKET FOR LITIGANTS? (HANNO VON FREYHOLD)..... | 275 |
| 1 <i>Preliminary Assumptions</i> | 275 |
| 2 <i>Legal culture in Europe</i> | 282 |
| 3 <i>Consequences of Increased Litigation</i> | 286 |
| 4 <i>Specific Solutions</i> | 291 |
| 5 <i>Alternatives</i> | 301 |
| II. RESULTS AND PROPOSALS..... | 309 |
| 1 <i>Summary of Results</i> | 309 |
| 2 <i>Proposals</i> | 310 |
| ANNEX: ACKNOWLEDGEMENTS | 313 |

Part A: Preface

I. Introduction

The results of the previous study on the *Cost of Judicial Barriers for Consumers in the Single Market*¹ could be summarised as a "non-existent single legal market" for consumers: Civil litigation concerning "minor everyday disputes" of consumers in another member state takes a very long time (an average of two years) and the cost could be even higher than an assumed dispute value of 2,000 ECU. This *denial of justice* for consumers occurs in a period of stabilisation of the single market and the preparation of the introduction of a common currency.

It can be stated that these factors are stabilising the economic success of the Union on the level of *repeat players*, larger enterprises with stable economic relations in the member states. On the level of *one-shotters*, consumers with few cross-border transactions, the opportunities of participation in the single market have risen and will further increase with the introduction of the Euro, but the means to effectively defend and protect their rights are limited. As the previous study concluded: **A rational actor would not pursue a cross-border consumer claim within Europe in court.**²

The current *Study on the Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market* examines the situation of consumers in cross-border appellate proceedings, re-evaluating the question if a rational actor would pursue such claims. The study supplies and completes the previous study: It describes the *infrastructure of law enforcement* in the member states, concerning **all levels** of justice / civil litigation. The focus is on *non-professional actors* in the single market with few cross-border contacts and on the specific / additional limitations which arise in appellate proceedings, as well as on the opportunities which are given to consumers by the appeal. The cross-border conflicts *non-professional actors* are usually involved in are often minor disputes; but at the

¹ von Freyhold/Gessner/Vial/Wagner (eds.): *The Cost of Judicial Barriers for Consumers in the Single Market - A Report for the European Commission* (1996).

² *ibid.*

same time a development towards the participation of consumers in more complex transactions with higher values can be observed.

At these levels, conflicts arise mainly as results of the participation of consumers in the Single Market on the field of services (72%);³ more specifically the most conflictuous high value transactions consumers are involved in concern banking, insurance, brokers and agencies (with *time-sharing* as a field of recent negative prominence and source for legal conflicts). In the field of trade, transactions of furniture, high-tech goods, real estate and cars can be pointed out as fields of consumers' cross-border activities.⁴ These types of transactions obviously have higher values in dispute than consumers' everyday activities. In case of a conflict the assumption would be that there is a significantly higher likelihood of legal proceedings⁵, and for appeals. The study examines this assumption and shows the influencing factors for the decision whether to pursue a cross-border consumer claim.

The issue of appellate proceedings itself is a very complex one: Every member state has its own *structure of civil litigation*, there exists various models of court structures and systems of legal proceedings with their specific restrictions within the European Union. For the unadvanced consumer this variety within the Union seems to be a *jungle of justice*, with different courts, proceedings and costs, mixed with the possibility of language problems and misunderstandings. Furthermore, consumers are, as any actor in the legal field, faced with the general risk involved in legal proceedings, including the uncertainty of the results of a claim and its enforceability in practice.

The study summarises the structure of appellate proceedings in each member state by country reports, plus it examines additional factors, *e.g.* costs and time-frames.

³ Action de coopération transfrontalière pour l'accès des consommateurs au droit et au règlement des litiges: *Données statistiques, 1er rapport trimestriel*, Décembre 1994/June 1995.

⁴ Action de coopération transfrontalière pour l'accès des consommateurs au droit et au règlement des litiges: *Données statistiques, 1er rapport trimestriel*, Décembre 1994/June 1995.
Deutsch-französische Informations- und Beratungsstelle für Verbraucher: *EURO-Info, Jahresbericht 1993/94*, p.4 and 11.

⁵ According to the experts asked in the previous study, most lawyers would advice their clients to initiate cross-border legal proceedings in case of a dispute value of 50,000 ECU: von Freyhold/Gessner/Vial/Wagner (eds.): *The Cost of Judicial Barriers for Consumers in the Single Market - A Report for the European Commission* (1996).

The analysis of the structures of civil litigation in Europe shows different ways of legal conflict resolution, as well as similarities. Doing a comparison of *legal systems*, it is important to keep in mind the limitations of such a project: The results of the study enlighten the basic problems which necessarily arise in cross-border litigation. Though, it can not cover the sum of all risks and barriers that may possibly occur when a consumer is determined to litigate.

The study is a documentation and an analysis of the main aspects of civil litigation in Europe on all levels, giving information on various aspects involved in a hypothetical standard case. It shows the weaknesses of the system as well as the opportunities given: It will be a useful starting point for further discussions and activities within Europe.

In the aftermath of the previous study, the commission has been engaged in various activities to strengthen the position of consumers. Specifically, the extreme difficulties consumers face in protecting their rights were a starting point to strengthen the rights and powers of consumer associations. These associations have been further empowered to help in the prevention of the most striking problems that may affect a large number of consumers at the same time and come to the defence of groups of consumers if a problem has occurred.

Nevertheless, this touches only the top of the iceberg. As a matter of fact, consumer associations can hardly come to the defence of more than a fraction of affected consumers. Even more, on the cross-border level, consumer associations usually hardly have the necessary expertise. Thus, as mentioned in the previous study, consumers usually cannot rely on their effective support if a problem occurs. Therefore, in practice, the newly granted rights for consumer associations currently are hardly more than of a declaratory nature.

Thus, the problems consumers have on an individual level are still awaiting resolution.

The issue of long lasting, complicated and expensive civil proceedings, resulting in what might be described as a denial of justice, especially concerning the not legally advanced consumers, has led to several activities and plans within the European Union and its member states to find new ways to handle legal conflicts and to proceed civil cases.

The Study on the Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market can be seen in this context: It has as a major aim to describe the infrastructure of civil law enforcement in the member states and to enlighten

the basic problems which necessarily arise in cross-border litigation in all instances. It is a documentation and a analysis of civil litigation within the European Union, as well as it focuses on the actual problems and barriers which influence the functioning - or not-functioning - of civil conflict resolution in the various systems of justice existing in Europe. The Study will thus be an important step towards a better understanding of the complex situation in the Union concerning cross-border conflicts on all levels of the systems of civil litigation.

Additional to the examination of the status quo, the study is also part of an attempt to take action against the restrictions cross-border claims have to face in Europe. Here the internal discussions and ideas in the member states to reform the systems of civil litigation and to design new means to ensure a functioning system of justice, especially concerning the "weakest" parts in civil conflicts, are of a general interest. Most of the member states are in a constant development to improve their legal system; the ideas connected to this and the means designed can not be ignored also in the European context. Furthermore, national innovations might be a starting point or an inspiration also for the Union concerning the task to reduce the limitations of the single market which arise by the existing variety of legal systems. On the other hand, in the era of the Single Market, changes to a national legal system must have implications that reach beyond the individual member state's boundaries and have to be taken into account.

In the context of the study, **cross-border** proceedings are understood as law suits in which at least one of the parties to the same has its residence or place of business in a member state different to the one in which the court proceeding takes place.

Consumers are natural persons, whose participation in the civil litigation is independent from their professional or entrepreneurial activities. The study investigates the legal barriers that arise in the higher instances of such litigation. In the Single Market, cross-border consumer conflicts arise as consumers purchase goods and services within the Single Market when the contractual performance does not meet the expectations with regard to delivery, service, quality of the goods or services and/or payment.⁶ Further legal conflicts

⁶ *Green paper on the Access of Consumers to Justice and the Resolution of Disputes by Consumers in the Single Market*, COM (93) 576 final of 16 November 1993.

particularly in the field of torts and liability may result from the mobility within the Single Market.

II. Methods of Research

The empirical subject of the study concerns practical aspects of appellate proceedings taking place in courts, *i.e.*, public institutions. Thus, within the framework of the study, legal practitioners and the ministries of justice, the latter being the governmental body having overall knowledge of the courts' activities, are the institutions of interest as well as the natural source of information in order to achieve the aim of drawing a realistic picture as possible of the infrastructure of civil law enforcement in the European Union and illustrate the existing situation concerning access to justice in appellate proceedings for consumers. As will be shown, appellate proceedings require legal counsel in all but very few member states so that other institutions such as consumer associations are rarely involved in this type of litigation.

With such an approach, the actual difference between the law in the book and the law in action in any legal system must be kept in mind. It is important to understand that the implementation of law is a process of transformation. Additional legal experts and practitioners were involved to complete the study by the writing of in-depth studies on certain member states with their specific systems of justice and approaches concerning civil legal conflicts and appeals.

The direction of this gathering of information is to describe legal behaviour. The behaviour of parties, lawyers, judges and institutions like the Central Authorities which are involved in case of foreign service of process are in the focus as well as the actual use of courts in cross-border conflicts.

III. Contents of the Study

Country reports covering the judicial systems of all 15 member states form the backbone of the study. These country reports attempt to explain two first instance and appellate proceedings of the respective member states work and in particular which factors have important influences on the cost and durations of these proceedings.

A preliminary summary includes aspects that concern all member states, such as proceedings before the ECJ. Most importantly, it provides an overview of the country reports including tables and graphs that contain the actual figures which

follow as a result of the country reports and should facilitate an exact comparison between the cost and the duration of the various proceedings.

The country reports are supplemented by a chapter on particular aspects of cross-border proceedings as they are influenced by the application of conventions which exist to facilitate such proceedings.

In addition to the chapter of the country reports the second part of the study contains special reports from selected member states. They intend to add a complex picture of litigation in these diverse member states, and thus of the entire EU. This part shall develop further details for the better understanding of the data gathered in all member states providing, on a model basis, a comprehensive insight into both practical and theoretical issues.

In particular, the activities of the member states to improve the system of civil justice is of a special interest for the task of the study. One example for a phase of creating new ways of dealing with civil legal conflicts and the restrictions of such an attempt can be observed in **Denmark**. In present Denmark the issue of civil litigation in the system of justice and its limitations is a subject of major interest. As in the European Union, the focus is in Denmark on legal conflicts involving "ordinary citizens", or to put it in the context of the Single Market, the individual consumer. This group of participants (or non-participants if things go wrong) in the legal system are seen as the weakest parts, the unadvanced one-shotter who is seen as very likely to be "scared away" by the difficulties and complexities of civil litigation.

The previous study on the *Cost of Judicial Barriers* had shown that the **Italian** civil system represents an extreme within the EU, especially concerning the duration of the proceedings. In the meantime, revolutionary changes of the civil procedure and of international private law have taken place in Italy. A description of the current legal situation and of the procedural practice is therefore provided by an Italian practitioner. Regarding the aims of the reform, the situation in Italy is similar to the one in Denmark and, accordingly, similar solutions have been found, namely as regards the creation of a small claims proceeding. Nevertheless, the comparison between both countries show that notwithstanding all similarities, the introduction of the same concepts in may lead to different outcomes in different legal cultures and therefore require individual solutions.

The country report on **Austria** gives the impression that Austria may possibly be the average model among the member states in terms of fees and at the same

time having one of the comparatively more efficient judicial systems. It therefore seemed interesting to find out in more detail how the Austrian proceedings actually work, what can be learned from Austria, but also which problems still arise.

A report from **France** provides an attempt at a very personal and therefore particularly practical view on the issues that govern litigation as it focuses on the people who actually litigate. These people are the consumers, citizens, or customers of the legal system, whatever they may be called and for whom these proceedings are lastly meant for. A both sociological and psychological investigation can possibly provide additional insight that mere legal, procedural or tactical investigations will fail to give.

The **United Kingdom** represents the common law system in the EU which must not be omitted.

Besides the more nationally oriented information and analysis on civil litigation in Europe, the study examines also the general issue of a **single legal market**, focusing on the issues of this report and its impact on the reality of civil litigation in the European Union. The study can not provide a final solution to the problems connected with cross-border civil litigation in the European Union. But it can bring the practical difficulties and limitations of civil litigation in Europe into a wider perspective. Furthermore, it might be a first step towards the development of solutions. It is designed to assist in the better understanding of the limitations of the legal systems to react to civil conflicts and it will be a useful starting point for further discussion and activities within Europe.

Finally, the study is completed with a **summary of results**.

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**Part B: Report on the Cost of Judicial Proceedings in the European Union
(Birgit Feldtmann, Hanno v. Freyhold, Enzo L. Vial)**

I. Introduction

The main object of interest of the study are the additional factors of cost and duration arising in appellate proceedings. As a basis for the following questions we shall assume a standard civil case, such as a service or purchase contract, a damage claim, or a loan agreement. A party from one member state of the EU had commenced an action against a party from another member state of the EU which took place in one of the country's first instance courts. One of the parties appeals.

It should be noted that, depending on the circumstances of the case, a cross-border civil proceeding may take place either in the member state in which the consumer resides or, in the member state in which the seller, service provider or tortfeasor resides or maintains a place of business. In some cases, as in tort cases, the litigation may even take place in a third member state, the *locus delicti commissi*, i.e., the place of the tort. From the consumer's point of view, the latter litigation takes place abroad.

To achieve comparable information on the several systems of justice it is necessary to start the investigation of the civil proceedings in the individual member states from a joint starting point: For the calculation of cost arising in appellate proceedings and for the estimation of length of proceedings the study assumes a civil dispute with a value of 50,000 ECU. Setting a value is necessary for the estimation and for a reasonable comparison of results obtained with regard to the different member states; in a number of member states legal fees are dependent on the value at stake.

At first glance an assumed value of dispute of 50,000 or 200,000 ECU appears to raise doubts as most consumer conflicts are considered to be far below this value⁷, nevertheless, as pointed out before, within the established single market consumer transactions with such higher values are also a part of the consumers economic participation in the European Union. On the one hand, these types of

⁷ EUROBAROMETER 43,0 of 17.05.1995.

transactions might not be considered as consumers' everyday activities, but on the other hand it can be assumed for sure for these transactions that they have a high relevance for the consumers involved and in case of a conflict there is a significantly high likelihood of legal proceedings.

II. Country Reports

BELGIUM

1 National Civil Proceeding

1.1 Court structure

The Belgian court structure consists of

- Justice of the Peace;
- District Court;
- Court of Appeal;
- Supreme Court (Cour de Cassation).

Additionally, other specialized courts do exist and can be included into ordinary Jurisdiction: Police Courts, Commercial Courts, Labour Courts, Courts of Labour Appeal.

The competences of these courts, excluding Police and Labour Courts, are as follows:

The Justice of the Peace has jurisdiction on claims below 1,850 ECU⁸ and - without threshold amount limit - some specific matters.

The District Court is competent for all matters exceeding 1,850 ECU (except commercial matters and labour matters) and for appeals on judgments of Justices of the Peace.

⁸ All currency values in this study are based on the official exchange rates of 31 December 1997, OJ C 1998 1/9 of 03.01.1998.

The Commercial Court tries commercial matters and appeals on judgments of Justices of the Peace (regarding commercial matters).

The Court of Appeal tries appeals on judgments of District Courts and on judgments of Commercial Courts.

The Supreme Court (Cour de Cassation) hears appeals (cassation) on judgments of all courts rendered in the last instance: only examination of legal issues, not factual ones.

The number of District Courts, of Commercial Courts and of Labour Courts in Belgium is 27 *i.e.* one in each judicial district (arrondissement); in some districts, there are several sections of the Commercial Court and of the Labour Court in different locations.

The number of Courts of Appeal and of Courts of Labour Appeal in Belgium is 5, and these courts are located in Brussels, Antwerpen, Gent, Liege and Mons; some Courts of Labour Appeal have several sections in different locations.

1.2 First Instance Proceedings

The first instance courts for civil and commercial matters are as follows:

Actions concerning civil or commercial matters are dealt with by a Justice of the Peace, provided the matter in litigation is below a value of approximately 1,850 ECU. The Justice of the Peace has also jurisdiction in specific matters (without any threshold amount limit) such as actions concerning real estate leasing *e.a.*

Matters exceeding a value of 1,850 ECU are dealt with by the District Courts, unless it is a commercial matter which is dealt with by Commercial Courts. Besides, these courts have jurisdiction - without any threshold amount limit - in specific matters.

1.3 Appellate Proceedings

Appeals on judgments of the Justice of the Peace are dealt with by the District Court or by the Commercial Court (commercial matters).

Appeals on the judgments of the District Courts and of the Commercial Court (given at first instance) are dealt with by the Court of Appeal.

"Second appeal" as such does not exist under Belgian law. After a case has been sentenced on appeal there is no "second appeal" against this decision, but only a possibility of "cassation" before the Supreme Court (Cour de Cassation).

The petition of "cassation" is brought before the Supreme Court (Cour de Cassation) in Brussels, and such petition is only admissible if the question concerns infringement of law or the lack of motivation of opinion.

1.4 Lawyers in the Proceedings

Before the Supreme Court (Cour de Cassation), in civil matters, only lawyers with a special licence ("advocaat bij het Hof van Cassatie / avocat á la Cour de Cassation") can appear. At the moment there are only 16 of such licensed lawyers, each of them appointed by Royal Decree from a list of three candidates.

For the other courts all Belgian attorneys may appear or even lawyers registered in other member states of the European Union.

1.5 Legal Form of Appeals

When appeal is brought before the courts, the Commercial Courts, the Courts of Appeal or the Courts of Labour Appeal, the proceedings take place *de novo*, the court judging the factual and the legal grounds of the case at second instance.

The court, giving a decision on appeal, can review the contested judgment against which appeal was made and give a new decision. The case can be sent back to the lower judge, but only in case that the court on appeal is confirming a measure of investigation (*e.g.* the appointment of a Court Surveyor) ordered by the lower judge.

A proceeding before the Supreme Court (Cour de Cassation) - an "appeal in cassation" - is admissible on legal grounds only, *i.e.* questions concerning infringement of law or the lack of motivation of opinion. If the appeal in cassation is granted, the case is referred to another court (other location) of the same level as the court which has given the contested (and annulled) judgment. The court to which the case has been referred to, can only hear the case within the limits set by the Supreme Court in its decision.

1.6 Further Requirements and Restrictions for the Appeal

Against judgments of the Justices of the Peace, appeal can be lodged only in matters exceeding 1,250 ECU. On judgments of the District Courts and of the Commercial Courts, appeal can be lodged in matters exceeding 1,850 ECU.

Appeal can be lodged on judgments given after trial at first instance, and on judgments given by default. Against default judgments an opposition before the same instance can be filed as well. Appeal can be lodged against final judgments and against intermediate judgments, however intermediate judgments deciding on a conflict of jurisdiction are only appealable after the final judgment at first instance has been rendered.

1.7 Number of Documents to be Served

In each instance, at least one document has to be served directly to the opponent: a writ of summons in the first instance, a writ or a petition on appeal.

During the proceedings some other notifications (served by a bailiff or by a letter of the clerk of the court) can be necessary. Besides memoranda and written arguments (conclusions) are filed at the court registry, and a copy of the memoranda and of the supporting documents is sent to the opponent's lawyer. The original copies of the supporting documents are filed in court at the time of the pleadings.

1.8 Expert Witnesses

Belgian law does not provide special rules for expert witnesses. An expert can be appointed by the court in order to draft a survey report. The costs of this survey, appointed by the court during the proceedings, have to be advanced by the plaintiff, but can be recovered against the defendant if the claim is granted and the defendant is ordered to pay the law costs.

2 Time factors

2.1 Time Frame for Appeals

In civil matters appeal can be lodged as soon as the contested judgment has been given. When the judgment is notified to a party by a writ served by a bailiff, then

the period for lodging an appeal is one month as from the date of the notification (period to be extended for a party residing abroad).

Appeal is lodged by a writ served by a bailiff to the other parties concerned, or by a petition submitted to the court before which the appeal is instituted.

When the other party is appearing at the first hearing of the appeal proceedings, the court mostly will postpone the case to a later hearing or even sine die. After the first hearing the memoranda (conclusions) of both parties have to be filed; the Belgian Code of Civil Procedure provides periods (one month for the appellee, another one month for the answer of the appellant and finally 15 days for the last answer of the appellee). However these periods are not automatically sanctioned, and in practice these time frames mostly are not respected.

However, several judicial instruments exist (articles 747, 750, 751 of the Code of Civil Procedure) which allow the most diligent party to have a mandatory court calendar for filing written submissions act.

The memoranda and arguments (conclusions) of the appellant and the appellee are filed to the court, and a copy to the other party or its attorney with a copy of the supporting documents. The original copies of the supporting documents are filed in court at the time of the pleadings, or 15 days beforehand.

An appeal in cassation before the Supreme Court has to be filed within three months as from the date the appeal judgment has been notified by a writ of a bailiff (period can be extended when one of the parties is established abroad). The appeal in cassation is filed by petition, signed by an "avocat á la Cour de Cassation", notified by writ of a bailiff to the other party, and submitted next (within 15 days after the notification) to the court registry of the Supreme Court. The petition has to mention and to explain the arguments and the legal grounds the Petitioner in cassation is relying on. The proceeding before the Supreme Court is taking place in writing, *i.e.* usually without pleadings before the court.

Before the Supreme Court the periods determined by the Belgian Code of Civil Procedure for filing memoranda, are strict and have to be respected under pain of cancellation: the Petitioner in cassation can file a explanatory memorandum within 15 days after the notification of the petition, the Defendant has to file his reply within three months as from the notification of the petition or of the explanatory memorandum, and the Petitioner can file in particular cases a last memorandum within a period of one month as from the notification of the reply of the Defendant.

After all parties have filed their memoranda, the Attorney General of the Supreme Court, or one of his substitutes, will give his opinion in a report to the Supreme Court, and the Court will determine a hearing in order to examine the case.

2.2 Estimated Duration of Civil Cases

If the defendant is represented in court it may take between 6 and 12 months to obtain an enforceable judgment in the first instance, but it cannot be excluded that it may take more than 12 months, *i.e.*, 12 to 24 months, and even more. Default judgments are rendered the date of introduction and an enforceable title is available, depending on the court, after a few days or at a maximum of one month.

Before the Courts of Appeal, proceedings take mostly longer than in the first instance, and it cannot be excluded that appeal proceedings take more than 5 years, depending on the nature of the case and the particular circumstances of each Court of Appeals.

In this respect it has to be mentioned that, in civil matters, the prescription is interrupted by the notification of the writ of summons in the first instance, and until final judgment on appeal is rendered.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

The general principle on lawyers fees is contained in article 459 of the Belgian Code of Civil Procedure and the Belgian National Bar recommendations, which have been incorporated in most local bar guide-lines. According to these guide-lines lawyers may calculate their fees on hourly rates, on percentage values of the claim and in flat fees for specific procedures.

A percentage of 15% of the value is likely to be applied for simple cases with values up to 7,500 ECU, thus the fees would be in the range of 300 ECU for a value of 2,000 ECU, or less for lower values. Lower percentages will be applied, according to a decreasing scale, for higher values *i.e.* percentages from 15% to 10% for values around 50,000 ECU and 4% for values up to 250,000 ECU, and lower percentages for higher values. The fees are calculated per "bracket", applying the corresponding percentages for each "piece" of the value.

Accordingly, the fees for a claim of 50,000 ECU would be in the range of 5,300 ECU and for a claim of 200,000 ECU in the range of 12,000 ECU.

For very simple matters or, when the claim is not fully recovered, the fees may be reduced by up to 50%. On the other hand, expenses are additional and may add up to 50% of the lawyers fees.

In case an hourly rate is applied the same differs from firm to firm. A standard hourly rate, exclusive of costs, would be 80 ECU, but various parameters such as the financial value of the case, the experience of the lawyer, the urgency, the complexity of the matter and the result achieved may be considered, and the hourly rate would vary accordingly.

In international matters it is quite common to agree to and apply hourly rates. Generally, a standard appellate proceeding might use in the average of 25 hours which, considering a value of 50,000 ECU and a rate of 110 ECU per hour would amount to 2,750 ECU so that this calculation leads to about the same costs as if calculated by the percentage scheme. At a value of 200,000 ECU lawyer's might charge a little more per hour and, with respect to the fact that such case would probably be or be made more complex, need more hours. Accordingly, the aggregate fees would amount to about 5,250 ECU which favours the client in relation to the percentage fee schedule.

In Belgium all member of the Bar may represent clients in all state courts throughout Belgium (except the Supreme Court where, in civil matters, only the "avocats á la Cour de Cassation" can appear). In case the matter is handled in a different city, the fees and costs as aforesaid will in principle only be increased for travelling expenses. In case a corresponding lawyer mentioned is called upon, a minimum indemnity (for various simple duties) of 65 ECU plus costs is to be paid so that a minimum of 75 ECU would be appropriate in the comparative table. For more complicated duties, the fees of the corresponding lawyer will be calculated as aforesaid.

For foreign clients no different costs are generally anticipated. However, the lawyers may prefer an hourly rate for foreign clients rather than the percentage. Language skills may have to be considered.

Contingency fees are prohibited for Belgian lawyers.

In case of appeal, after a proceeding in first instance, the lawyers fees are calculated usually as follows:

- on basis of percentage values: 50% of the fees calculated for the first instance proceedings, when the same attorney is handling the case in first instance and in appeal; full obligation of the percentage value if another attorney handles the case on appeal;
- fees calculated on hourly bases: the same hourly rate is usually applied for proceedings in first instance and on appeal.

As far as the court fees are concerned, court registry fees have to be paid when placing a case on the case list. The amount of the fees depend of the level of the court: Justice of the Peace 35 ECU; District Court and Commercial Court 82 ECU; Court of Appeal 188 ECU; Supreme Court 325 ECU. For proceedings before Labour Courts and Courts of Labour Appeal, no court registry fees are due.

In addition bailiffs expenses have to be paid when a notification by a writ of a bailiff is necessary. The bailiff's fees for service of process will - for a claim in the amount of 2,000 ECU - depending on the number of pages, the indemnification for the travelling distance, etc. vary between 75 ECU and 250 ECU, costs for mandatory translations not included.

Translator's fees ranging from 1 to 2 ECU per line are customary but not mandatory. An apostille or certification is charged at 5 ECU.

If the judgment contains a condemnation to payment of an amount in excess of 12,500 ECU, registration taxes at 3% on the amount of the judgment are due.

The authenticated copy of the judgment constituting the enforceable title costs 1.50 ECU per page at the Justice of The Peace, 3 ECU per page in the District Court and the Commercial Court, 1 ECU in the Labour Court and in the Court of Labour Appeal, 3 ECU in the Court of Appeal, 5 ECU in the Supreme Court.

3.2 VAT-Rules

Belgian lawyers are not subject to VAT.

3.3 Transfer of Money

Collected monies are generally forwarded to clients abroad (and in Belgium) by bank transfer.

Lawyers in Belgium in general do not accept credit cards.

3.4 Gathering of Information

Addresses of private individuals are located by enquiring at the Municipal Registry Office. The information can be obtained immediately at costs between 3 and 8 ECU .

Notaries public and bailiffs have, according to statutory provisions, access to the National State Registry. Information can be obtained immediately at costs between 5 and 10 ECU.

Addresses (and other information) about companies can be obtained at the Trade Register (at the Commercial Court) free of charge. Excerpts from the Trade Register are delivered after a few days, at costs of 1 ECU per page.

3.5 Cost of Recognition of Judgments

For the enforcement of foreign judgments a request signed by an attorney has to be filed at the District Court, and court registry fees are 50 ECU.

Including the involvement of an attorney, the minimum cost for obtaining an enforcement order of foreign judgments should be 250 ECU.

After the enforcement order has been issued, an authenticated copy of the order is delivered at cost of 3 ECU per page and has to be served by the bailiff at costs between 100 to 300 ECU.

DENMARK

1 National Civil Proceeding

1.1 Court Structure

The civil court structure in Denmark, which is described in the Danish Administration of Justice Act (*retsplejelov*), is divided into three levels of courts:

Denmark is divided into 82 judicial districts with a District Court (*byret*) in each district. Two appellate courts exist, the Eastern Court of Appeal (*østre Landsret*) in Copenhagen and the Western Court of Appeal (*Vestre Landsret*) in Viborg. The jurisdiction of the Courts of Appeal are geographically defined. The Supreme Court (*Højesteret*) is located in Copenhagen and has jurisdiction for the whole country.

Furthermore, the Maritime and Commercial Court (*Sø- og Handelsretten*) is part of the ordinary court system in Denmark. It is placed in Copenhagen and it deals in particular with maritime and commercial / trade cases; concerning ordinary consumer disputes (cross-border or not) this court is unlikely to have jurisdiction.

1.2 First Instance Proceedings

As a main rule, all civil cases start at the District Court; generally the one in the judicial district to which the place of residence of the person who is faced with a claim against him belongs to or in which the defendant company does its business.

The Courts of Appeal treats cases of first instance regarding disputes between public administration and individuals (*e.g.* testing of decisions made by a ministry or a central official appeals body which has the upper administrative authority to make decisions in cases between the public and the private). Furthermore cases of general public importance or of particular importance may be referred to the Court of Appeals by the District Courts on request of one of the parties. Also cases which raise the issue of the use of common market law or of foreign law may on the request of one of the parties be transferred to the Court of Appeal by the District Court. The same is possible for cases with an economic value of more than 66,420 ECU.

In this connection it should be mentioned that there is a recent discussion in Denmark on the treatment of so-called small claims: There exists plans to create a shortened procedure for those cases with a small threshold value (2,670 ECU), based on a quick proceeding in front of a judge without the participation of lawyer and with no possibility for appeal.

1.3 Appellate Proceedings

The general principle for appeals in Denmark is a two instances system: Decisions of the District Courts can be appealed to the Court of Appeal, whereas first instance decisions from the Court of Appeal (and from the Maritime and Commercial Court) can be appealed to the Supreme Court.

Nevertheless, a case which started at the District Court might get permission for a second appeal after the verdict of the Court of Appeal, now to the Supreme Court, if a special commission (procesbevillingsnævnet) decides that the particular case is of special interest and therefore permits a second appeal.

Concerning cases regarding claims with a financial value of maximum 1330 ECU, the decision may only be appealed in special circumstances, *e.g.* if the case raises issues of principle character, again depending on the permission of the commission.

1.4 Lawyers in the Proceedings

Each person who is appointed as a lawyer by the Ministry of Justice has the right of audience in the District Court. Persons who are in the phase of traineeship to a lawyer (advokatfuldmægtig) can also represent a case at the District Court if they are under supervision of an appointed lawyer.

To represent a case at the Court of Appeal (and the Maritime and Commercial Court) a lawyer (or an authorised advokatfuldmægtig) has to pass a test in procedure. This test consists of the representation of two cases in front of one of those courts, the evaluation of this tests are done by the court.

The right of audience at the Supreme Court will be given to the lawyer in question, if he / she proofs by a statement of the Danish Lawyers Bar that he / she has worked as a lawyer with a right of audience for the District Court for at least 5 years and if the Court of Appeal, where he / she represented cases, confesses that he / she is used to the procedure.

1.5 Legal Form of Appeals

As a main rule, appeals in civil cases take place in Denmark *de novo*; in the second instance the claim will be reviewed on all aspects, both legally and concerning the facts.

Claims and submissions which have not been alleged in the previous instance, may, in case the opposing counsel objects, only be put forward with the permission of the court.

In general it is said that an appeal from the District Court to the Court of Appeal has a higher likelihood to succeed than an appeal from the Court of Appeal to the Supreme Court.

A successful appeal can result in a change of the verdict, a reversal of the first decision or in remission to the court from which verdict was appealed. In the latter case the renewed treatment of the case will then proceed in accordance to the decision of the appellate instance.

1.6 Number of Documents to be Served

When the plaintiff files a writ of summons in a case of first instance and if he does not know that the defendant is represented by a lawyer, the writ of summons shall be served on the defendant.

Where it is presupposed that the defendant accordingly contacts a lawyer, further correspondence during the legal proceeding and during a possible appeal will be addressed to this lawyer who subsequently notifies his client.

In general the number of documents / correspondence exchanged between the parties will be 4 and in appellate proceedings 2.

1.7 Expert Witnesses

The fees of expert witnesses are not defined. Usually there are calculated on a hourly basis and confirmed by the court. In general it can be said that the hourly rate of an expert witness will vary between 65 ECU and 170 ECU.

The costs of expert witness are part of the final decision on the cost of the case: As a starting point the party wanting the expert witness involved in the case shall pay the fee. Nevertheless, at the end of the legal proceeding, the court has possibility of allocating the legal costs to the benefit of the winning party,

resulting in that the losing part has to bear the cost of the case including expert witnesses fees.

2 Time Factors

2.1 Time Frame for Appeals

Appeals against a decision from a District Court must be lodged within 4 weeks, whereas appeals against judgments from a Court of Appeal (and the Maritime and Commercial Court) must be handed in within 8 weeks. The period starts running from the passing of the decision.

In general, the courts are obliged to proceed civil cases in reasonable time. In practice the appellate court in question accordingly fixes the periods (normally 14 days) for the following steps in the treatment of the case. These periods may be extended at request, which often happens in practice. The notice of appeal shall be accompanied by a transcript of the decision being appealed and copies of the notice of appeal.

In this connection it should be mentioned that in 1997 a change of the Danish Administration of Justice Act (*retsplejelov*) entered into force with the aim to fasten up civil procedure by giving shorter time frames for certain steps of the proceeding and by reducing the possibilities to stay proceedings.

2.2 Estimated Duration of Civil Cases

As everywhere the duration of civil cases depends on a wide extent of the specific circumstances of the case concerned; the complexity of the judicial questions which arise, the availability of witnesses and the handling of the case by the individual judge / court are some of the aspects which influence the length of legal proceedings.

With this limitations of estimated duration of civil cases in mind, legal professionals agree that cases instituted at the District Court will usually be dealt with quicker than cases at the Court of Appeal or the Supreme Court.

It is estimated at the District Courts the duration of a case from the lodging of the claim to the verdict as a minimum will have a duration of at least 3-6 months. For "normal" cases 6 month up to 2 years are estimated and in extreme cases 3-5 years or even more are seen as possible duration.

Concerning proceedings at the Court of Appeal it is estimated a minimum of 9 months up to 2 years, in "normal" cases 1-2½ years are seen as realistic and in extreme cases more than 3-5 years are possible. If the Court of Appeal functions as a appellate court instead of a first instance court, the duration of the cases are estimated slightly shorter.

Concerning the proceedings at the Supreme Court it is estimated that the duration is slightly shorter than at the Court of Appeal.

As a supplement of this estimations by legal practitioners it can be added that the Danish Minister of Justice, Frank Jensen, estimates that it takes about 9 month before the highest Danish court (Supreme Court) actually deals with a case.

Furthermore it was published in the media that the "waiting-time" at the Courts of Appeals are nowadays about 250 days.

3 Costs Factors

3.1 Lawyer Fees and Court Fees

Concerning court cases lawyers fees are no longer regulated by the Danish lawyers' fees guide-lines issued by the Danish Lawyers Bar. Nevertheless, many lawyers still follow these guide-lines, unless a specific agreement with the client has been made.

For a case with a value in dispute of 50,000 ECU the lawyer's fee will as a starting point constitute 3,285 ECU. A case with a value of 200,000 ECU the fee will constitute 7,770 ECU.

The court fees are regulated by the Danish Act on Court Fees. There have to be paid at two steps of the proceeding, both times relating to the value in dispute: The first fee has to be paid with lodging of the claim / the appeal and an additional fee (1/5 of the already paid fee) must be paid with the setting of a date for proceedings in front of the court.

In a civil case of 50,000 ECU the total court fees for one instance of proceedings will constitute 670 ECU and in a civil case of 200,000 ECU, the court fees for one instance will constitute 2,475 ECU.

For an appeal to the Supreme Court these court fees rise by 50%; with a minimum court fee of 200 ECU.

The first transcript of a court decision in a civil case for the use of the parties of the case is free of charge.

3.2 VAT-Rules

For domestic clients lawyer fees are subject to the general VAT of 25%.

Concerning businessmen / companies with residence outside of Denmark and inside of the EU VAT must not be paid. Individual clients who are resident in the EU shall pay VAT unless the service is used outside the EU.

3.3 Transfer of Money

In general, Danish lawyers do not accept credit cards. The transfer of collected monies will be done by cheques or by bank transfer.

3.4 Gathering of Information

There are a number of computerised registers kept by different authorities containing various information regarding companies and individuals. Some information can be obtained over the telephone free of charge, other, *e.g.* certificates and computer print-outs are available for small fees.

To find out an address concerning a company, it is possible to contact the Erhvervs- og Selskabsstyrelsen (the department for companies) free of charge. To find out private addresses the Folkeregister (residence registration) passes information, with a fee of 6 ECU per request.

3.5 Cost of Recognition of Judgments

The average total cost for the recognition of a judgment from a court in another state within the EU will be limited as only the following must be produced:

- a copy of the judgment which has been confirmed by a foreign court;
- evidence of the judgment may be enforced in the state which has delivered the judgment and of the service of the judgment;
- in connection with a default judgment evidence of the fact that the preliminary pleading of the case or a similar document has been served or

announced to the person who has failed to appear (cf. section 5 of the Act on the EU Judgments Convention).

The average total cost for the enforcement of judgments in court (fogedret) for dispute values of 50,000 ECU will be 1,420 ECU; of which the court fee constitutes 290 ECU and the lawyers fee 1,130 ECU . A proceeding with a dispute value of 200,000 ECU will cause costs in the amount of 4,800 ECU, of which the court fee constitutes ECU 1,040 and the lawyers fee 3,760 ECU.

These costs for the enforcement of the judgment will be added to the amount which the judgment debtor according to the decision has been ordered to pay.

GERMANY

1 National Civil Proceeding

1.1 Court Structure

In Germany there are two instances for claims worth up to 5,000 ECU and three for those worth over 5,000 ECU:

- Local Court (*Amtsgericht*);
- District Court (*Landgericht*);
- Court of Appeal (*Oberlandesgericht*);
- Supreme Court (*Bundesgerichtshof*).

This includes the ordinary civil courts, only. The *Bundesverfassungsgericht* (Federal Constitutional Court), *Arbeitsgerichte* (labour courts), *Verwaltungsgerichte* (administrative courts), the *Patentgerichte* (patent courts) and the like are not included. It is a constitutional right to be able to appeal to the *Bundesverfassungsgericht* (BVG). There are no court costs involved if the appeal does not represent an abuse of process (§ 34 BVerfGG). However all legal avenues must first be exhausted. In addition, any court may decide to refer questions to the BVG for a preliminary determination of a constitutional issue (Art. 100 GG), comparable to an Art. 117 Treaty of Rome referral to the European Court of Justice.

1.2 First Instance Proceedings

For claims up to 5,000 ECU, family law cases and residential tenancy disputes starts at first instance in the *Amtsgericht* (§§ 23, 23a GVG). For claims above 5,000 ECU the *Landgericht* (§72 GVG) is the first instance court.

1.3 Appellate Proceedings

Appeals from the *Amtsgericht* are appealed to the *Landgericht* (§ 72 GVG), except family law matters, which go to the *Oberlandesgericht* (§ 119 I No. 1 GVG). If the case started at the *Landgericht* in first instance, it is appealed at the *Oberlandesgericht* (§ 199 III GVG).

There are no further appeal for cases that have been appealed from the *Amtsgericht* to the *Landgericht* unless there are constitutional issues involved (in which case the appeal is to be filed with the *Bundesverfassungsgericht*, which in the German legal system is treated as being outside the civil court system). Cases appealed from the *Landgericht* to the *Oberlandesgericht* may be further appealed to the *Bundesgerichtshof* on points of law only. In order to appeal to the *Bundesgerichtshof*, leave of the court of second instance is required unless the sum in dispute exceeds 30,360 or a legal question of fundamental importance is at issue (§ 546 ZPO).

There are *Landgerichte* and *Oberlandesgericht* throughout the Federal Republic, each having a defined geographic area from which they hear appeals from the lower courts. The *Bundesgerichtshof* is in the city of Karlsruhe.

1.4 Lawyers in the Proceedings

Any practising attorney may appear before all *Amtsgerichte* in civil matters. However, there are restrictions for lawyers to appear before all other higher and highest instances and in family matters: an attorney may only plead before the Local Court or Courts to which he is admitted (§ 78 ZPO). Furthermore, while in some *Länder* he may only be admitted before either the lower courts or a *Oberlandesgericht* whereas in 6 *Länder*⁹, "dual" qualification is allowed. In both cases, qualification before the *Oberlandesgericht* requires 5 years of legal practice before the lower courts. Only a select group of attorneys are admitted before the *Bundesgerichtshof*, which is also all-exclusive.

As a result, for disputes that begin on the *Landgericht* level and in family matters, the parties do need a new lawyer for every instance, except when the dispute takes place in one of the 6 *Länder* mentioned above and the lawyer of first instance has dual qualification.

1.5 Legal Form of Appeals

Both courts of second instance (*i.e.* the *Landgericht* in its appellate jurisdiction for cases from the *Amtsgericht* and the *Oberlandesgericht*) hear appeals *de novo* on both the facts and the law. The appeal is in effect a retrial to be decided on the

⁹ Baden-Württemberg, Bavaria and Saarland, and the "city states" of Berlin, Bremen and Hamburg.

merits of the evidence before it and not on the basis of how the lower court should have decided given the evidence before it at the time. However, evidence brought before the court of first instance may be incorporated by reference before the court of second instance (§ 137 III ZPO combined with § 523 ZPO) where this seems efficient and opportune.

Only in very limited circumstances, where for one of the reasons specified in the procedural code (*e.g.*, a dismissal for lack of jurisdiction) a full trial was not had on first instance, the court of second instance may cancel the decision of the lower court and re-refer the matter to the court of first instance (§§ 538, 539 ZPO).

The 3rd instance to the *Bundesgerichtshof* appeal can be on a point of law only. Accordingly, this court will return the matter to the *Oberlandesgericht* should additional factual evidence be required in order to decide the case based on the legal principles set out by the Supreme Court. Else, as a basic principle, all courts are to decide the matter themselves.

1.6 Further Requirements and Restrictions for the Appeal

If the case started in the *Amtsgericht* as first instance court, there must be at least 760 ECU in dispute for an appeal to lie (§ 511a ZPO).

As described above, cases that have been appealed from the *Amtsgericht* to the *Landgericht* may not be further appealed, generally.

1.7 Numbers of Documents to be Served

If lawyers are on record before the issuing of proceedings, no document has to be served directly on the opponent. It is in any case the responsibility of the court to serve any documents. Usually, about three to four documents are served on each party in each instance. If a party does not reside in Germany it will be required to appoint a person within Germany who is authorized to accept any further service of process within the proceeding. Therefore, in practice, only one document per instance needs to be served by the court abroad, two if there is a default judgment.

1.8 Expert Witnesses

Expert witnesses (Sachverständiger) summoned by the court are entitled to a remuneration of up to 75 ECU per hour (§ 3 ZSEG). This can be increased if the expert witness has to travel from abroad (§ 6 ZSEG) or is a member of the medical profession (§ 5 ZSEG).

The sum is determined by a court order (§ 16 ZSEG). In special circumstances an advance may be granted by the court (§ 14 ZSEG).

The recoverable element of the remuneration of those experts chosen by one of the parties as expert witnesses have their costs are determined by the court (§ 26 GKG). This will be whatever the court regards as reasonable. Usually the party that relies on the evidence of the expert has to advance the estimated fees. Finally all fees of a proceeding are paid by the losing party.

2 Time Factors

2.1 Time Frame for Appeals

Appeal must be lodged no later than one month following the service of the perfected judgment, but in any event no later than six months following the pronouncement of the judgment (§ 516 ZPO).

The appeal must then be provided with reasons within a further month (§ 519 II ZPO).

The court may set the respondent a time limit to reply in writing to the appeal as it sees fit and may also determine a date for the oral hearing of the case (§§ 520, 555 ZPO).

In practice, these time frames are rigid for the initial lodging of any appeal. It may be stayed, however, in some circumstances, *e.g.* if the potential appellant has applied for civil legal aid.

The time limit for filing reasons in support of the appeal is not so rigid and may be extended by the appellate court (§ 519 ZPO or § 554 ZPO) upon reasoned application that has to be filed before expiration of the time limit. The time limits under §§ 520, 555 ZPO are at the court's discretion.

2.2 Estimated Duration of Civil Cases

The durations of first instance or appellate proceedings at the *Landgericht* are estimated at 6 months to 1,5 years with 8 months as a realistic value, provided that service of process can be effected in due time and that expert and other witnesses are available when needed.

Appellate proceedings in the *Oberlandesgerichte* are estimated with 4 months to 2 years, with 1 year as a realistic value, again provided that external factors do not prolong the proceeding. At the *Oberlandesgerichte* Bremen and Oldenburg the official statistics indicate an average duration of about 4 months only.

The proceeding at the *Bundesgerichtshof* takes a minimum of 1,5 years but may also last up to 6 years. A duration of 2,5 years is considered a realistic threshold. As in any jurisdiction, the length of proceedings in Germany will greatly depend on such variable parameters such as the nature of the case and the approach of the individual judges. The same applies basically for the Constitutional Court.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

The lawyers fees for a proceeding are as follows for each instance (in ECU):

| dispute value | first instance | appeal | second appeal |
|---------------|----------------|--------|---------------|
| 50,000 | 3,256 | 4,227 | 4,335 |
| 200,000 | 5,690 | 7,395 | 7,584 |

In the event that no examination of witnesses or other evidence takes place, the costs for the first and/or second instance will be one third less.

Where one of the parties does not reside at the place of jurisdiction and has already employed a lawyer at his residence, he will need a second lawyer for the proceeding itself. While it is common practice for lawyers to share the fees among them, so that the client's bill remains the same, this might not necessarily be so. Therefore, in some cases the "home" lawyer might charge another third of the fees set forth above. There is extensive case law on the question in which cases these additional fees are justified and may be charged against the opponent upon winning the case, and in which cases this would not be justified. Individual parties are usually favoured in this respect as opposed to companies, who are held to be able to maintain contact to their lawyer in a different place by mail.

The above attorney's fees are a minimum set down by law. Approx. 95% of German lawyers use those scales. In practice, large commercial firms will often agree an hourly rate with their clients, particularly in non-litigation matters (which shall not, however, lead to a charge less than the legal minimum). However, at values of 50,000 or 200,000 ECU, lawyers would rarely ask for a fee different from the scale fees in litigation matters, since no more than the scale fees set out above can be recovered from an opponent following a trial and since at these values the fees are generous for most cases in relation to the potential time the lawyer has to spend on the case.

The court fees for each instance for a full hearing to judgment (§ 11 II GKG) are as follows (in ECU):

| dispute value | first instance | appeal | second appeal |
|---------------|----------------|--------|---------------|
| 50,000 | 1,454 | 2,181 | 2,424 |
| 200,000 | 4,500 | 6,750 | 7,500 |

Certain expenses of the court, particularly translation fees, witness and expert witness expenses are charged to the parties irrespective of the value of a claim and reflect the true value of the service involved. The cost of service of court documents (whether by mail or not) is usually included in the court fee.

3.2 VAT-Rules

VAT is payable at a rate of 16% for all fees except for foreign EU residents registered for VAT abroad and all non-EU residents. As a general rule these will be foreign companies.

3.3 Transfer of Money

Collected moneys are generally forwarded to foreign clients by automatic money transfer.

The acceptance of credit cards by lawyers would be extremely unusual, if not unethical, as some argue.

3.4 Gathering of Information

It is a legal requirement for all those resident in the Federal Republic of Germany to register themselves with the relevant local authority. Any change in address is

also subject to compulsory registration. A search can be conducted by an attorney on behalf of a client if a bona fide interest is shown. This will involve a charge of between 5 to 15 ECU per local authority register.

Each search in a commercial register for a company costs 10 ECU.

3.5 Cost of Recognition of Judgments

The scale costs for the undisputed recognition of a foreign judgment under the Brussels Convention is 1,166 ECU (1,095 ECU attorney scale fees and 71 ECU court fees) and 1,956 ECU (1,885 ECU attorney scale fees and 71 ECU court fees) for judgments with a value of 50,000 ECU and 200,000 ECU, respectively. If disputed, the lawyer fees could resemble those of an ordinary proceeding, while as regard the court fees, only an additional 35 ECU are charged.

Lawyers fees for each step in an enforcement proceeding are 343 ECU and 566 ECU for judgments with a value of 50,000 ECU and 200,000 ECU, respectively. The cost for one activity of the court's bailiff is about 300 ECU and 1,000 ECU, respectively. However, the costs will rise, if enforcement is not straight forward as each additional attempt to seize the debtors assets adds the same costs as before. Some activities require court intervention which causes additional costs of DM 20. If any assets are to be auctioned, special rates apply. These sums are recoverable from the debtor.

GREECE

1 National Civil Proceeding

1.1 Court Structure

The ordinary civil courts of first instance are:

- Justices of the Peace (*Eirinodikeio*);
- One-member District Courts (*Proto dikeio*);
- Three-member District Courts.

The Courts of Appeal are:

- Court of Appeals (*Efeteio*);
- The Supreme Court (*Arios Pagos*).

The Justices of the Peace are divided into approximately 300 districts throughout the country, they mostly handle cases of low monetary value or involving agricultural disputes.

The one or Three-member District Courts, sixty three in each category, sit in jurisdictional areas which coincide roughly with the boundaries of the respective Prefectures. One-member District Courts have enjoyed a steadily increasing role as the competent courts in special kinds of litigation (*i.e.* labour disputes, litigation related to car accidents, family matters).

The Three-member District Courts are entrusted with a double function. On one hand, they have general original jurisdiction in civil matters which do not belong to the other two types of first instance civil courts (art. 18 of the Code of Civil Procedure). On the other hand, they hear against decisions of the Justices of the Peace.

1.2 First Instance Proceedings

As a rule, the subject matter competence depends on the amount in controversy. Consequently, the competence of the Justices of the Peace depends exclusively

on whether the object of litigation may be valued in monetary terms and on whether the sum claimed does not exceed 3,200 ECU.

The competence of the One-member District Courts currently extends to cases where the amount in controversy, while greater than 3,200 ECU does not exceed 16,025 ECU (art. 14.2 of the Code of Civil Procedure). (This amount is about to be increased up to 25,640 ECU as of 1.1.1998).

The Three-member District Courts are simultaneously courts of first instance and of appeal. According to art. 18.1 of the Code of Civil Procedure, they must hear all disputes which do not belong to any other court. This presumption of subject matter competence must be understood under two aspects: Firstly, they cover, all civil disputes exceeding the sum of 16,025 ECU and not belonging to the extraordinary competence of the One-member District Courts or the Justices of the Peace. Secondly, they extend to civil disputes which may not be valued in monetary terms (*i.e.* divorce cases). The Three-member District Courts are also the appropriate courts to hear the appeals against decisions of the Justices of the Peace.

The amount in controversy stands as defined in the complaint, without taking into account interest of other accessory claims. Along with this value-conditioned competence, the Code of Civil Procedure adopts a parallel method of allocating civil disputes among these three courts, regardless of the amount in controversy, by expanding the competence of the Justices of the Peace and the One-member Courts, according to the nature of particular species of disputes. Thus, to the former are allotted many cases involving farming, restrictions on property, transportation or performance of some other services, and the internal working of associations and co-operatives (art. 15); to the latter, leases employment, insurance and car accident disputes, claims of lawyers and of some other professionals, as well as most family litigation with financial impact, especially maintenance petitions (art. 16).

1.3 Appellate Proceedings

The competence for adjudicating in a second instance has been allocated to the Courts of Appeal. These courts hear appeals against decisions of all courts of first instance, with the exception of the decisions of the Justices of the Peace, namely of all Three-member and One-member District Courts (art. 19). Appeals go to the thirteen Courts of Appeals which sit in the largest cities of the country in panels of three judges.

The highest decree civil court of Greece - sitting in Athens and normally hearing cases in panels of five justices or in full bench with all justices (fifty-six) entitled to participate - has the principal competence to judicate over cassations against decisions of all Greek civil courts, namely of the courts of appeal, of the Three-member and One-member District Courts, and of the Justices of the Peace (Arts. 20.1 & 553 of the Code of Civil Procedure).

An appellate proceeding normally follows the rules governing proceedings at first instance (art. 524.1). However, neither new claims nor a cross-action are admissible (art. 525.2.3). Alterations of the factual basis of the action, of its object, or of the requested relief are inadmissible, even if the opposing party consents (art. 526). An exception refers to factual allegations which are presented as defences against the appeal, as long as these do not result in the alteration of the factual basis of action (art. 527). On the other hand, parties are, as a rule, free to produce new means of evidence in a Court of Appeal, including, under certain conditions, testimony and the examination of the parties. Fresh evidence can, however, be excluded at the discretion of the judge, when he decides the delay was designed as part of dilatory tactics.

In practice, when an appellate court decides to reverse, it will usually proceed with the case and decide it on the merits. This is an obligation, expressly provided for, once the court of first instance has also delivered a decision on the merits. Otherwise, the Court of Appeal has the discretionary power to either remand or retain the case for decision on its merits (art. 535.1 of the Code of Civil Procedure).

1.4 Lawyers in the Proceedings

According to the Lawyers' Code an attorney may appear before the Court of Appeal after four years of practice before the Courts of Appeal and by virtue of a resolution by the Bar Association. Finally, after six years of practice before the Courts of Appeal and by virtue of a resolution by the Bar Association, they may appear before the Supreme Court.

1.5 Legal Form of Appeals

1.5.1 General Principles

All methods of appeal are as of right; they are provided specifically by the law and there is no other way of reviewing a judgment. Appeals are not necessarily

addressed to a higher court; although not often used, two kinds of attack (reopening of default and of contested judgments) are directed to the same court which rendered the decision under challenge (see below).

Following French patterns, Greek civil procedure distinguishes between ordinary and extraordinary methods of attack. Reopening a default decision, as well as the regular appeal leading to a review on the law and on the facts, make up the former group. To the latter group belong the two remaining methods of attack: (1) the reopening of contested judgments, and (2) cassation, the request to the Supreme Court for a review on the law only. The functional consequences of this distinction lie with the effect of *res judicata* and enforceability of judgments. Generally, both come into play only after the ordinary methods of attack have been exhausted, that is either rejected or left unused within the time limitation provided. By contrast, extraordinary methods of attack neither suspend the *res judicata* effect nor stay execution of the judgment under challenge. Whereas, however, *res judicata* cannot be precipitated or deferred by order of the court in its discretion, the procedural maturity of the judgment for enforcement purposes may vary in both directions; the court may, or sometimes must, allow the provisional enforcement of a judgment worth the one or the other ordinary method of attack still pending (Arts. 907-914); it may also suspend the enforcement of a judgment already having *res judicata* effect until the exhaustion of the extraordinary methods of review (Arts. 546.2; 565.2).

1.5.2 Reopening of Default

The reopening of default is a twofold method of attack. It means, first, that a party who has not been duly summoned to a hearing of the case may demand reopening of the decision. In this sense, reopening is premised on the right to be heard in court (art. 20 I Const.) and does not produce a suspensive effect (art. 506.3 C.C.Proc.). However, it is rarely successful since it is unlikely that the court, when issuing the default judgment, did not consider the question of proper service on the defaulting party.

The second meaning of the reopening of default is more technical and peculiar to Greek civil procedure. It covers the cases in which the default was handed down in the first hearing of the case, in first or second instance (intermediate appellate level). In such circumstances, the defaulting party may demand, and the court must reopen the default, regardless of whether the party had been duly served (art. 501 I: "unjustified" reopening of default). This latter attack is provided with suspensive effect and often serves only defendant's dilatory tactics.

1.5.3 Regular Appeal

The most important and frequent attack on judgments is provided through appeal. The term has a technical meaning, denoting the attack on first instance judgments, addressed to an (intermediate) Court of Appeal's authorised to review the judgment on the law and on the facts. In this sense, appeals may generally be taken from judgments rendered by any trial court (Arts. 511,13). As a rule, only final judgments are appealable.

Grounds for appeal may refer to pure questions of fact, including the evaluation of evidence, to questions of (substantive or procedural) law, or to alleged procedural mistakes of the lower court. Consequently, an intermediate appellate court has potentially the same powers as the trial court which issued the judgment appealed against. It cannot, however, grant relief beyond the issues to which the appellant has restricted his appeal (art. 522); new claims may not be presented on appeal (art. 525). Yet, a cross-appeal is allowed to the party who has not appealed, but only within the challenged portions of the lower-court judgment or those necessarily related to them (art. 523). The Court of Appeals conducts a trial *de novo* on all matters before it: a regular appeal on the record alone is unknown in Greek civil procedure.

Upon reversal, the Court of Appeals usually retains the case. If the lower court did not have the opportunity to pass on the merits, for example if it dismissed the claim because it thought that the action was barred by *res judicata* or by lack of standing to sue or of jurisdiction, and the Court of Appeals decides precisely on this ground, at its discretion the appellate court may either decide the case on the merits or remand; otherwise, the Court of Appeals retries the case on full (art. 535).

1.5.4 Reopening of Contested Judgments

This avenue is open to a party aggrieved by a judgment having *res judicata* effects, regardless of the availability of a cassation to the Supreme Court, yet on very narrow grounds. The grounds may be either purely procedural or have simultaneously some substantive connection (see art. 544). To the former category belong the existence of forged or of inconsistent judgments, a knowingly improper method of service of process as well as a party's improper representation. Along with these procedural improprieties, contested judgments may also be reopened in cases of perjury or other misconduct, provided that a criminal sanction has been already inflicted thereon through an unappealable decision; also if existing, yet concealed, documentary evidence has been

discovered afterwards; finally in cases in which a judicial decision supporting the judgment under attack has been vacated. Under all these quasi-substantive grounds, the defect subsequently disclosed must have materially affected the outcome of the concluded proceedings.

1.5.5 Cassation

Compared to the regular appeal (see above), proceedings on cassation in the Supreme Court take on a much narrower scope. Here, the grounds for review are quite limited, and may involve violation of either a rule of substantive law or of some specified rule of procedure (arts. 559, 560). Cassation thus proceeds on the record and is not allowed in principle to touch upon findings of fact (art. 561 I). It may nevertheless be founded on a distortion of clear and precise documentary evidence or on lack of legal basis, *i.e.*, whenever the bindings of fact contained in the lower-court decision are so inconsistent or insufficient that the Supreme Court cannot determine whether the law has been correctly applied.

Apart from these marginal grounds for cassation, a violation of rules of substantive law may result from either erroneous interpretation or mistaken application of a legal norm. In the latter alternative, the Supreme Court reviews also the characterisation attached to facts, for instance whether or not they constitute negligence or whether they comply with abstract legal notions, such as good faith reason, incorporated in the applicable rules. Here, however, emerge mixed questions of law and fact which cause difficulties in delineating the exact scope of review and spawn a somewhat inconsistent series of cases. Upon reversal, the case may be either remanded to a lower court or referred to another panel of the same Supreme Court for re-examination of the disputed issue (cf. art. 580, as amended through art. 5 XV L. 1738/1987).

1.5.6 Effects

The commencement of an appellate proceeding has three effects which are termed: a) suspensive, b) devolutive, c) communicative. Whereas the first refers to the stay of execution which results from both the time period (art. 519) and the initiation of a proceeding on appeal (art. 521), the second marks the character of an appeal as a "devolutive" method and in particular, marks the extend of the powers granted to the court of the higher level. This court is thus restricted to the grounds of appeal including any additional ones, put forward by the parties (art. 522). The "communicative" effect of an appeal is connected to the right of the respondent to bring a cross-appeal (art. 523). Cross-appeals may only be

brought by means of a special complaint which filed with the clerk and then served on the appellant at least eight days before the hearing of the appeal.

1.6 Numbers of Documents to be Served

The initial service of the action on the defendant - whereby the summoning of the defendant on the already fixed day for the first hearing of the case is also included - is regarded as a necessary element in the initiation of an action. Service must be made at least thirty days before the first hearing.

Any party's default requires the court to ascertain whether proper service of process was made on the defaulting party. If not, the case may not proceed and a new service becomes necessary.

Written pleadings other than the complaint are never required to be served or even sent to the other party.

Judgments are served in accordance with the same rules as those provided for all procedural acts. This is, therefore, done on the initiative of the parties (art. 310.1) in practice on the initiative of those who are successful, as time-limits for methods of review normally run from service of the judgment on the defeated party. By way of exception, non-final judgments are deemed to have been served when the parties, their representatives or their attorneys were present during publication (art. 310.2).

Finally, the date of the taking of evidence before the panel of the court can be specified at a certain hearing after a time period from service of the decision. The summons to the defendant as regards the testimony of the witnesses is also served.

1.7 Expert Witnesses

Expertise is explicitly defined as a means of evidence. Experts are characterised as the auxiliary officials of the court (art. 369), who exercise a public action. They are accordingly treated as court assistants with regard to their appointment or substitution, exclusion etc. In contrast to experts, who are appointed by the court, technical consultants are selected by the parties from a circle of persons qualified to be court appointed experts (art. 391).

The general rule is that each party has to pay the dues and the expenses of his own procedural acts in advance. Court costs are allocated after the trial,

following the "defeat principle". According to a main rule, each losing party is charged with his own costs, as well as with the costs of his opponent (art. 176). This rule can basically also apply when each party is only partially successful (art. 178). The court can then divide the costs in accordance with the degree of the parties' defeat.

2 Time Factors

2.1 Time Frame for Appeals

The time to appeal is thirty days when the party resides in Greece and 60 days when the party resides abroad or is of unknown residence (art. 518.1). In the case of no judgment being served, time to appeal runs from the day of publication and is then three years (art. 518.2).

A reopening may be asked for not later than fifteen days from the date of service of the default judgment or sixty days if the defaulting party resides abroad (art. 503). The time periods for attacking default decisions through the ordinary methods of opposition and of appeal run simultaneously. To safeguard his right of appeal against such decisions since opposition against default must be exclusively based on evidence of improper service of process and can hence be unsuccessful, a party is required, besides bringing an opposition, to also subsidiary raise a timely appeal.

When a party resides in Greece, the time period for filing a cassation is thirty days starting from the day following the day on which the judgment under review is served on the opposing party (art. 564.1). Interestingly, this time period is ninety days if the party seeking a review in cassation resides abroad, or is of unknown residence (art. 564.2).

When the attack decision is still subject to ordinary methods of review, this time limit starts to run after the time period for raising these methods has been exhausted. In cases where no service of the judgment under review has been effective, there is a time limit for cassation of three years which runs from the date of publication (art. 564.3).

In case the parties are residing in Greece, the time period for reopening is sixty days after the day on which the judgment to be reviewed was served on the opposite party (art. 545.1), or, when decisions of the courts of first instance are challenged after the day when the time limits to raise ordinary methods of review

have been exhausted. This time limitation becomes one hundred and twenty days when a party resides abroad or is of unknown residence (art. 545.2). In quite a number of instances, however, these time periods may be considerably extended, in particular when reopening is based on the misconduct of a party as they start to run only after the facts which constitute the asserted grounds of reopening have actually occurred (art. 545.3). Finally, when no service has been effected, the time period for reopening runs from publication of the judgment, provided that this is a formal *res judicata* (art. 545.5) and is then three years.

The Code of Civil Procedure contains a number of stipulations specifying the mode of initiating all review proceedings (arts. 495-498). Methods of attack are regarded as having been brought as soon as the relevant written petition has been submitted to the clerk of the court where the attacked judgment was rendered (art. 495.1), and its registration by the clerk in the special Records of Methods of Review kept in its court has been effectuated (arts. 475.2, 496). This is the relevant moment when the effects of methods of review commence (art. 500). No service on the adversary party is required. In accordance with the principal of parties' motion, further steps depend on the initiative of the interested party, who is authorised to move the review proceeding by fixing the date for the hearing before the appropriate court (art. 498.1). Service of summons on the opposing party must then observe the same time limits as in the case of actions, that is the service must be completed at least thirty days before the hearing of the case.

Pleadings do not need to be served on the opposing party. They are filed with the clerk of the court one day before or at least two hours before the oral hearing (arts. 498.2, 228). The appellee is authorised to obtain a copy of the pleadings of the appellant. Each party can moreover submit an additional pleading termed "Addition and Contradiction" which should be filed up to 12.00 o'clock of the third working day after the hearing. This can include some further analysis or clarifications, concerning allegations already contained in the main pleading.

A civil action is commenced at the plaintiff's initiative by two separate procedural acts: by filing a complaint with the clerk of the court and by serving a copy of it on the defendant. The clerk of the court appoints a day and time for the first hearing of the case and then enters the action in the docket as soon as the action is filed (art. 226). The court has discretionary power to postpone the hearing of a case at the request of a party for good cause (art. 241), a practice which tends to become a rule, as such a possibility is very frequently utilised by Greek attorneys.

2.2 Estimated Duration of Civil Cases

As far as the minimum / extreme duration for each instance is concerned, it should be noted that it can not be accurately defined or estimated, since such answer depends on many different factors, such as the kind of the proceedings, nature and complexity of the case, the subject-matter of the evidentiary proceedings as well as the means of proof etc. It is a time consuming procedure. In general terms, a first instance proceeding takes about 3 years to reach a decision. It usually takes another 2-4 years with a realistic average of 3 years for the issuance of a decision by the Court of Appeal or the Supreme Court.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Legal costs in Greece are relatively low. They comprise the strictly judicial costs, which include several kinds of fees or duties to be deposited in advance, and all various extrajudicial expenses, such as the remuneration of attorneys, notaries, bailiffs, experts etc., as well as some other expenses such as those of witnesses, technical consultants etc. Fees of lawyers are, however, subject to statutory regulations concerning their lowest limits at about 2% of the value and further with respect to the level of the court. Under certain conditions, a proportion of the legal fees must be deposited, before the trial, with the bar associations, which may decide to distribute a certain percentage to their members. In practice an attorney's remuneration is often fixed by an agreement between him and his client. Contingent fee arrangements are allowed, and indeed usual in some areas (*e.g.* labour or tort cases or actions relating to rights in immovables), and are rated at 10% to 20% of the amount eventually awarded.

If contingency fees are not agreed on, which would be likely in the above cases, a flat fee of 1,250 ECU or 3,300 ECU can be expected for a claim of 50,000 ECU or 200,000 ECU, respectively. These fees, as a total, would not be much different in higher courts.

The stamp duties are standard and extend up to a reasonable amount (*i.e.* 6.4 - 16 ECU). However, it should be mentioned that the court expenses for claimed amounts will be 1% approximately of the capital.

3.2 VAT-Rules

There are no VAT-rules for lawyers fees for individual clients and for companies.

3.3 Transfer of Money

Collected money is usually forwarded to the foreign client through a bank account. Credit cards are usually not accepted, so the clients are requested to have the lawyers' statement of fees and expenses settled through a check.

3.4 Gathering of Information

It is the presumed duty of the client party to know the address of the addressee so that the service of the complaint to be effected. Therefore, no service is provided by the lawyer, usually, and cost estimations are impossible.

3.5 Cost of Recognition of Judgments

The cost for the recognition of foreign judgment will be 1% approximately of the claimed amount plus some miscellaneous expenses, such as additional service requests or newspaper publications, as the case may be. For higher values the percentage would probably be slightly lower.

The cost for the enforcement of judgment depends on the assets of the debtor and may be estimated at about 75% of the costs estimated for the recognition.

SPAIN

1 National Civil Proceeding

1.1 Court Structure

The Spanish Constitution of 1978, states the principle of jurisdictional unity. After it, *Ley de Demarcación y Planta Judicial* ("LOPJ") was passed in 1988.

The following judges and courts belong to the civil jurisdiction:

- Justice of the Peace (Juzgados de Paz);
- Judge of the First Instance (Juzgados de Primera Instancia);
- Provincial Court which is the first appellate court;
- Superior Court of Justice;
- Civil Court of Supreme Court;
- Constitutional Court.

Additionally, Family Courts are among the special courts in the civil ordinary jurisdiction. They are, indeed, specialized first instance courts.

At first sight, this civil court structure is quite simple but the autonomous regions have to be considered: art. 152 Spanish Constitution has an effect on this matter and introduces some important changes. For example, within the limits of the autonomous region, the Superior Court of Justice behaves as the Supreme Court. This precaution takes legal form in art 73 of the Constitutional Law of judiciary, but it is only for infraction of local, civil or especial rules.

Spanish Law provides for specific rules regulating the structure and distribution of the different courts around Spain in order to adapt the actual judicial system to the current need. To this effect, LOPJ provides that the state is divided into municipalities, districts, provinces and autonomous regions. There is one or more First Instance Courts in each district whose seat is in the capital of it and there is a Provincial Court in capitals of every province.

1.2 First Instance Proceedings

Civil cases start at first instance in the following judges or courts; depending on the matter they are related to:

1.2.1 Justice of the Peace

The Justice of the Peace is located in every municipality where no First Instance Court exists (usually very small villages). Substantiation a case, decision and execution of the proceedings is provided by law. The Justice of the Peace tries cases not over 480 ECU in hearing and also lawsuits with amounts not over 48 ECU.

1.2.2 Judge of First Instance

The Judge of First Instance is the ordinary court at first instance and as a result of it, it tries trials which have not been attributed to other judges or courts by law. Also, acts of voluntary jurisdiction which have been stated by law are tried by this judge without forgetting questions of competence in civil matter among Justices of the Peace in the judicial district. The first instance of most of civil proceedings in Spain is taking place before this kind of courts.

1.2.3 Provincial Court

This court is not very often used at first instance, because as we can see below, it behaves much more as a second instance court. The provincial court tries questions of competence in civil matter among courts within the province which have not another common superior and also, magistrate's recusations when competence has not been attributed to a special court of the Superior Court of Justice.

1.2.4 Superior Court of Justice

- At sole instance, bills of civil liability, for acts committed in their respective offices, addressed against the President and members of Government, of the Council of the Autonomous Regions and against members of the legislature when the case is not attributed to the Supreme Court.
- At sole instance, bills of civil liability, for acts committed in their respective offices against all or most of all of magistrates of a Provincial Court.

- Questions of competence among jurisdictional courts with seat in the Autonomous Region in the civil order which have not another common superior.

1.2.5 Supreme Court

Indeed, it is a "third instance", and it tries the "recurso de casación".

- At sole instance, bills of civil liability, for acts committed their respective offices, addressed against the President of Government, of Congress and Senate, the President of the Supreme Court.
- Request for the recognition of foreign judgments.

In the Spanish judicial system it can be distinguished among ordinary declaratory actions, execution proceedings and special civil proceedings. Only in reference with ordinary declaratory actions, law fixes several amounts of money. The sort of declaratory action depends on the amount of the claim. These actions are taken if there is not a special proceeding to apply.

- Major claim lawsuits ("juicio de mayor cuantía"); involving more than 955,860 ECU.
- Minor claim lawsuits ("juicio de menor cuantía"); involving more than 4,780 ECU and less than 955,860 ECU and bills which amount is invaluable.
- Declaratory proceedings ("juicio de cognición"); involving more than 480 ECU and less than 4,780 ECU.
- Oral proceedings ("juicio verbal"); involving less than 480 ECU.

Apart from this declaratory actions, several actions can be taken which depend on the matter and not on the amount of the claim.

1.3 Appellate Proceedings

Appeal and second instance do not have equivalent meaning. Not all appeal gives rise a second instance but only those ones which are interposed against a definitive judgment on the merit.

Remedy of appeal is the ordinary, devolutive, characteristic remedy. The judge who has jurisdiction on appeal is the hierarchical superior to the judge who gave judgment. The decision which is going to be taken, replaces the one which was taken by the lower-court judge.

Pursuant to the "ley de Demarcación y Planta" in 1988, the competences for the appeal in civil matter have become more simplified:

The First Instances Judge has jurisdiction on appeals against decisions pronounced by Justices of the Peace; the Provincial Court has jurisdiction on appeals against decisions of First Instance Judges.

Additionally, the civil law procedure permits an appeal to the Supreme Court in the following cases:

- in major/minor lawsuits (juicio de mayor/menor cuantía), when the dispute value exceeds 35,850 ECU;
- in declaratory proceedings (juicio de cognición) when the matter deals with urban rent and has a dispute value in excess of 8,960 ECU and the first and second instances decision are contradictory.

Appeals to the Constitutional Court are possible only when there is a infringement of a Constitutional Right, without any threshold amount.

The second appeals will be brought before the First Chamber of the Supreme Court. Both the Supreme Court and the Constitutional Court are located in Madrid.

1.4 Lawyers in the Proceedings

Spanish law does not impose any kind of restrictions and licenses for lawyers to appear before higher and highest instances, except that they must be registered either permanently or temporarily for the case in question at the relevant provincial bar association.

1.5 Legal Form of Appeals

In the view of the Spanish jurisdiction, the second instance is considered as a procedural stage whose purpose is a "new view" of the matter in dispute. That means that, the second instance is not a new process in which parties can introduce a new request or new evidence.

It is not pretended to repeat at second instance what was done at first instance but another judge gives a new judgment about what was already claimed and decided at first instance. Second instance is only opened through remedy of appeal. The results of the appeal depend entirely upon whether the appellant has sufficient legal rights for the basis of the appeal. The higher the appeal, the more difficult is a successful outcome, as more courts would have scrutinised the value of the case in their decisions, especially if the lower courts' decisions are similar.

In the second instance, the judge of the appeal court can also analyse if the procedural activity during first instance was correct or not. The judge may send the records to the first instance judge in order to correct the faults and reproduce the process from that moment.

The actual and legal situation which is found by the judge at second instance can be different from the previous one at first instance. Spanish law allows that evidence may be submitted in second instance if it was unduly rejected in first instance or even if it is of a new character.

Related to sentence in appeal proceedings, it must be congruent with the appellant's claims. But the sentence can be incongruent such as "*extra petita*", "*ultra petita*", and omission of pronouncement. However, because of not been a new process, congruency has special features:

- "*Reformatio in peius*" is forbidden.
- Claims which were not made at first instance, cannot be the object of judgment at second instance.

In the strict sense, there are only first and second instance but in some cases a third instance or "*recurso de casación*" does exist which is described by Spanish lawyers as "very useful". It is an extraordinary remedy and it is lodged before the Supreme Court. Law provides those limited resolutions that may be appealed but, in fact, these rules are so wide that almost every decision can be appealed. When the amount in dispute is more than 29,900 ECU (which is the case in most of cases) or the decision at first instance is different from the one at second instance, one can use the "*recurso de casación*".

Finally, it should be pointed out that the Spanish system is not clearly divided into a first and a second instance but it depends on the type of resolution and the judge or court who pronounced it.

1.6 Further Requirements and Restrictions for the Appeal

Apart from the preconditions for lodging an appeal to the Supreme Court as described above, there is no further restriction for appeals related to threshold amounts. According to the Spanish system, almost all sort of decisions pronounced at first instance can be appealed because of the general principle of Spanish law that all decisions can go through two steps in legal proceedings before becoming definitive ones.

1.7 Number of Documents to be Served

All of the documents are served by the court and not by the plaintiff. The initial claim and the reply, counter-reply and any counterclaims are notified to the other party through the court. The parties must submit as many copies as required for such notifications through the court. As soon as the proctor is appointed, all notifications are made to the proctor representing the party to be notified. If a default judgment is rendered and the defendant is thus not represented by a proctor, the judgment is served by publication. Accordingly, under all circumstances only one document is directly served on the defendant by the court.

1.8 Expert Witnesses

Expert witness fees are calculated in accordance with rules and customs of the expert's profession and pursuant to the negotiation with the same if possible. The fees are paid by the party appointing the expert, which will be recoverable only if the court awards the recovery of expenses from the other party at the end of the proceeding.

2 Time Factors

2.1 Time Frame for Appeals

2.1.1 Appeal to the Provincial Court

First, the term to appeal the sentence is 5 days - of course within this term it must only be announced to the judge of first instance that appeal will be lodged. After this, the judge shall send the documents which have been provided by the parties during the first instance, and give 15 days to the parties in order to appear before

the provincial court (or 10 days if the appeal is not against a sentence but a procedural resolution).

Under the experience of Spanish lawyers in practice these steps require between one or two months. It depends on where the Provincial Court is situated. The respondent has 6 days to decide if he wants to follow the Appeal.

After that, there is a hearing where attorneys have to expound their arguments.

The time that passes from the announcement to the hearing is usually between one and two years. It depends on the place where the appeal is going to take place; Madrid and Barcelona should be slower than small cities.

On application of the winning party the first instance judge may declare the first instance judgment provisionally executable.

2.1.2 Appeal to the Supreme Court

For an appeal to the Supreme Court the appellant must file the notice of appeal at the Provincial Civil Court with a term of 10 days from the date the decision has been notified.

If the notice meets the legal requirements it will be remitted to the First Chamber of the Supreme Court. Within 30 days the appellant must appear before the first chamber of the Supreme Court with the writ of appeal and it will be remitted to the attorney general for its reports as to the legality of the same. After the receipt of the attorney general's report, the Supreme Court will examine the appeal and if it accepts the same will remit it to the other party for reply within 20 days. After the reply, the Supreme Court, within 90 days will determine a date for the hearing or voting of by the court. The decision will then be issued within 15 days.

2.1.3 Appeal to the Constitutional Court

There are 20 days to file the appeal for legal protection to the Constitutional Court. Then, the attorney general and the Constitutional Court will examine the appeal to review if it meets all the legal requirements. If it is accepted, the Supreme Court will be requested to remit to the Constitutional Court the court file. Subsequently, the parties will appear before the Constitutional Court within 10 days in order for them to present the pleading within 20 days from the date of their appearance before the court and the judgment will given in another 10 days.

The period of time imposed by the laws of civil procedure upon the parties are obligatory in all their terms. Any kind of delay in the delivery of the writs will lead to their not being admitted by the courts.

2.2 Estimated Duration of Civil Cases

The time span for the diverse legal proceedings and instances depends a great deal upon the court involved and the amount of work it has. It also has to be considered in which part of Spain the proceeding takes place.

In the main cities, as Madrid, Barcelona, Seville, etc., the duration is about 1,5 years for the first instance, and 2 years for the Second Instance. The third instance is much slower and can take 3 years for final resolution.

Usually in the smaller provinces the proceedings are faster (1 year for the first instance and another year for the second instance), although, of course, this is not a rule as there are some villages which for their special conditions (many factories or companies, etc.) are collapsed and the proceedings are as slow as in the big cities.

The more complicated the proceedings, the longer the term will last and even exceed the above estimates, where a case may even last in first instance five year or more. In this regard, we should mention that a lawsuit in first instance can have many incidental proceedings and appeals to the same and when non-residents are involved, letters rogatory which take quite a bit of time.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

There are no court fees to pay in Spain.

However, there is basically, except for small claims oral proceedings, the need to appoint a lawyer and a court proctor. The latter figure is the person that represents the party before the court while the lawyer directs and conducts the case. In short, the lawyer prepares the writs and the briefs and the proctor files them on behalf of the client and receives all notifications from the court. The proctor's fees are calculated pursuant to specific rates enacted by the association for each type of proceeding, normally calculated on a descending scale on the basis of the amount of the proceeding. Lawyers fees are liberalised in Spain,

although the bar associations have enacted orientative minimum guide-lines for the calculation of the same, which are the ones usually applied. It has to be noted that each bar association has its own rules and that in Spain there are many different bar associations which usually, but not always, correspond to the provinces (for historical reasons, some bar associations are limited to a single city).

Spanish law prohibits contingency fees.

The fees established by the rules are proportional to the amount and the kind of the proceeding. The rules of Madrid Bar Association may be taken as an example. Notwithstanding that, each bar association has its own tables, these rules do not differ very much.

Following the rules of the Madrid bar association, a first instance proceeding causes attorney's fees of about 8,000 ECU if the value in dispute is 50,000 ECU. If the value is 200,000 ECU, the fees would amount to 20,000 ECU.

In the second instance the fees are 40% of the above-mentioned amount.

The fees for the special third instance are 75% of the fees as established for the first instance.

The fees for the higher instances may be higher if a different lawyer is used than the one who represented the party below.

Proceedings before the Constitutional Court and the ECJ are at about the same rate as the fees in the third instance, plus travel expenses as there may be.

3.2 VAT-Rules

Spanish lawyers are obliged to collect 16% VAT from all domestic clients. There is no VAT applicable against foreign corporate clients and from individual clients from third countries.

3.3 Transfer of Money

When a Spanish lawyer has to collect money from foreign clients he asks for a downpayment, and accepts both check or bank transfer. Funds are normally remitted abroad by bank transfer to the recipient's account or by a cashier's check drawn to the payee's order.

Lawyers usually do not have the facilities for the acceptance of credit cards, probably because lawyers initially have confidence in the client making payment, will accept checks and require a retainer for fees and disbursements.

3.4 Gathering of Information

The telephone directories are possible source of obtaining the addresses. Also an other source for companies is the Mercantile Registry. In that case he receives not only the address but also financial and properties data. It costs more or less 150-300 ECU. In any case, a detective's services can be used. There some investigation companies which do not investigate individual and others companies which do. Costs may also be at rates of about 200 ECU per case.

3.5 Cost of Recognition of Judgments

As mentioned above, lawyers fees are liberalised in Spain. The Madrid Bar Association provides an suggested fee total cost for the recognition of a foreign judgment of, approximately, 600 ECU to which one should add the required official translations and proctor's fees.

The average total cost for lawyers fees for the enforcement of judgments for a value of 50,000 ECU is approximately 4,376 ECU pursuant to the Madrid Bar Association guide-lines, plus 900 ECU for Proctor's fees.

The average total cost for lawyers fees for the enforcement judgments for a value of 200,000 ECU is, approximately, 12,440 ECU pursuant to the Madrid Bar Association guide-lines, plus 2,500 ECU for Proctor's fees.

FRANCE

1 National Civil Proceeding

1.1 Court Structure

The French court structure consists of:

- Local Court (*Tribunal d' Instance*);
- District Court (*Tribunal de Grande Instance*);
- Court of Appeal (*Cours d'Appel*);
- Supreme Court (*Cour de Cassation*).

Exclusive jurisdiction on special matters is given to the Commercial Court (*Tribunal de Commerce*), the Labour Court (*conseil des prud'hommes*), the Social Assurance Court (*tribunal des affaires de la sécurité sociale*) and *tribunal paritaire des baux ruraux* which has jurisdiction on litigation between land-owners and farmers.

1.2 First Instance Proceedings

Proceedings in first instance are brought before the following courts, excluded the special jurisdiction of Labour Court, the Social Assurance Court and *tribunal paritaire des baux ruraux*.

1.2.1 Local Court (*tribunal d' instance*)

One has to distinguish between claims up to an amount of 2,570 ECU for which the *tribunal d'instance* has jurisdiction without any possibility for the parties to introduce an appeal and claims for 2,570 to 5,000 ECU which undergo appeal. On several other matters the *tribunal d'instance* has exclusive jurisdiction, such as enforcement proceedings by way of seizing of wages, salaries etc., rent, guardianship-matters, etc.

There are at about 600 *tribunaux d'instance* in France today.

1.2.2 District Court (*Tribunal de Grande Instance*)

The *Tribunal de Grande Instance* has exclusive jurisdiction in all civil matters (divorce, alimony, child-care, adoptions), in civil registry-matters (changing of name, etc.), control of enforcement proceedings, enforcement of foreign decisions, some tax matters, real-estate matters, intellectual property trademarks, patent, copyright) and all civil matters over 5,000 ECU.

1.2.3 Commercial Court (*Tribunal de Commerce*)

The *Tribunal de Commerce* is competent for all litigation arising between merchants, *i.e.*, persons or firms registered as such, and litigations between merchants and private persons it later choose so; litigations arising on the subject of commercial acts (promissory notes, lien on goods); bankruptcy matters.

1.3 Appellate Proceedings

Appeals from all courts with the sole exception of the *Cour d'Assises* (Assize Court) are submitted to the appellate courts and in the last instance to the *Cour de Cassation*.

1.3.1 Court of Appeal (*Cours d'Appel*)

The Courts of Appeal are located in the main city of every region. There are 30 courts in homeland France, and 4 in the colonial territories still attached to France. Each court is composed of one president and two judges. An Attorney General assists at the hearings and often, but not always, offers his opinion.

1.3.2 Supreme Court (*Cour de Cassation*)

The highest instance in civil and penal matters in France is the Cour de Cassation. It is located in the Palace of Justice in Paris and composed of more than 600 counsellors. There are three civil chambers, one chamber for social matters and one chamber for penal matters.

1.4 Lawyers in the Proceedings

Before the Courts of Appeal the parties have to be assisted by a special lawyer, called "*avoué*", who watches over the procedure and introduces the writings in

his name. However, the writings are generally prepared by a "normal" lawyer who also pleads the case.

At the Cour de Cassation only lawyers with a special licence (avocats au Conseil d'Etat et à la Cour de Cassation) are admitted.

Before the Commercial Courts until 1975 the parties had to be assisted by *avoués* as well. The obligation has been abolished, but the *avoués* subsist mainly to assure that the procedural hearings in order to prepare the actual trial be correctly followed. It therefore is highly recommended to have an *avoué* in addition to the "normal" lawyer who actually defends the cause.

It must be noted that it is not compulsory to be assisted by a lawyer at the *tribunal d'instance*, conseil des prud'hommes, *tribunal paritaire des baux ruraux*, *tribunal des affaires de sécurité sociale* and *tribunal de commerce*.

1.5 Legal Form of Appeals

The Court of Appeal rehearses the case *de novo*, *i.e.*, on fact and on law, while the Cour de Cassation is judge only of the correction application and interpretation of the law.

If the case gets reexamined *de novo* by the Courts of Appeal, the first instance-decision may be confirmed, reversed or modified.

Each case submitted to the Cour de Cassation undergoes a first control in order to determine if it implies a real question of law. If not, the request will be rejected without further examination.

The Cour de Cassation may confirm or reverse. If reversed, the case is distributed to a second Court of Appeal which is not bound by the decision of the Cour de Cassation. If it does not follow the highest judge's opinion, the Cour de Cassation will hear the case for a second time and, if it upholds its first opinion, seize a third Court of Appeal, which this time is bound to follow.

1.6 Number of Documents to be Served

All initial writs of summons and notifications of court decisions have to be served directly on the opponent. Declarations of appeal and cassation are notified directly by the clerk's office. In the *Tribunal de Grande Instance*, some of the

documents served on the lawyers have to be served by bailiff, but the fees are only at about 1 ECU per document.

1.7 Expert Witnesses

There are no binding rules for fixing expert witness fees in France. The courts simply apply general average fees in the beginning, to be paid in advance by the plaintiff, *i.e.*, the party asking for a witness.

During the procedure the expert then may ask for complementary fees to be accepted or not by the judge.

The expert witness fees being considered as proceeding-costs ("dépens") have to be refunded by the losing party to its opponent.

The translation fees for writs of summons and decisions to be served to the opponent party are also considered as "dépens" and can be recovered. Translation fees are calculated by most translators on a word-by-word fixum of about 0.3 ECU.

2 Time Factors

2.1 Time Frame for Appeals

The normal delay to lodge appeal is 1 month from the time of reception of notification which in any case has to be served by a bailiff, concerning foreign parties by way of communication by the Attorney General's services in France to those in the defendant's country.

It is of 2 weeks for all gracious matters, injunctions, summary procedures. It is prolonged for another month for all foreign addressees.

With the exception of decisions taken in summary proceedings, enforcement is suspended during the appeal proceeding.

The declaration of appeal has to be deposited at the office of the clerk of the Court of Appeal and signed by the appellant's *avoué*.

Within 2 months one of the parties then has to ask for the inscription of the case on the court's docket. If the appellee has not designated his own *avoué* in the

meantime, the appellant has to serve an official writ of summons indicating that without such designation within 15 days, the case may be tried in his absence.

Besides, the appellant has to introduce his arguments ("conclusions") within four months from the declaration of appeal.

After this, one of the counsellors of the Court of Appeal will regularly examine the procedure and fix time frames for the exchange of documents, arguments etc.

The delay to form appeal at the Cour de Cassation is four months from the notification of the Court of Appeal's decision.

The appellant has to notify his first memorandum containing all arguments of his position in law ("motifs") within five months from his declaration of cassation; the appellee may answer within three months from the notification.

After this, one of the counsellors of the Cour de Cassation fixes delays for further exchanges of arguments.

2.2 Estimated Duration of Civil Cases

At the Court of Appeal of Paris proceedings in civil matters take between 8 and 15 months, in labour matters 16 months to two years, in commercial matters between 2 years and a half and 3 years.

At the Cour de Cassation, procedures may easily last for 5 to 6 years.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Court fees may vary between 27 and 200 ECU.

Lawyers fees are free. It is therefore highly recommended to negotiate fixum fees beforehand.

The Parisian Bar Association has issued, some years ago, a "recommendation" on fees, suggesting to calculate fees on an hourly billing rate between 120 and 225 ECU with a recommended hourly fee of 181 ECU. However, since competition is strong, many lawyers propose much less expensive fees and there are some few law firms billing on a higher level. A common rate may be at 120 ECU.

While contingency fees are not allowed with a French client, they may be accepted while a foreign client is concerned. A percentage of about 5% is common.

Depending on the difficulty of the case, duration, extra work such as translations of correspondence, writings etc., with a value on stake of 50,000 ECU, the lawyers fees for one procedure may vary between 750 ECU as a strict minimum and 7,600 ECU, the average being rather of 2,200 to 3,000 ECU.

For cases brought before a District Court located in another department than the home department of the Court of Appeal to which each lawyer is attached, a correspondent counsel is required who, if restricted strictly to the task of transferring documents to and from the court, would charge fees of about 380 to 530 ECU.

As mentioned above, at the Commercial Court, it is strongly recommended having an "agrée" in addition to the normal lawyer. The fees are fixed freely, generally 300 to 380 ECU.

As an exception to the general rule, the *avoué's* fees at the Courts of Appeal are subject to tarification. For a value at stake of 50,000 ECU they would be of about 760 ECU, for a value of 200,000 of about 1,360 ECU plus court fees of about 150 ECU. These fees are to be added to the normal lawyer fees which amount to about 2,500 ECU.

The lawyers at the *Cour de Cassation* also calculate their fees freely. They rarely underrate an amount of 3,000 and may easily reach 9,000 ECU or more.

3.2 VAT-Rules

There are no VAT-rules to be considered by lawyers.

3.3 Transfer of Money

All collected amounts have to be credited to a bank-account specially installed for each lawyer and each case at a special bank-agency, called CARPA. The CARPA then issues a check to the order of the client, foreign or French.

If he has not been fully paid, the lawyer may ask his client to be authorized to have his fees deducted from the collected amount and paid directly.

3.4 Gathering of Information

The normal proceeding for address-location would imply seizing the Attorney General who would ask the social assurance agencies, the central bank of France and the police registry for information. However, this way of proceeding is very long (1 year and a half to 2 years) and often disappointing because the information would not be valid any more.

Therefore it is recommendable to have a private investigation made. Some agencies accept to bill only in case of success and are rather speedy (two weeks) and inexpensive 135 ECU.

3.5 Cost of Recognition of Judgments

Recognition of foreign decisions from the EU ("exéquatur") is quite simple in most cases, provided all necessary documents, *i.e.*, original decision, notice of service of writ of summon, notification and translations of these documents, are submitted. The lawyer's fees should not pass 380 to 450 ECU without consideration of the claim at stake.

Enforcement is quite another thing since there is a special procedure of enforcement-control now. Fixum fees are quite common, here. Nevertheless, one has to consider that enforcement begins with a full fledged proceeding similar to a first instance proceeding. Thereafter, the bailiff has to be paid for his various services. Provided that, the enforcement is restricted to the sale of personal property or the seizing of financial assets, such as salaries or bank accounts, the total fees for the lawyer and bailiff would be in the range of 1,250 ECU. If, however, real estate is to be auctioned, the costs are excessive and may easily reach 4,000 to 5,000 ECU.

IRELAND

1 National Civil Proceeding

1.1 Court Structure

The civil court structure in Ireland consists of

- Small Claims Court
- Local Court (*District Court/An Chuirt Duiche*)
- District Court (*Circuit Court/An Chuirt Chuarda*)
- Court of Appeal (*High Court/An t-Ard Cuirt*)
- Supreme Court (*Supreme Court/An Chuirt Uachgarach*).

1.2 First Instance Proceedings

Proceedings start in first instance in the Small Claims Court or the *District Court*.

The procedure at the Small Claims Court allows a consumer to institute a civil proceeding against a vendor in relation to any goods or services in which the amount of the claim does not exceed 650 ECU. It is consumer orientated and relates to claims in respect of faulty goods, goods and services not supplied and bad workmanship. It is an alternative simpler and less expensive method of commencing and dealing with a civil proceeding in respect of a small claim.

The *District Court* is the lowest court in the hierarchical system of courts. with original jurisdiction in civil matters. Cases are heard by a judge sitting alone without a jury. On civil matters the court can award damages of up to 6,500 ECU. It has jurisdiction over a wide range of matters but has no jurisdiction in actions in tort for defamation, slander of title, malicious prosecution or false imprisonment. Where the parties consent in civil matters, the *District Court* has unlimited jurisdiction under the Courts Act, 1991.

1.3 Appellate Proceedings

An appeal from the *District Court* lies to the *Circuit Court*. The appeal consists of a re-hearing of the case and the substitution of the court's decision for the

District Court's decision, but limited to the jurisdiction in that regard of the lower court.

Ireland is divided into a number of circuits: a Circuit Court judge is assigned to each circuit and travels to towns in that circuit to hear cases, sitting alone in civil cases. The court can award damages of up to 38,860 ECU.

For claims with higher amounts, the *High Court* acts as the court of first instance.

Appeals from the *Circuit Court* lie to the *High Court* by way of a re-hearing and the decision is generally not appealable. In civil matters, the *High Court* can award unlimited damages, although there are certain guide-lines laid down by the High and Supreme Courts in respect of certain personal injuries actions. The Supreme Court has appellate jurisdiction from decisions of the *High Court*.

1.4 Lawyers in the Proceedings

Solicitors have a right of audience under all courts under the Courts Act, 1971. However, it is the usual practice for solicitors to brief barristers to attend before courts higher than the *District Court* on their client's behalf. Notwithstanding that it is not unusual for solicitors to exercise their advocacy rights in certain matters; particularly the area of family law.

1.5 Legal Form of Appeals

There is a hearing of a case *de novo* when an appeal is made to the *Circuit Court* to challenge an order of the *District Court* on the merits of the decision. All questions of law and fact are open to review and either party may call fresh evidence.

An appeal lies to the *High Court* from an order of the *Circuit Court* in civil matters by way of a re-hearing and the decision is generally not appealable.

The current practice is that an appeal from the *High Court* to the Supreme Court exists on a point of law, only. The Supreme Court is an appellate court, it has no originating jurisdiction. However, in certain exceptional cases, the Supreme Court has reviewed the facts of a case presented to the court of lower jurisdiction and has overturned a factual finding in respect of same.

A *Circuit Court* judge may refer any question of law to the Supreme Court by way of "case stated" and may adjourn for an announcement of judgment or order

pending the determination of such case stated. Similarly, a case may be stated on the question of law by the *High Court* to the Supreme Court. A case may be stated on a question of law from the *District Court* to the *High Court*.

Where an appeal leads to the return of a case to the lower courts, it is returned to the court in which it was heard at first instance.

1.6 Further Requirements and Restrictions for the Appeal

Appellants must lodge a notice of appeal, which states whether the whole or part only of any judgment or order is being appealed. The notice of appeal must be served upon all parties directly affected by the appeal. In relation to appeals from the *High Court* to the Supreme Court, the appellant lodges an attested copy of the judgment or order appealed from and must lodge five books of appeal each containing copies of the pleadings and all other documents required for the hearing of the appeal in the Supreme Court Office. It is not necessary for a person served with notice of appeal to give notice by way of cross appeal, but if they intend, upon the hearing of the appeal, to contend that the judgment or order appealed from should be varied, they must within four days of such service upon them, or within such extended time as may be allowed by the Supreme Court, give notice of such intention to any parties who may be affected by such intention. As regards time frames, the Supreme Court has the power to enlarge or abridge the time appointed in the rules of the Superior Courts within which notice of appeal must be lodged.

1.7 Numbers of Documents to be Served

The only document that must be served directly on the opponent in civil proceedings is the writ. However, if solicitors are appointed, and they undertake to accept service of proceedings, even the initial writ can be served on the solicitor.

1.8 Expert Witnesses

Expert witnesses fees are calculated from general guide-lines arising from agreements between representatives of the various professions and the Law Society. Obviously, certain specialists charge higher fees, depending on the level of expertise and effort required. Most doctors expect payment for reports in advance. However expert witnesses are not paid until after the trial for court attendances. Usually, the successful litigant is awarded costs, which means that

the other party must pay their own costs as well as the opponents. Consequently, any experts fees, which would be allowed on taxation, will be paid by the defeated party.

2 Time Factors

2.1 Time Frame for Appeals

Under the Rules of the Superior Courts, appeals from the *District Court* to the *Circuit Court* must be lodged within ten days of the *District Court* decision which is being appealed. Appeals from the *Circuit Court* to the *High Court* must be lodged within ten days of the *Circuit Court* decision or order which is being appealed. Appeals from the *High Court* to the Supreme Court must be, lodged within 21 days from the date of perfection of the *High Court* judgment or order.

2.2 Estimated Duration of Civil Cases

In relation to the *Circuit Court*, trials are allocated trial dates within 8 to 12 weeks of setting down. Under a practice note issued by the *Circuit Court* Office in June 1997, solicitors must make certain that they are ready for trial before they set down for trial. Solicitors must complete and sign a new check-list before notice of trial will be accepted at the *Circuit Court* Office. It is necessary to obtain a letter from defendants and third parties declaring their readiness for trial. All pre-trial matters must be attended to, including discovery, dealing: with notices for particulars, having proofs advised on by counsel etc. The solicitor must submit an estimate of how many witnesses he/she expects to call and the estimated duration of the trial. This procedure ensures that delays are kept to a minimum.

The total duration of taking a *Circuit Court* case will obviously vary, depending on the complexities of the case and the amount of time spent on pre-trial preparation, but the new procedures ensure that once both sides declare their readiness for trial, a trial date can be obtained within 8 to 12 weeks. Getting ready for trial would take at least 4 or 5 months from the commencement of the action, if it is handled efficiently. Therefore, one can manage to conclude a first instance proceeding at the *Circuit Court* within about 8 months.

In relation to *High Court* proceedings instituted, since 1 September 1997, plaintiffs must now serve notice in respect of any reports on which they intend to rely at trial on the other side. This must be done within 3 months of the notice of trial being served. Similarly, there is a corresponding obligation on defendants.

Both sides must exchange a list of the witnesses they intend to call at trial and must also exchange witnesses' statements. These new requirements will obviously slow down matters. However, once these obligations are met, both parties can agree and ask for a hearing date and obtain same within a relatively short period of time. Yet, pretrial proceedings take quite some time and two years for a full proceeding are not unusual.

Finally, at the Supreme Court, one should reckon with three years for a proceeding to be concluded.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

At dispute values of 50,000 ECU or 200,000 ECU, the proceeding will most definitely start at the High Court level. Such a proceeding of 50,000 ECU would generate pretrial solicitors fees of at least 15,000 ECU, as the required documentation in form of affidavits in *High Court* is quite complex. Barristers brief fees in the *High Court* vary, depending on whether the barrister is a junior or senior counsel, and also on the documents drafted. A brief fee of a junior barrister would be at about 5,200 ECU, which includes the fees for the first day in court. Each additional day of court hearings may be charged at half of that rate, *i.e.*, about 2,600 ECU. While simple cases may be concluded within a day and complicated cases can take weeks of trial, it is not unusual to expect at least three days of trial. During the hearings, the solicitor will be present, often together with an apprentice, both charging their hourly rates of 300 ECU or 160 ECU, respectively (on the low side). These fees would add up to another 4,100 ECU for the trial alone. In total, therefore, the costs may easily add up to 14,500 ECU plus court fees and other expenses which would, together with the solicitors fees mentioned before lead to fees of approximately 30,000 ECU.

In the Supreme Court, if not before, and for higher values such as 200,000 ECU or more complex cases, a senior barrister would definitely be employed. Brief fees, as above, may thus amount to at least 7,000 ECU, and half of this amount for each additional day in court. In addition, a junior barrister would accompany the senior barrister, an apprentice the solicitor. Accordingly, the fees for the trial can add up to 18,000 ECU. Again, pretrial solicitor fees of 15,000 ECU would have been incurred raising the total costs including court fees to 35,000 ECU in the Supreme Court, where the trial may have fewer days, or more in High Court, possibly 45,000 ECU.

If fees cannot be agreed upon, usually the matter is sent to the Taxing Master to be adjudicated on.

Fortunately, if the case is commenced at the High Court, there would be no 3rd instance available.

3.2 VAT-Rules

VAT is charged at 21% on solicitors and barristers fees. This rate applies to both to individual clients and companies.

3.3 Transfer of Money

Generally, collected monies are forwarded by bank transfer, as this is the fastest method. Cheques and bank drafts are also used, although these take longer to clear. Credit card payment is not acceptable.

3.4 Gathering of Information

There is no specific address location service in Ireland, beyond Directory Enquiries. In relation to companies, the inter Companies Comparisons Office (Searchline) provides a comprehensive service for a fee of 100 ECU.

3.5 Cost of Recognition of Judgments

In order for foreign judgments to be recognised in Ireland, an ex-parte application must be made to the Master of the *High Court*. This is accompanied by a copy of the judgment which is sought to be enforced, proof of service and an affidavit. Due to the rigorous checking system involved, a solicitor would charge approximately 2,600 ECU for the enforcement of a judgment for a dispute value of 50,000 ECU and approximately 9,000 for that of 200,000 ECU.

ITALY

1 National Civil Proceeding

1.1 Court Structure

The civil court structure in Italy is the following:

- Small Claims Court (*Giudice di Pace*);
- Local Court (*Pretore*);
- District Court (*Tribunale*);
- Court of Appeal (*Corte d'Appello*), which mainly deals with appeals of decisions of Tribunale;
- Supreme Court (*Corte di Cassazione*).

In addition, any court, upon request of the parties or by its autonomous decision, may decide to submit to the Constitutional Court (*Corte Costituzionale*) specific provisions of law which are suspected not to conform with principles of the Italian constitution of the Republic.

While *Giudici di Pace* are largely present in the territory, as well as *Pretori* (in principle, one may say that in each town there is a *pretore*), *Tribunali* are located in each town which is the centre of a Province and *Corti d'Appello* are 1 to 3 for each region, *i.e.*, only in the most important towns. The *Corte di Cassazione* is located only in Rome, as well as the *Corte Costituzionale*.

1.2 First Instance Proceedings

At present time in Italy there are 3 courts in which civil cases start at first instance:

- *Giudice di Pace*,
- *Pretore*,
- *Tribunale*.

The competence of each court where the case has to be started depend on various issues, sometimes the value of the case may be relevant, sometimes the nature of the litigation.

With regard to the nature of the litigation, the *Giudice di Pace* is competent for cases regarding the rules for planting of trees and hedges. The *Pretore* has exclusive jurisdiction regarding leases or tenancy. The *Tribunale* is the authority exclusively competent for trials concerning taxes, status or legal capacity.

With regard to the value, the courts are competent as follows:

- *Giudice di Pace* - up to 2,575 ECU (car and boat damages up to 15,450 ECU);
- *Pretore* up to 25,750 ECU when the *Giudice di Pace* is not competent;
- *Tribunale* - all the remaining cases;
- *Corte d'Appello* - regardless of the value and only specific matters provided for by the law.

The Civil Procedure Code (C.P.C.) establishes the rules competence of each of these courts in artt. 7, 8, 9.

1.3 Appellate Proceedings

Decisions may be appealed usually once as to the merit, and the decision of the appeal may be submitted to the Supreme Court as to the correct application of principle of law. However, in certain cases only direct recourse to the Supreme Court is granted to the parties.

Generally, appeals from *Giudice di pace* and *Pretore* go to the *Tribunale*. Appeals from the *Tribunale* go to the *Corte di appello*.

It is possible for a party to appeal against a decision of the *Tribunale* and the *Corte d'Appello* respectively in *Corte di Appello* and *Corte di Cassazione*.

1.4 Lawyers in the Proceedings

The only restriction for lawyers to appear before higher courts regards the *Corte di Cassazione*: in this case the lawyers have to be enrolled in a special law list named "*Albo degli avvocati cassazionisti*". To be admitted in this *Albo*, the

lawyers must demonstrate that they have effectively exercised the legal profession for at least ten years.

1.5 Legal Form of Appeals

It is necessary to make a distinction between the appeal to *Tribunale* or *Corte di appello*, and the recourse to *Corte di Cassazione*.

The first one has boundless nature: this means that the party can regret the whole injustice of the first instance's sentence. Nonetheless, as a rule, the parties cannot offer new evidence in the appellate trial.

The recourse to the *Corte di Cassazione* has a different nature. A party can apply to *Corte di Cassazione* only on the base of specific violations of law (similar to the French system of cassation).

The distinctive feature is that the judge aims at the rescission of the previous decision, so that a new examination of the trial will be possible or the proceeding will stop.

Therefore two results are possible:

- cassation with return of the case to a lower court;
- cassation without adjournment of the case.

In the first case with his decision the judge will reopen the trial indicating the court which will be competent. Obviously the new judge will be a different one and not the one of first instance.

A special case is one known as "*rinvio improprio*": in this case the judge of second instance should have returned the case to the judge of first instance, so the *Corte di Cassazione* substitutes itself to the judge of appeal, remitting the case to first instance judge.

1.6 Further Requirements and Restrictions for the Appeal

Some decisions of *Giudice di Pace* and the decisions rendered in first decree by *Corte d'Appello* are not subject to appeal. According to art.339 c.p.c. are unappealable, first of all, decisions in relation to which the court has decided on equity, that is in the case of agreement of the parties on the possibility to decide the trial making use of equity, in relation to cases whose value is above

1,000 ECU. Only in the remaining cases it is possible to appeal to Tribunal against Giudice di Pace's decisions - see art. 331 law 374/91, art. 339 c.p.c. and art. 341 c.p.c.

The terms within which appeals have to be lodged are 60 days. Both terms have effect from notification of decisions. In any case (even if the decision is not notified) the appeal cannot be proposed 1 year after the decision.

In appeals to Tribunale and Corte di Appello appellee must answer at least 20 days before the day of the hearing fixed in the act of summons - see art.343 and art. 166 c.p.c.

1.7 Number of documents to be served

Usually the documents which must be directly served to the parties are the writ of summons or the petitions which introduce the proceedings in each instance. Also the document by which the enforcement proceedings are introduced must be directly served to the parties. So, only one document per instance is served directly on the defendant, while all other documents after settlement of defendant will be deposited in court.

1.8 Expert Witnesses

Expert fees are generally calculated on the basis of general professional fees which are previously determined for almost every kind of professional service. Normally, such fees must be paid in advance by the claimant and, at the end of the proceedings, by the losing party.

2 Time Factors

2.1 Time Frame for Appeals

The time to propose the appeal depends on whether the decision has been or not served: if decision has been served the time is 30 days (60 days for recourse to the Supreme Court); if not it is one year.

The appellant party has to indicate the reason of the appeal and the appellee is granted with a term to reply which is usually not less than 60 days (excluding special cases where the court may reduce such term). In practice, very often

courts post-pone the hearings, and therefore the appellee has more time to prepare its defence.

2.2 Estimated Duration of Civil Cases

In practice, the absolute minimum time for the first instance is one year and half; for the appeal two years, for the Supreme Court three years. However, depending on the workload of the individual court some lawyers estimate even a minimum of 4 years to 10 years for each instance and a minimum of 8 years to an unlimited time for a total appellate proceeding. Realistically, one can expect three years for the first instance and a little longer for each of the following instances. If, in a rare case, a proceeding is brought for a preliminary ruling to the Constitutional Court, such case might be delayed by about two years.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Stamp duties are provided for by Italian law, currently in an amount of 10 ECU for any set of four pages of any defence or brief of each of the parties (stamp duties are not due for labour litigations and for litigation not exceeding 1,000 ECU), furthermore, secretarial fees are due to the court by the plaintiff to an amount of around 100 ECU, for each instance; service by public bailiff has to be paid in an amount of around 25 ECU for each service.

If an executory condemnation to pay money is rendered, a Registrar's tax in the amount of 3% of the payable amount may be due; such tax may be recovered from the losing party.

Lawyers fees are calculated according to a very complex chart which assigns a fee scale for each individual act of the lawyer, such as a telephone call, a letter, a hearing, a writ (per set of pages) etc., each based in addition on the value in dispute. Accordingly, it is very difficult to estimate the costs precisely as it is impossible to oversee all the individual activities that may become necessary. In addition, within the fee scale for each such activity, which in itself is quite wide, it is in the discretion of the lawyer to select the appropriate figure which may be anywhere within that scale.

In practice, one can expect total legal fees of about 2,500 ECU for a first instance proceeding about a dispute value of 50,000 ECU or more. An appellate

proceeding might cost in the range of 4,200 ECU while an appeal to the *Corte di Cassazione*, a proceeding before the Constitutional Court or the ECJ would each cost around 5,450 ECU. To the latter travel and other expense of about 1,550 ECU have to be added.

3.2 VAT-Rules

Generally, VAT need not be paid by foreign clients both by individuals and by companies. On the contrary, VAT has to be paid by all the domestic clients: the VAT-rule for lawyers fees establishes the payment of 20% VAT plus an additional 2% lawyers' pension fund surcharge.

3.3 Transfer of Money

In general, Italian lawyers do not accept payments by credit cards. Monies to clients abroad are paid by cheque. The lawyer receive payments directly on his Bank account.

3.4 Gathering of Information

Both individual clients and companies may be located in the lawyer's office, or in an accountant's office. The location for a judicial case has no special cost but is part of the work of the lawyer for the case. The location of a legal office for a company usually is provided by accountants and not by lawyers. Therefore, the cost of such location will be directly calculated in the general costs of the proceedings.

3.5 Cost of Recognition of Judgments

The average total costs for the recognition of foreign judgments depends on the length and the complexity of the proceedings. In any case, such cost for a proceeding with values of 50,000 ECU or more can be evaluated between a minimum of 1,000 ECU and a maximum of 5,200 ECU. As an average costs 2,500 ECU are realistic, of which 360 ECU would be court fees.

An enforcement proceeding might be a little less expensive, maybe 2,000 ECU, as long as the enforcement does not involve real estate. In that case, the cost would be at least 50% higher.

LUXEMBOURG

1 National Civil Proceeding

1.1 Court Structure

The preliminary chapter of the Luxembourg Code of Civil Procedure contains provisions relating to the competence of the courts in civil and commercial matters. Luxembourg is divided into two districts (Luxembourg and Diekirch). In both districts, there are tribunals of first instance competent for civil commercial and criminal matters.

The court structure is as follows:

- *Justice the Paix civil/commercial* (Justice of the Peace);
- *Tribunal d'Arrondissement / de Commerce* (District Court / Commercial Court);
- *Cour d'Appel* (Court of Appeal);
- *Cour de Cassation* (Supreme Court).

For the district of Luxembourg, there are 2 Justices of the Peace (Luxembourg and Esch/Alzette) and for the district of Diekirch 1 Justice of the Peace. There is one *Tribunal d'Arrondissement* located in each of the *Arrondissement* (Luxembourg and Diekirch).

It should also be noted that a law dated July 27, 1996 has created a Constitutional Court in Luxembourg. The constitutional compliance control introduced by article 6 of the above mentioned law is based upon the system of interlocutory questions. Article 6 provides in fact that if a party raises a question referring to the conformity of a law to the Constitution, the court has to seize the Constitutional Court. The interlocutory question will suspend the proceedings before the judicial or administrative court.

1.2 First Instance Proceedings

Jurisdiction of the courts of first instance is principally based on *ratione valoris* criteria. In civil and commercial matters, the Justice de Paix is competent in the first instance up to an amount of 9,800 ECU.

There are, however, a number of exceptions, provided for by articles 3 and 4 of the preliminary chapter. The Justice de Paix is competent in the first instance (up to an amount of 730 ECU) and on appeal (whatever the amount is) for the following matters:

- demands for damages done by human beings or animals to fields, fruits and harvest,
- demands relating to defects of domestic animals,
- demands relating to all disputes between landlord and tenant as to the existence and execution of leases,
- demands relating to the repairs of damages caused to the superficial ownership by exploitation of mines.

Article 17 of the preliminary chapter provides that the District Court (*Tribunal d'Arrondissement* or *Tribunal de Commerce*) is, as far as commercial and civil matters are concerned, the common court of law and is competent to decide on all subjects for which the law has not given exclusive competence to other jurisdictions, by reason of the subject matter or the amount of the demand. As a general rule, the District Court is competent in the first instance for all demands exceeding the value of 9,800 ECU.

1.3 Appellate Proceedings

According to article 4 of the preliminary chapter, the Justice de Paix is always competent in case of appeal, whatever the amount be, for the following subjects:

- demands for alimonies (except those related to an action for divorce or separation);
- actions for the fixation of boundaries;
- disputes related to irrigation work
- actions for the recovery of possession, writ of ejectment;
- actions related to easements;
- actions related to agricultural warrants;

Pursuant to Article 19 of the preliminary chapter, the District Court is competent to hear appeals from decisions given by the Justice de paix. Appeals can be lodged in front of the *Tribunal d'Arrondissement*.

The District Court is composed of 10 specialised sections dealing with civil, commercial and criminal matters.

Article 16-1 of the CCP provides that appeals of judgments rendered by the *Justice de paix* in commercial matters are brought before the commercial section of the District Court. The procedure before the commercial section of the District Court is an oral procedure, there is no exchange of conclusions.

Appeals against District Court judgments are lodged before the Court of Appeal in Luxembourg.

1.4 Lawyers in the Proceedings

There are no special restrictions and licenses for lawyers to appear before higher and highest instances, except as far as the newly created Constitutional Court is concerned. However, in civil cases, trainee lawyers (with less than 3 years experience) may appear alone only before lower courts (that is to say the Justice of the Peace). Although they may appear physically before the District Courts and the Court of Appeal and *Cour de Cassation*, they need to be assisted by a senior lawyer to file written pleadings, even though they may orally argue the case alone.

1.5 Legal Form of Appeals

Article 464 of the Code of civil procedure provides that in case of appeal no new claim can be raised, except as a defense to the main action. This implies that the appellant may invoke new arguments, but they must be limited to the grounds contained in the original writ of summons. The parties may bring in new evidence or witnesses, as long as they are related to the original grounds. The appellate courts hear the case again on the merits and confirm or overrule the judgment of first instance. If the judgment is null and void the appellate court has the choice to hear the case itself or to send it back.

According to article 3 of the Law dated February 18, 1885 on cassation proceedings, any judgment rendered in the last instance either by the Justice de Paix or as by the District Court in civil and commercial matters may be deferred to the *Cour de Cassation* for violation of the law or for formal defects. That

means, an appeal on legal grounds may only be lodged before the Cour De Cassation. While the cassation system may lead to the return of the case to the lower courts, there is no referral for rehearing in case of appeals.

1.6 Further Requirements and Restrictions for the Appeal

One must notice the difference between two threshold value regarding the possibility to appeal. Judgments concerning cases from a value below the threshold of 730 ECU are definitive and may not be appealed. However, an appeal on grounds of law is always possible. It is lodged with the Cour de Cassation.

Judgments regarding cases from a value above the aforementioned threshold will not be definitive and an appeal can then be lodged.

1.7 Number of Documents to be Served

The documents that have to be served directly on the opponent are the original writ and the Appeal writ of summons. All other subsequent documents shall be exchanged between lawyers, only.

1.8 Expert Witnesses

Expert fees are part of legal fees to be paid by the losing party. However the party requesting expert witness may be obliged to advance a retainer. At the end of the proceeding it is usually up to the losing party to bear the expert costs. Expert fees are free and no special rules apply.

2 Time Factors

2.1 Time Frame for Appeals

Generally, appeals have to be lodged within a time frame of 40 days (15 days for opposition in case of a judgment by default with the possibility of a further appeal) as of the service of the judgment. However, article 73 of the Code of civil procedure provides that the deadline of 40 days may be increased by 15 days for defendants residing in Belgium, France, Monaco, the Netherlands, Germany, Switzerland or Liechtenstein and by 1 month for defendants residing in another European territory, including Turkey and Cyprus but excluding the former

USSR. Finally, for defendants residing in another part of the world, the 40 days are increased by a time period of 2 months.

An appeal to the Cour de cassation should be lodged within 2 months.

An new act entering into force on 15 September 1998 provides for strict rules concerning the filing of the pleadings.

According to article 462 of the Code of civil procedure, the appellant shall give formal notice of the grounds of appeal by communicating the so-called "*conclusions de style*". This document does not contain any substantive developments as to the reasons of appeal but merely restates the indications already contained in the notice of appeal. The defendant shall respond to these grounds and an exchange of conclusions will follow. In the conclusions, the parties will develop their arguments. This "*conclusions de style*" shall be filed within a time frame of 8 days. The response of the defendant shall be filed within a time frame of 8 days, too. It should be noted that the respective time periods of 8 days provided for by article 462 of the Code of civil procedure are generally not respected in practice.

2.2 Estimated Duration of Civil Cases

In cases starting at the lowest level (Justice of the Peace) the duration of a case may be finished after 4 months.

The *Tribunal d'Arrondissement* will render a first instance judgment after 2 or 3 years, whereas the *Tribunal de Commerce* usually needs not more than between 6 months and 2 years.

The duration of a second instance proceeding at the *Tribunal d'Arrondissement* is about 6 months to 2 and a half years. In more important cases proceedings may last up to five or six years. For an appeal at the *Cour d'Appel*, between 6 months and 2 years may be calculated, however, due to the individual case only the appeal before the Court of Appeals may even take 4 or 5 years.

Recently, the newly founded Constitutional Court has rendered its very first decision. The time frames for the procedure at the Constitutional Court are quite strict. Each party has a time frame of 1 month to present a brief of comment and another to reply. These time frames run simultaneously. Thereafter the hearing must take place within a further month. Thus all in all, the procedure takes

almost exactly 3 months plus the time to write and type up the judgment which, in the above stated first case took less than a month.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Regarding the cost of the proceeding, no detailed rules are applicable. Court fees do not exist in Luxembourg. Lawyers estimates their fees freely by negotiation and there is no scale of charges or taxation by the court. The amount of hourly rates depends in a great way on the complexity of the suit, a minimum hourly rate of 100 ECU can be calculated, though. The usual hourly rate varies from 120 ECU to 370 in consideration of the difficulty of the case. In any event, the bar committee can tax the client's bill and the decision is binding on the lawyer, so that exaggerated fees may be scrutinized.

Accordingly, the lawyers fees may be estimated as follows:

First instance:

- Proceeding at *Justice de Paix*: 735 - 2,450 ECU;
- Proceeding at *Tribunal d'Arrondissement*: 1,225 - 3,680 ECU; with a realistic average of 3,000 ECU for a claim of 50,000 ECU and a little more for higher values.

Second instance:

- *Tribunal d'Arrondissement*: 1,225 - 3,680 ECU; the same applies as above with regard to realistic averages.
- *Cour d'Appell*: 1,470 - 4,900 ECU; a realistic average would be at 4,000 ECU and again, a little more for higher values.

The lawyers costs for a proceeding at the Constitutional Court can be estimated at about the same level as for a first instance proceeding sometimes even less, *i.e.*, at 2,500 ECU. The short time frames and the limitations regarding the questions would not usually allow too much lawyer time to be spent. The same costs would apply for a proceeding before the ECJ. Travel expenses usually do not occur.

3.2 VAT-Rules

Generally, VAT of 12% has to be added to the lawyers fees. If an European Union client himself subject to VAT in his home country, VAT is inapplicable (Art 17.2 e VAT Act). If an European Union client is not subject to VAT in his home country, VAT is applicable (c). In case of a non European Union client VAT is inapplicable (Art. 17.2 e VAT Act).

3.3 Transfer of Money

Credit cards are not accepted by Lawyers in Luxembourg. Collected money should be directly transmitted to the client. This rule is strictly applied by the Council of the Bar and non compliance is a serious offence to the professional rules. The payment to clients abroad is usually effected by bank transfer.

3.4 Gathering of Information

Lawyers may locate addresses. A draft statute will regulate in detail the issue. As far as address location of private individuals is concerned, an address may be located by contacting the authorities of the Municipality where the private individual resides. A request can also be filed with the Justice of the Peace to search the social insurance directory. This procedure may take several weeks. Companies may be located at the Trade Registry open to the public. In normal cases the average costs of address location and the duration of address location are insignificant.

3.5 Cost of Recognition of Judgments

It is difficult to appraise total costs as lawyers fees are free and not subject to strict regulation. Fees generally take into account the number of hours worked on a case.

Summing up, the lawyer's fees for the recognition of a judgment may be estimated at about 1,250 ECU.

Enforcement of judgments involve in general bailiff costs between 245 and 1,230 ECU.

References:

The relevant threshold amounts have been amended by a Law dated August 11, 1996 (Loi du 11 août 1996 portant augmentation du taux de compétence des justices de paix, Mém. A 1996, p. 2026 **Fehler! Verweisquelle konnte nicht gefunden werden.**).

NETHERLANDS

1 National Civil Proceeding

1.1 Court Structure

In principle there are four types of civil courts which handle civil cases in three instances:

- Local Court (*Kantongerecht*);
- District Court (*Arrondissementsrechtbank*);
- Court of Appeal (*Gerechtshof*);
- Supreme Court (*Hoge Raad*).

1.2 First Instance Proceedings

Civil cases usually start either in the Local or the District Court, depending on the financial significance or the nature of the case.

The Local Court has the exclusive jurisdiction for claims up to 2,250 ECU and for all cases, regardless of the financial claim, concerning employment agreements and rental agreements.

The District Court has jurisdiction for all claims for which no other court has jurisdiction.

Most cases in the Netherlands are decided on written procedure and there is no oral hearing.

1.3 Appellate Proceedings

A proceeding that started in first instance to the Local Court is appealed at the District Court. The Cassation goes to the Supreme Court. The threshold amount for appeals at the Local Court is 1,100 ECU.

If the District Court is the first instance court there are no threshold amounts for appeals. The appeals go to the Court of Appeal and, for the cassation, to the Supreme Court.

Interestingly, while constitutional aspects are considered by the courts of all levels, this does not include the testing of statutes for their compliance with the constitution which is specifically not allowed in the Netherlands. However, since the European Convention of Human Rights and other conventions are also supreme laws of the land in the Netherlands it is possible for a court to find a statute in violation of these conventions and thus declare it inapplicable.

1.4 Lawyers in the Proceedings

There are no restrictions for lawyers to appear before a higher or the highest instance. Nevertheless, the lawyer has to have an exclusive right of appearance before a specific court in procedural matters (procurator). Only a lawyer who is settled in the district of the District Court, has such an exclusive right.

1.5 Legal Form of Appeals

The proceeding in appeal is a completely new trial, which may lead to the reversal of the judgment in first instance, followed by a new judgment by the higher instance (District Court or Court of Appeal).

In case an appeal is followed by a cassation, the case is reviewed on legal grounds only. If the Supreme Court decides to a cassation of the judgment, he will either pronounce a new judgment or return the case to the court which pronounced the reversed judgment, or refer it to another court of the same instance.

1.6 Number of Documents to be Served

The usual number of documents that have to be served directly upon the opponent (defendant or appellee) in each instance is one.

Service is effected by bailiff who, as opposed to most other member states, is directly employed by the claiming lawyer. Thereafter, the defendant is deemed to be domiciled in his lawyers office.

Accordingly, in case of an appeal or a cassation the writ can also be served on the opponent's lawyer of the previous instance.

1.7 Expert Witnesses

Unless otherwise determined by the judge, the plaintiff has to make a deposit for the expert witness fees with the clerk's department. The party who is ordered to pay legal costs, will eventually have to pay the fees.

There is some legislation in which the expert witness fees are determined ("Wet tarieven in burgerlijke zaken" and "Besluit tarieven in burgerlijke zaken"). They may differ depending on the kind of expert involved.

2 Time Factors

2.1 Time Frame for Appeals

Appeals as well as cassations have to be lodged within 3 months from the judgment by way of a writ of summons.

The time frames between the summons/statement of claim, the statement of defence, the reply and the rejoinder are usually several months. The parties themselves decide how long these time frames will be.

2.2 Estimated Duration of Civil Cases

The estimated duration for each instance is between 1 and 2 years. However, a proceeding may be finished even in less time than one year or, due to the individual requirements of the case, last longer than two years. Therefore, for a proceeding that cover all three instances, a time frame of 4 to 5 years seems realistic, whereas the proceeding may even exceed 6 or 7 years.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Normally lawyers fees are based on hourly rates. There are no fixed rates for different steps or types of proceedings. It depends on the nature of the case what fee will be charged. However, the bar association provides a guideline which contains a formula for the calculation of the fees based on a) the nature of the case, *i.e.*, the value necessary specialized knowledge and the urgency, b) the experience of the lawyer, and c) the clients ability to pay. Each item is awarded a

factor between 0.6 and 2.5, all factors are multiplied with each other, the number of hours spent and the basic hourly rate which is currently at about 126 ECU.

According to a table, a value of 50,000 ECU would have the factor 1. If this case is handled by a lawyer with more than five years experience a factor of 1 also applies. It shall further be assumed that specialized knowledge is required (= factor of 1.5) and that the case is not specifically urgent (= factor of 1). Further, as the assumed case is a consumer conflict, the clients ability to pay would be low so that a factor of 0.7 would apply. Finally, if the case uses 25 hours of lawyer time, this would lead to the following calculation:

$$1 \times 1 \times 1.5 \times 1 \times 0.7 \times 25 \times 126 \text{ ECU} = 3,307.5 \text{ ECU.}$$

For a value of 200,000 ECU, the respective factor would be 2. All other items unchanged, the fees would therefore be 6,615 ECU.

The court fees are as follows:

3.1.1 Local Court

max. 130 ECU, depending on the financial significance or the nature of the case.

3.1.2 District Court

- claim up to 11,200 ECU: max. 200 ECU;
- claim of more than 11,200 ECU: 1,9% of the claim up to a maximum of 3,130 ECU (750 ECU in case of a private person).

3.1.3 Court of Appeal/Supreme Court

- claim up to 11,200 ECU: max. 265 ECU;
- claim of more than 11,200 ECU: 2,4% of the claim up to a maximum of 3130 (750 ECU in case of a private person).

3.2 VAT-Rules

A VAT-tariff of 17.5% is included in the lawyers fees in case the lawyer renders his services to companies seated in The Netherlands, to foreign companies for

the benefit of their permanent affiliates in The Netherlands, or to any private person within any of the member states of the EU.

3.3 Transfer of Money

Monies are collected on a separate account for third parties and subsequently forwarded to the client.

In general, lawyers do not accept credit cards. Usually the payment of lawyers fees is made by deposit.

3.4 Gathering of Information

Addresses can be located by consulting the register of commercial enterprises (companies) or the population register (private persons). The average costs are 4,5 or 9 ECU per consultation. With regard to the register of commercial enterprises, it is possible to have an on line-connection with the Chamber of commerce and industry, which makes it possible to get the required information immediately. A certificate of residence may be obtained in a few days.

3.5 Cost of Recognition of Judgments

One has to distinguish two situations:

The situation that there exists a treaty which recognizes foreign judgments (which is the case for cross-border proceedings within the EU), (a), and the situation that this is not the case (b).

a. In case there is a treaty the District Court will have to give permission to enforce the foreign judgment in The Netherlands. This so called "exequatur"-procedure is relatively simple and does not take very much time or effort to complete.

b. If a treaty does not exist, the foreign judgment cannot be enforced in The Netherlands, but new legal proceedings will have to be started in The Netherlands. This will take much more time and therefore be much more expensive.

AUSTRIA

1 National Civil Proceeding

1.1 Court Structure

At the lowest level of the Austrian civil court structure are the Local Courts (*Bezirksgerichte*). They have jurisdiction in all matters where the value of the subject matter in dispute does not exceed 720 ECU. In addition, they have jurisdiction in certain matters regardless of the value of the claim (see below, addressing exclusive jurisdiction).

At the second level are the District Courts (*Landesgerichte*) which have jurisdiction as courts of first instance for all matters in which the Local Courts do not have jurisdiction. They are also the courts of second instance for appeals against decisions of the Local Courts. There are several District Courts in Austria, at least one in each Federal State.

An appeal against a decision of a District Court, acting as a court of first instance, is heard by one of the four Courts of Appeal (*Oberlandesgerichte*). The Courts of Appeal are situated in Vienna, Graz (Styria), Linz (Upper Austria) and Innsbruck (Tyrol). For second and further appeals see above. Appeals against the appellate decisions of the Courts of Appeal are made to the Supreme Court (*Oberster Gerichtshof*), the highest civil court in Austria.

In Vienna only, there are separate courts at the first and second levels for commercial matters: the Commercial Local Court (*Bezirksgericht für Handelssachen*) and the Commercial Court (*Handelsgericht*). In addition, the Labour and Social Court (*Arbeits- und Sozialgericht Wien*) in Vienna has exclusive jurisdiction in employment disputes and in social security disputes.

1.2 First Instance Proceedings

In general, claims must be filed with the court at the defendant's place of general jurisdiction (*allgemeiner Gerichtsstand*) which is determined by the defendant's domicile, general residence or registered office. Additional forums exist for businesses and entrepreneurs or may be stipulated in written agreement. However, consumers cannot agree a priori to be sued in a forum other than one located in their place of general jurisdiction.

For threshold amounts determining jurisdiction of the courts of first instance see above. The Local Courts have exclusive jurisdiction in the following matters, irrespective of the value in dispute:

- family matters;
- disputes in relation to lease agreements including their formal termination;
- disputes between travellers or guests and their counterparts;
- disputes about the boundaries of land;
- disputes about disturbance of possession; and
- some other matters of minor importance.

The Commercial (Local) Court(s) in Vienna have jurisdiction for commercial matters brought before a court in Vienna. In the other Federal States the common civil courts also hear all commercial matters. Upon application of either party, the panel may consist in part of lay judges with some expertise in commercial practice.

The Commercial Local Court and the Commercial District Court in Vienna have, depending upon the value in dispute, exclusive jurisdiction in, amongst others, the following matters:

- lawsuits against corporations and other commercial entities arising out of their commercial activities;
- lawsuits against general managers, "prokuristen", and special agents;
- matters in connection with business acquisitions;
- disputes concerning the name of a business;
- intra-corporate disputes (among shareholders or partners and between the corporation and its shareholders or partners);
- matters in connection with bills of exchange and cheques;
- disputes about product liability, intellectual property rights and unfair competition.

1.3 Appellate Proceedings

The Austrian Code of Civil Procedure knows three forms of appeal called *Berufung*, *Revision* and *Rekurs*. These forms of appeal are often designated "ordinary" appeals in scholarly legal writing, as opposed to "extraordinary" forms of appeal, such as appellate actions (nullity appeal - "Nichtigkeitsklage", and the action intended to recommence the proceedings - "Wiederaufnahmeklage").

1.3.1 *Berufung* (Appeal)

The *Berufung* is the general ascending and suspensive appeal against judgments given in first instance. According to the provisions of the Austrian Code of Civil Procedure, the limited appeal (*beschränkte Berufung*) is the rule and the full appeal (*volle Berufung*) is the exception to the rule.

Limited appeal: Neither new claims nor objections pertaining to the subject-matter may be raised, nor may new facts or fresh evidence be submitted (§ 382 (1) ZPO). The appellate court will review only whether the court of first instance has made the right decision on the basis of the facts and evidence submitted by the end of the proceedings. New facts and fresh evidence can be submitted only if they support or refute the grounds of the appeal, provided such facts and evidence were notified to the opponent in the appeal brief or the response to the appeal (§ 482 (2) ZPO). Therefore, any new aspects concerning the nullity or irregularity of the proceedings or judgments given in first instance or the current appellate proceedings are admissible just like new legal statements giving different legal substantiations for the applications relevant to the principal object of the action.

Full appeal: New facts and fresh evidence may be submitted in matrimony matters, in descent matters and labour disputes under § 50 (1) of the Act on Labour and Social Tribunals and in case on the continuance of employment for the party having had no qualified representation in any stage of the proceedings in first instance (§ 63 (1) Act on Labour and Social Tribunals).

The appeal is lodged with the court of first instance which, having reviewed compliance with the pertinent time limits and notified the opponent, will refer the case to the appellate court. The appellate court will review admissibility, effectiveness and *gravamen* in a non-public session. In the absence of any of these requirements, the appeal shall be dismissed by way of court order.

The appellate court hands down its decision

- by way of court order on procedural irregularities and on irregularities and nullities disregarded in the preliminary procedure, or
- by way of judgment on findings on the merits.

These rules are subject to two exceptions:

- In case of certain procedural irregularities, the court of appeal shall render a judgment on the merits (scheduling an additional hearing, if necessary), instead of dismissing the appeal, for reasons of adequacy and reasonableness (§ 496 (3) ZPO).
- If the findings of fact established by the court of first instance need to be completed for the purpose of ascertaining the legal position of the court of appeal, the latter shall issue an order and refer the case back to the court of first instance on the grounds of inaccurate legal evaluation. In this case as well, the court of appeal shall hand down a decision on the merits for the purpose of reasonableness (§ 496 (2) ZPO).

1.3.2 Revision (Cassation)

The form of appeal called *Revision* is an appeal against judgments rendered by the Courts of Appeals. *Revision* will be decided by the Supreme Court and serves first of all to review the decision given by the Court of Appeal in terms of the solution of legal issues and compliance with procedural laws and, secondly, to safeguard legal unity, legal certainty and the development of the law.

The Supreme Court must adhere to the findings of fact established by the courts of second instance and may not review points of fact. New facts and fresh evidence may be submitted only if they affirm or refute the nullity or irregularity of the appellate proceedings.

However, not every judgment will go up to the Supreme Court. The Code of Civil Procedure lays down the following restrictions in connection with a *Revision*:

- Generally speaking, a *Revision* may not be filed if the object of the dispute, on which the Court of Appeal has handed down a decision, does not exceed 3,740 ECU in money or money's worth (as of 1 January 1998) and if the object in dispute does not exceed 18,702 ECU in money or money's worth, special proceedings apply.

- According to § 502 (1) ZPO, the judgment handed down by the appellate court may be appealed only if the decision depends on resolving a point of substantive or procedural law having considerable significance to safeguard legal unity, legal certainty or the development of the law, for example because the decision of the appellate court deviates from Supreme Court practice or because such practice is not uniform or does not exist at all.

The appeal brief (*Revisionsschrift*) shall be filed with the court of first instance (§ 505 (1) ZPO) which will review it as to whether it is admissible. With the appeal having been served on the opponent, the latter may file a response within four weeks. Having received the opponent's response (or by the end of the filing period), the court of first instance submits the case to the Court of Appeal which may dismiss the appeal for the same reasons as the court of first instance (§ 508 (3) ZPO). Otherwise, it will pass the appeal on to the Supreme Court (= ordinary appeal proceedings).

An extraordinary appeal (*außerordentliche Revision*) may be lodged if the appellant alleges that the judgment given by the Court of Appeal is based on a point of substantive or material law, having considerable significance as referred to in § 502 (2) ZPO, being not properly resolved although the Court of Appeal expressly stated in its judgment that this was not the case. In that case, the court of first instance reviews the requirements underlying the appeal and serves the legal brief on the opponent (without requesting him to file a response). The appeal together with all files of the lawsuit will be directly submitted to the Supreme Court (§ 508 (2) ZPO). Should the Supreme Court find during its initial review of the extraordinary appeal that such appeal is likely not to be dismissed in the absence of the requirements set forth in § 502 (1) ZPO, it shall notify the opponent that he may at his option respond to the appeal. In that case, the response shall be submitted directly to the Supreme Court. After having received the response to the appeal (or by the end of the time limit) the Supreme Court will hand down a final decision whether the case concerns a material point of law and, if this is the case, it will make a decision on the merits.

In contrast to the dismissal of an ordinary appeal (*ordentliche Revision*), the extraordinary appeal (*außerordentliche Revision*) may be dismissed without giving a statement of reasons.

A decision on a *Revision* may be handed down by way of court order or in form of a judgment.

1.3.3 *Rekurs* (motion to review)

A *Rekurs* is a (generally) ascending, (generally) non-suspensive, unilateral or bilateral appeal against orders issued in first and second instance.

Ascending means that a *Rekurs* will, as a rule, go up to the next instance. However, in the cases referred to in § 522 (1) ZPO, the court of first instance itself may grant the appeal: against punishment for misconduct, decisions of the judge to continue the lawsuit, any dismissal of appeals, any dismissal of objections (§§ 451, 397a, 398, 442a ZPO) and *a limine* dismissals.

The appeal generally does not hinder the execution of the challenged order or the enforceability thereof (§ 524 (1) ZPO). However, the court may on application order that the order be suspended on a preliminary basis, provided this has no disproportional material adverse effect on the opponent or would otherwise frustrate the purpose of the appeal (§ 524 (2) ZPO).

As already mentioned, if directed at an order of second instance, the appeal must be filed with the court of first instance which will review compliance with the pertinent time limits and the admissibility of the appeal; in the absence of the same, it will immediately dismiss the appeal.

In case of a *Rekurs*, there is generally no brief to be submitted by the opponent ("unilateral appeal"). The opponent will not be heard in the proceedings.

An exception to this rule are the cases referred to in § 521a ZPO. These provisions stipulate a bilateral scenario in an appeal against the final order, an order to revoke the judgment given by the appellate court as referred to in § 510 (1) (2) ZPO and the order dismissing an action after the case has become pending or an application to dismiss an action: In these cases, the opponent may file a response within four weeks from service of the appeal.

An appeal to the Constitutional Court (*Verfassungsgerichtshof*) is not possible for parties to a civil case under Austrian law, only the court can request a preliminary ruling from the Constitutional Court as to whether a rule of law is unconstitutional and therefore void. Thus the parties have no remedy to challenge the constitutionality of statutes or statutory instruments in civil litigation.

Similarly, the court can request a preliminary ruling from the European Court of Justice on a matter of EC-law.

1.4 Lawyers in the Proceedings

There are no restrictions or licences required for lawyers for appearing before higher instances. Provided that the advocate is registered with one of the four Courts of Appeal, he may act before any court or administrative authority in Austria (Advocate Act - "Rechtsanwaltsordnung").

1.5 Legal Form of Appeals

The appellate court (in second or third instance) may:

- declare the appeal inadmissible;
- remand the matter to a lower court because the lower court's decision was a result of a wrongful procedure or because the appellate court annuls the lower court's decision; or
- decide on the merits of the case (confirmation or alteration, see 497 ZPO).

When the appeal leads to the return of the case, the court of second instance remands the matter to the court of first instance. The court of third instance remands the matter to the court of second instance, if either party was deprived of the right to participate in the proceedings in second instance, or if it was not duly represented therein. Otherwise, the matter is also remanded to the court of first instance, in particular if it is clear that an additional (evidentiary) hearing is necessary in order to render a judgment. The lower courts are bound by the legal reasoning of the appellate court(s).

1.6 Further Requirements and Restrictions for the Appeal

For appeals against judgments the following thresholds apply :

- a. There is no threshold for appeals against decisions of a court of first instance (*Berufung*). However, if the value in dispute does not exceed 1,080 ECU the appeal can only be based on a point of law or a request for an annulment; the first judge's decision on the facts of the case cannot be appealed.
- b. An Appeal against an appellate decision (*Revision*) to a court of third instance is:
 - always possible in family matters and in certain disputes connected with lease agreements;

- in other matters only admissible if the value in dispute before the appellate court exceeded 3,600 ECU. In addition, the court of third instance will only hear the case if it requires an answer to an unsolved (or where the panels previously reached opposing conclusions) question of material legal interest;
- subject to special rules in labour and social security matters. It is beyond the scope of this survey to describe them in detail.

Each party may lodge an appeal. The petition of appeal must in particular

- declare the extent to which the decision of the lower court is appealed;
- give arguments for each ground upon which the appeal is based; and
- provide (documents) and/or offer all relevant evidence (including witnesses) to substantiate these grounds.

All documents filed at an earlier stage of the proceedings are transferred together with the entire file by the lower court. In the majority of cases there is no need to file additional documents.

An important restriction for the appellate procedure is that new claims, new facts or new pieces of evidence are not admissible. New legal reasoning is allowed, and new facts and new pieces of evidence may be produced for supporting (or defeating) the grounds of appeal (Neuerungsverbot, § 482 ZPO).

Any application in relation to the appellate proceedings as well as any permitted new facts or pieces of evidence must already be stated in the appeal, or the answer to the appeal, respectively. Applications/new facts/new pieces of evidence brought forward later on cannot be accepted and taken into account by the court.

1.7 Number of Documents to be Served

The proceedings before the first instance court start with the complaint of the plaintiff, which is addressed in the form of a writ to the court. The court forwards a copy of the complaint by special registered mail to the defendant, who may answer the complaint by a writ within a period of time set by the judge after service. The answer to the complaint is again addressed to the court, which forwards a copy to the plaintiff. The same procedure applies to appeal and second appeal. No further writs must be filed in the proceedings, but the parties *may* file writs until the beginning of the oral hearings in first instance. After the

beginning of the oral hearings, writs may only be filed if the court has allowed so. However, as the law allows a direct exchange of writs and documents between the parties' attorneys, this is, as a matter of courtesy, common practice. Only the summons to the parties for the court hearings are served on the parties directly, thus in first instance, 2-3 times service has to be effected on the parties themselves.

1.8 Expert witnesses

The calculation of expert witness fees is governed by the Fee Entitlement Act (*Gebührenanspruchsgesetz, GGG*). His fees are finally determined by the court and may be appealed by either party. In relation to written opinions and the taking part in evidentiary hearings, the fee is calculated from both the dispute value and the amount of work (hours) involved.

The expert witness is engaged by the court and therefore paid by the court. The court is entitled to reimbursement from the parties. It is in the court's discretion to instruct one or both parties to pay a retainer for the expert witness in advance. Usually the party carrying the burden of proof is instructed to pay such a retainer. Ultimately the costs of an expert witness are paid by the losing party.

2 Time Factors

2.1 Time Frame for Appeals

The time limit for the appeal is four weeks from the date the judgment is effective (usually the date of service) (§ 464 (1) ZPO). The appeal must be mailed within the four-week term. The court of first instance will serve the appeal on the opponent who may file a response within four weeks.

In most (but not all) civil cases the deadline is suspended during court holidays. If the deadline has expired the court of first instance must declare the appeal or the reply inadmissible. In practice the time limits for appeal and answer to the appeal are strict. Only if a party can show that it was - without its fault - impossible for it to keep the time limit (for example, because of a severe medical condition of the attorney), a belated writ will be accepted (§ 146 ZPO) and a reinstatement into the *status quo ante* is possible.

2.2 Estimated Duration of Civil Cases

Apart from the possibility of a settlement, by which proceedings will end immediately, it is clear that the duration depends on the complexity of the case and the number of witnesses to be heard or the necessity of expert witnesses. For simple cases, a duration of one year is realistic, more complex cases will last for several years.

Appellate procedures (including second appeal) usually do not include evidentiary hearings, therefore in an appeal procedure a decision will usually be rendered on average within 10 - 12 months. However, depending upon the court which has jurisdiction and upon the complexities of the matter, a decision could be obtained even within 4 or 5 months, but this is rather exceptional. Only in extreme cases the waiting period for an appellate decision is more than two years.

The courts of third instance take approximately the same time period to render judgment.

3 Costs Factors

3.1 Lawyers fees and Court Fees

3.1.1 Lawyers Fees

The party having lost a civil lawsuit has to reimburse the prevailing party according to an attorneys' tariff laid down in the Act on Attorneys' Tariffs and by ordinance of the Federal Minister of Justice. In the lawsuit, the fees to be paid by the opponent are predominantly determined by the number and length of court hearings and the number of legal briefs filed in accordance with a schedule based on the amount in dispute.

Out-of-court work performed by the attorney is also subject to the Austrian Attorneys' Tariff. Activities not governed in the Attorneys' Tariff shall be billed according to the Autonomous Guide-lines on Attorneys' Fees. Services are also billed according to the Autonomous Guide-lines on Attorneys Fees if the applicability of such Guide-lines was specifically agreed. However, for this agreement to be valid, the content thereof must be discussed with client in advance. Billing on an hourly basis may be agreed but is not subject to reimbursement which follows general rules.

The amount of legal fees is established on the basis of the following criteria: amount in dispute, complexity of the matter, time spent by the attorney, scope of attorney's activities, plus out-of-pocket expenses, plus VAT. For every writ, or talking part in hearings, the lawyer earns a fixed sum depending on the amount in question, the type of writ or hearing, and (in case of a hearing) on the length of the hearing. Any preparatory work is covered by the lump sum for the writ/hearing.

Giving an example, an Austrian lawyer would charge the following amounts:

63 ECU for short legal briefs, filings and applications to establish legal fees if the amount in dispute is 50,000 ECU, or 77 ECU if the amount in dispute is 200,000 ECU;

300 ECU for simple complaints and legal briefs, applications to grant attachment, court hearings, short land register and companies register filings if the amount in dispute is 50,000 ECU, or 370 ECU if the amount in dispute is 200,000 ECU;

580 ECU for complaints, statements of defence, trials, each first hour of court hearings with taking of evidence, applications to grant attachment by virtue of foreign titles, appeals against costs, applications for preliminary injunctions, statements and objections against such applications if the amount in dispute is 50,000 ECU, or 730 ECU if the amount in dispute is 200,000 ECU.

730 ECU for appeals against judgments of first instance, any response in this connection, remedies, appeals against orders of first and second instance, any response in this connection (not including appeals against and responses to appeals to the Supreme Court and appeals against cost decisions), complaints, appellate hearings if the amount in dispute is 50,000 ECU, or 910 ECU if the amount in dispute is 200,000 ECU;

875 ECU for appeals to the Supreme Court, any response in this connection, appeals against orders of first and second instance and any response in this connection to the Supreme Court if the amount in dispute is 50,000 ECU, or 1095 ECU if the amount in dispute is 200,000 ECU.

In addition, generally, supplements apply in the amount of 50% of the standard fee as set forth above.

Summing up, in a case of normal complexity with the above mentioned dispute values, the lawyer's fees for a writ or a hearing (of one hour) will approximately amount to:

| dispute value | first instance | appeal | second appeal |
|---------------|----------------|--------|---------------|
| 50,000 | 4,375 | 1,825 | 1,310 |
| 200,000 | 8,250 | 2,300 | 1,700 |

These fees may be regarded as an absolute minimum. Austrian lawyers stated that in an average case (second and third instance) they would, depending on the circumstances of the case, even charge a higher fee. It should be noted that, the fees might be doubled if the lawyer becomes engaged at a court outside of his place of office. Thus, as an example, second appeals by parties with lawyers from outside Vienna, where the Supreme Court is located, are more expensive.

In the opposite, the defendant's or appellee's lawyers fees are usually somewhat lower as the initial reply of a defendant is deemed not to be as difficult to prepare as a complaint and as there is usually no second reply brief to submit.

In matters in which the case is submitted to the Constitutional Court for a ruling, no additional lawyers fees incur as this proceeding usually takes place without party participation. Only if in rare circumstances the party's lawyers are asked for a written opinion by the court or heard in court, lawyers may charge fees. In this exceptional case the double fee as for the second appeal may be charged.

3.1.2 Court Fees

The court fees are determined in the Court Fees Act (*Gerichtsgebührengesetz*). The fee is calculated with reference to the dispute value. If the dispute is not for a certain sum of money, it is usually up to the plaintiff to determine it. However, if this amount appears too low, the court will rectify the evaluation. The court fees are to be paid in an overall sum at the beginning of each instance. No further costs will accrue for this instance apart from fees for lawyers, witnesses, expert witnesses and translators. The costs for (up to 2) copies of the minutes of a hearing as well as of the decision are covered. Copies (if requested) from the court file must be paid for by the parties. There are no limits to court fees, accordingly a high dispute value will result in extraordinarily high court fees.

The court fees for a civil proceeding may amount to:

| dispute value | first instance | appeal | second appeal |
|---------------|----------------|--------|---------------|
|---------------|----------------|--------|---------------|

| | | | |
|---------|-------|-------|-------|
| 50,000 | 975 | 1,430 | 1,910 |
| 200,000 | 2,920 | 4,295 | 5,730 |

Both lawyers fees and court fees rise with the value at dispute but while lawyers fees are increasing at a decreasing rate, court fees become more important with higher values.

A proceeding before the Constitutional Court is free of charge.

3.1.3 General Rules

The court fees are paid by the party initiating the respective procedure, *i.e.* in the first instance by the plaintiff and in the appellate proceedings by the party lodging the appeal. Each party pays its lawyer's fees. However, in the end the losing party has to reimburse the succeeding party for all legal costs.

A party who cannot pay the costs of a legal procedure it is granted legal aid: No court fees are payable and a lawyer is provided for free. The lawyer does not receive any money, but the state pays a contribution to the lawyers pension fund. However, if the party loses the case, it has to pay the legal costs of the opponent. If the financial circumstances of the party change, the legal aid will be lifted and the party has to subsequently pay its legal costs.

3.2 VAT-Rules

Services provided by a lawyer are subject to value added tax of 20% of the fee. A domestic private client pays the fee together with the added VAT, and the lawyer pays the VAT to the financial authorities. Domestic undertakings (not only companies) may deduct the VAT included in the lawyer's fee from the sum of VAT it pays over to the financial authorities for its own services. As a result, a domestic undertaking does not actually pay VAT for lawyer's services.

In respect of foreign clients, one has to differentiate between clients from third countries and EU-based clients. In relation to third country clients, the lawyer's services are deemed to be rendered in the country where the client has its seat, therefore no VAT is chargeable in Austria. In respect of EU-based clients, the same applies to undertakings. But services rendered to EU-based private clients are subject to VAT in Austria. However, if the Austrian lawyer was contacted through the (foreign) lawyer of the client, the bill can be addressed to this lawyer. As the foreign lawyer is an undertaking, no VAT is payable.

3.3 Transfer of Money

In general, collected money are forwarded by bank transfer, if the lawyer is not instructed otherwise by the client.

It is not common practice in Austria to pay attorneys' fees by credit card.

3.4 Gathering of Information

The address of a corporation can be located on-line with the commercial register. The address of a natural person can be found in the phonebook or can be searched by an inquiry with the central registration office (*Zentralmeldeamt-Anfrage*). The inquiry takes approximately 2-3 weeks and costs 1.4 ECU. If the inquiry is made by letter, it costs 14.40 ECU. For an inquiry the full name and the birth date of the person must be known.

If this is not successful, a detective can assist who charges about 100 ECU for an address search within Austria.

In respect of undertakings, inquiries in the trade and industries authority and in the Commercial Register (*Firmenbuch*) are possible. Undertakings must register with the trade and industries authority, and companies and merchants must be registered in the Commercial Register. Inquiries to the Commercial Register cost 8.60 ECU, and can be made online from any court, any notary public and most lawyers. The on-line inquiry for a company's address is available within minutes.

3.5 Cost of Enforcement of Foreign Judgments

3.5.1 Recognition

According to section 85 Enforcement Act (*Exekutionsordnung, EO*), an application for the recognition of a foreign judgment may be filed with the competent Local Court.

The court fees are payable in a lump sum as determined by the Court Fees Act (*Gerichtsgebührengesetz*). According to TP 4a GGG, the respective court fees are 114 ECU (for a dispute value of 50,000 ECU), and 343 ECU (for a dispute value of 200,000 ECU). The lawyers fee for the respective writs are the same as those indicated above for first instance proceedings, so the costs amount to 1,114 ECU and 1,443 ECU, respectively.

3.5.2 Enforcement

The court fees for an application for the enforcement of (any) judgment depend on the assets which are to be utilised. In case moveable assets shall be seized, the court fees are the same as those set out above, *i.e.*, 114 and 343 ECU. If real estate shall be seized, the respective court fee amounts to 252 ECU (for a dispute value of 50,000 ECU) or 510 ECU (for 200,000 ECU). The lawyers fees for an application for the enforcement of a judgment amount to 445 ECU, or 557 ECU, respectively. If the lawyer takes part when the assets of the debtor are seized, a fee of 182 ECU for every 30 minutes is payable (for both dispute values of 50,000 ECU and 200,000 ECU). For any further services like writs, hearings and commissions, lawyers fees according to the mentioned principles will be payable. If real estate is seized, often a substantial amount for the expert appraisal accrues. So the enforcement of judgments will cost a minimum of about 700 ECU if the amount in dispute is 50,000 ECU and approximately 1,070 ECU if the amount in dispute is 200,000 ECU which already includes court fees (plus 20% VAT on the lawyers fees).

All costs of the enforcement procedure must be paid by the applicant in advance' but will be paid from the proceeds of the sale of any assets of the debtor.

PORTUGAL

1 National Civil Proceeding

1.1 Court Structure

According to the Portuguese Civil Procedural Code (CPC - Código de Processo Civil) and to the Judicial Courts Internal Laws (LOTJ - Lei Orgânica dos Tribunais Judiciais), Portuguese civil courts are organized according to the following hierarchical structure.

- Small Claims Courts (*tribunais de pequena instância*);
- First instance courts ("*tribunais de 1. instância*"), which can be divided into County Courts (*tribunais de comarca*), Circuit Courts (*tribunais de círculo*) and District Courts (*tribunais de distrito*);
- Courts of Appeal (*Tribunal da Relação*);
- Supreme Court (*Supremo Tribunal de Justiça*).

Not considering the Constitutional Court, the Supreme Court (STJ) is the highest instance of the judicial hierarchy. The STJ has civil, criminal and social sections. The civil sections have a residual competence and judge all cases not attributed to the other sections. The Supreme Court as well as the "Tribunal da Relação" can be classified as appellate courts, they have the capacity to review decisions of inferior courts. As an exception, in the case of an indemnity case against a magistrate, both the Court of Appeal ("Relação") and the Supreme Court ("STJ") can act as first instance when the value of the case exceeds 9,900 ECU.

The Courts of Appeal are located in the main town of each judicial district (Lisboa, Porto, Évora and Coimbra), and have jurisdiction in the respective judicial district.

1.2 First Instance Proceedings

According to the LOTJ and to the CPC, first instance civil courts can be classified and divided according to the following criteria:

- the matters;

- the territory;
- the form of the proceedings;
- the structure.

Insofar as the matters are concerned, first instance courts can be classified as courts of generic competence and as courts of specialized competence.

Civil courts of specific competence have jurisdiction over certain types of matters: civil, family, minors, labour and maritime.

In what concerns the territorial organization, first instance courts can be divided into County Courts (*tribunais de comarca*), Circuit Courts (*tribunais de circulo*) and District Courts (*tribunais de distrito*). Whenever the volume of work so justifies, Small Instance Courts (*tribunais de pequena instância*) can be created.

According to the form of procedure, first instance courts can be classified as specific competence courts or as mix specific competence courts. In the light of the above, civil court proceedings should be started in the first instance court which is materially and territorially competent for the case.

When the case follows "extra" summary proceedings (*processo somarissimo*) or refers to a civil matter not covered by our CPC corresponding to a special procedure and which decision is final (*i.e.* no appeal admitted) the court proceedings should be started at the small instance courts, if any.

According to Portuguese law, this kind of proceeding is applicable whenever the value of the case does not exceed half of that threshold amount, *i.e.* 1,240 ECU and the court proceedings' *causa petendi* is the fulfilment of pecuniary obligations, a compensation for damages or the return of *res mobiles*

1.3 Appellate Proceedings

First instance courts analyse cases with a dispute value up to 2,475 ECU without appeal ("alcada"). As a rule, first instance decisions appeals are presented before the Courts of Appeal "Relação" and further to the Supreme Court if a threshold amount of 9,900 ECU is met.

When the Courts of Appeal act as first instance, its decisions are contested before the Supreme Court ("STJ"), acting as second instance.

Exception is made with regard to the *appeal per saltum* (leap-frog) to the Supreme Court of Justice: whenever the value of the dispute exceeds the appeal court's threshold (9,900 ECU) and the pleadings only raise issues related to matters of law, both parties may request that the appeal of a first instance decision be analysed by the Supreme Court.

1.4 Lawyers in the Proceedings

Presently in Portugal there are no restrictions for lawyers to appear before higher and highest instances. However, trainee lawyers may only litigate in cases where the dispute amount is within the first instance threshold (2,475 ECU), except if they were appointed by the court to provide judicial assistance.

1.5 Legal Form of Appeals

As to the outcomes of the appeal proceeding, it has to be noted that Portuguese doctrine defines three different types of decisions the appellate court may take:

- Cassation system: the superior court annuls, rescinds or cancels the appealed decision, and sends the process back to the inferior court, where the cause will be decided *de novo*.
- Substitution system: after having received the appeal, the *ad quem* court will substitute the appealed decision by one of its own. In a general view, substitute appeals prevail in the Portuguese civil appeal proceedings.
- Intermediary system: after having received the appeal, the *ad quem* court will order the *a quo* court to pronounce a new decision, in accordance with the instructions provided by the superior court, namely concerning legal matters.

Under consideration of these possible outcomes the three different types of ordinary¹⁰ appeals shall be briefly described:

- "Apelação": appeal against a final decision on the merit of the case (not necessarily against the final decision on the case) taken by a first instance court. This appeal is immediately sent to a higher court - the second instance

¹⁰ Extraordinary appeals - "Revisão" (*Revision*) and "Oposição de Terceiros" (Third Party Opposition) are excluded.

(Tribunal da Relação) - and as a rule suspends the enforcement of the appealed against decision. The higher court usually replaces the appealed against decision by a decision of its own. When acting as second instance court, the appellate court may analyse both matters of law and of fact, since recorded depositions may be examined. Exceptionally, the "Relação" can even ask for a re-presentation of evidence.

- "Revista": appeal against the decision taken by the second instance court (Tribunal da Relação) on the merit of the case. This appeal, based only on legal grounds, is sent to the Supreme Court and as a rule does not suspend the enforcement of the appealed against decision (it only has such effects in cases dealing with the civil status of individuals, *e.g.* divorce, paternity investigation). The higher court either replaces the appealed against decision or returns the case to the lower court (here: the second instance court) so that this court extends its decision or proceeds to a new hearing. The Supreme Court can only decide on matters of law. It is not considered as a third instance court but as a review court, as it only controls the application of law based on the facts settled in the first and second instances.
- "Agravo": appeal against a decision of a first or a second instance court of which it is not possible to lodge a "apelação" or "revista" appeal, *i.e.* appeal against a decision which did not address the merit of the case. This appeal can either be treated as a separate proceeding or, in special situations, decided on the same proceedings. The higher court either replaces the appealed against decision (the rule in the "agravo" appeals to the second instance court) or returns the case to the lower court (the rule in the "agravo" appeals to the Supreme Court of Justice). "Agravo" appeals only suspend the enforcement of the appealed against decision in the cases expressly listed by law.

Appeals may under certain conditions also be lodged to the Constitutional Court. According to the Portuguese Constitution, courts can not apply any statutes that violate the Constitution or its principles. Any such statutes would be deemed unconstitutional. Thus, whenever a lower or a higher court considers a statute unconstitutional, the court must refuse to apply it and the parties may appeal against the courts' decision on the constitutionality of the statute. The court *ex officio* may also address this question to the Constitutional Court. In case the Constitutional Court decides on the unconstitutionality of the statute, it returns the case to the lower court to be decided according to the Constitutional Court's judgment.

According to the Portuguese Constitution, it is also possible to appeal to the Constitutional Court against court decisions that:

- refuse the application of a rule of any law or statute on the grounds of its illegality by violation of the law, under certain circumstances;
- refuse the application of a rule of a regional statute on the grounds of its illegality by violation of the statute of the autonomous region or of the Republic's general law;
- refuse the application of a rule of a statute emanated from a sovereign entity on the grounds of its illegality by violation of the statute of an autonomous region;
- apply a rule which illegality has been raised during the proceedings based on any of the grounds referred to in the preceding paragraphs.

1.6 Further Requirements and Restrictions for the Appeal

As a rule, every court decision may be appealed. The impossibility of appeal can result of two factors:

- the type of court decisions. Court orders and decisions pronounced in the use of discretionary powers are not subjected to appeal.
- the burden of payment of the prevailing party's legal fees and cost in litigation in connection with the threshold amount of the *a quo* court. Only cases with a dispute value above the threshold amount of the *a quo* court (2,475 ECU) and in which the damage value caused to the appellant by the appealed decision is higher than half of the threshold amount (1,238 ECU) are subject to appeal.

However, should the appeal be based on the grounds of violation of the rules on international competence, by reason of the matter, hierarchy or offense of *res judicata* the appeal is always admissible regardless of the value of the case.

Also, appeals are admissible without restrictions in the case of decisions concerning the civil status of individuals as well as of decisions on the value of the case, procedural incidents and injunctions on the grounds that their value exceeds the threshold of the "appealed" court.

Whenever there are two contradictory second instance court decisions on the same *de jure* material issue of which it is not possible to lodge an ordinary appeal for reasons other than the threshold amounts, appeals are always allowed unless the Supreme Court has already established jurisprudence on that particular issue. Appeal of decisions passed against unified jurisprudence of the Supreme Court is always admissible.

As a rule, appeals can only be lodged by the party that was defeated, in whole or in part, in the court proceedings. However, individuals directly and actually harmed by the court decision may appeal against the same notwithstanding the fact that they are not parties in the court proceedings.

1.7 Number of Documents to be Served

In Portugal, only one document in the entire proceeding, the complaint, needs to be served on the defendant. If the defendant is represented by a lawyer, service is thereafter effected on him. Should the defendant not employ a lawyer and default, he may be represented by a public officer.

1.8 Expert Witnesses

Expert witness fees are determined by statute¹¹ and fixed by the court. Generally said, those fees are usually paid at completion of each procedural step by the party who caused the attendance of the expert.

In detail, the right to remuneration of expert witness is determined by art. 34 C.C.C in the following terms: An expert witness that doesn't require special knowledge or qualifications receives per diligence 1/5 of 1 U.P.C.,¹² with the limit of 2 U.P.C. for all diligences achieved in the same day. An expert witness with qualifications receives between 1/3 and 2 U.P.C. per diligence.

In both cases, if the diligence requires more than a day, the court will define the payment according to the days and information given by the expert witness.

¹¹ Decree-Law no. 387-D/87 of December 29, 1987 (Code of Court Costs).

¹² Unity Procedure Account (Unidade de Conta Processual - U.C.P. or U.P.C.). The U.P.C. is a reference adopted by the Portuguese legislator in order to allow to bring up to date the justice rate, and in the years of 1995 to 1997 was equivalent to 60 ECU.

According to art. 32/1 c C.C.C., the expert witness fees have the nature of general charges. The general charges are guaranteed by the parties with a prepayment of costs, imposed by art. 44 C.C.C. However, if the diligence was officiously requested by the court, the cost is supported by the court and is only considered within the final account.

2 Time Factors

2.1 Time Frame for Appeals

Appeals have to be lodged at the *a quo* court within 10 calendar days as of the date on which:

- the appellant has been notified in writing of the court's decision;
- the decision has been published (in case the defendant fails to appear and the court has no legal obligation to notify him/her)
- the court's decision has been verbally produced, in case the party appeared or was present or was notified to appear.

The *a quo* court will then pronounce an admission or rejection order.

- Rejection of the appeal: due to lack of admissibility requirements
- Admission of the appeal: establishes the type of appeal, the effect, the moment, way and regime of the transfer of the appeal to a superior court.

Within 30 calendar days counted from the notification of the admission order, appeal pleadings on the merit of the case ("Apelação" and "Revista") should be provided. The appellee has 30 calendar days as of the date on which he is notified by the court of the appellant's pleadings to reply.

Should both parties have appealed against a decision, the first appellant has 20 calendar days to reply to the appellee's second appeal. Please note that this right of reply is limited to the grounds of the second appeal.

The above terms are extended by a further 10 calendar days where the subject matter of the appeal is the re-appraisal of evidence.

Appeal pleadings other than those on the merit of the case (*i.e.* "Agravo") should be provided within 15 calendar days as of the date on which the appellant is

notified of the decision appealed against. The appellee has also 15 calendar days as of the date on which he is notified by court of the appellant's pleadings to reply. These terms are extended by a further 10 calendar days where the subject matter of the appeal is the re-appraisal of evidence.

The above time frames can be exceeded by 3 calendar days without just cause. However this delay subjects the party in question to a fine.

In case of just cause (a situation not created by the party or by its representatives that impairs the timely lodge of the appeal or of the reply to the same), the party may exceed the above time frames. However, evidence has to be produced of the existence of just cause and the judge will hear the other party before taking a decision to accept or to refuse the appeal or the appeal's reply.

Once the appeal has been received by the superior court, a preliminary analysis of the appeal will be carried out by a single judge: its main purpose is the finding of irregularities (such as error in the type or effect of the appeal). If the appeal concerns a matter of little complexity, the judge may even pronounce a preliminary decision.

Supervening documents (that could not have been previously presented) may be presented up till this moment.

The appeal will then be analysed by each judge who composes the collective court ("conferência") during a total time of 60 days, and a draft of a final decision will be prepared. Only then will the appeal be presented to trial. The final decision is taken by a collective court.

2.2 Estimated Duration of Civil Cases

One lawyer stated that it was quite difficult, if not impossible' to predict realistically the duration of Portuguese civil litigation since many procedural incidents might arise and even if they did not, the *ad quem* court did not have a defined time frame to take a decision. As a rule, it is said that Portuguese justice is very slow and procedures are long.

Anyway, realistic durations for each instance may be estimated as follows:

First instance: from one and a half years up to two years, depending on the volume of work of each court (considering a standard proceeding, and neither counterclaim nor any other extraordinary occurrences are taken into account);

Second instance: around six to twelve months;

Supreme Court of Justice: around six to twelve months.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

3.1.1 Lawyers Fees

Lawyers fees depend on the time spent, the complexity of the matter, the relevance of the legal service, the wealth of the interested party, the outcome of the case as well as the uses of legal practice within the area.

In an appellate procedure there are no particular rules for lawyers fees. However, the Bar Association Act contains an article that rules the limits and formalities concerning lawyers fees. In Portugal, the lawyers must be registered in the Bar Association to practice law, and they must submit to its disciplinary jurisdiction.

Art. 5 of the Bar Association Act, approved by Executive Law no. 84/84 of the 16 March, defines standards for lawyers fees in the following terms:

..., the lawyers must act with moderation according to the duration, difficulty, importance of the service rendered, party's fortune. results achieved, forensic practice and county style.

In the case of judicial assistance (when a lawyer is appointed by the court in order to defend a person with little economic means), and taking into consideration that access to justice must be available to all, lawyers may not freely charge their judicial fees, a very low fee of not more than 150 ECU will be set by the court which makes the case rather a pro bono case for the lawyer involved.

One lawyer stated that, the bottle of wine that the poor fisherman may bring after the case and the human touch involved was probably more important than the fees awarded by the courts in these cases.

When this does not apply, in practice, lawyers bill by the hour for out of court work, and for court proceedings will more or less make a flat fee. This fee does not differ very much as between values of 50,000 ECU or 200,000 ECU.

3.1.2 Court Fees

In Portugal, court costs include the Justice Rates (initial and subsequent) and the general charges (covering notably the following costs borne by court: stamps, notarized documents, entertainment expenses and reimbursement of the successful party for his expenses). Notifications and judicial proceedings, *e.g.*, are charged with 1/5 U.P.C., certificates, transcripts and copies with 1/50 U.P.C.

Justice rates represent a gradual compensation for judicial activity and general charges include the costs of jurisdictional activity. The costs are determined by statute¹³ and base upon the value of the case. In some cases, a reduction may be granted.

As a rule, court fees are due by both parties, and are paid in two instalments:

- an initial court fee (art. 23. C.C.C.), corresponding to 1/4 of the total fee, must be paid after the pleadings are presented in the *a quo* court;
- a subsequent court fee (art. 25 C.C.C.), corresponding to 1/4 of the total fee, too, must be paid after the *ad quem* court has received the appeal and the process is ready for decision.

Procedure expenses are paid in advance by the parties. At the end of the proceeding the judgment that decides the appeal will condemn the defeated party to support the procedure costs. Furthermore, the defeated party must pay to the prevailing one a compensation amount (between 1/4 to 1/2 of the final court fee), usually determined by the court, in accordance with the dispute's value and the complexity of the case.

The appeal's value can never be inferior to 1 UCP.

Altogether, for a first instance proceeding the total court and lawyers fees would amount to about 4,000 ECU. If the same lawyer takes over the case also in second instance, the amount would be less, *i.e.*, about 2,200 ECU. For the third instance, total costs of 1,200 ECU may be calculated.

¹³ Decree-Law no. 387-D/87 of December 29, 1987 (Code of Court Costs - C.C.C.).

3.2 VAT-Rules

Lawyers fees are subject to VAT (at the legal rate of 17%) regardless of the fact that clients are residents (individuals or companies). In case of foreign clients, VAT is not charged (art. 6, section 9 of the Portuguese VAT Code).

3.3 Transfer of Money

Generally collected monies are forwarded to clients abroad by bank transfer. Credit cards are not usually accepted by lawyers.

3.4 Gathering of Information

In Portugal, the address location for companies is based on the Mercantile Register. A certification can be requested and has a cost of circa 10 ECU and it will be delivered in no more than two weeks. There is also the possibility of being informed by the Register of Legal Entities.

The location of private individuals is realized by normal ways, *i.e.*, by the telephone directory or by resorting to the services of a private detective. If there are problems finding the opponent's address, investigation can be officiously ordered by the court. The court can even order a service by publication or even a notice to the local police or to the judiciary police.

3.5 Cost of Recognition of Judgments

To determine the average costs for a recognition of foreign judgments, the following expenses may arise:

- lawyers fees (including the preparation of special proceedings of review and confirmation);
- court costs: for claims in the amount of 50,000 ECU the initial court rates is, again, 1/4 of the final justice rate which eventually amounts to 740 ECU (ancillary court charges excluded); for claims in the amount of 200,000 ECU the eventual total court costs are approximately 2,500 ECU to be paid in instalments of 1/4.
- translations (of the judgment, of the power-of-attorney and of any document which proves that according to the law of the State of origin the decision is executory and was duly served).

To determine the costs for the enforcement of judgments in general, the following expenses may arise:

- lawyers fees;
- court costs (the same amounts as indicated above);
- translations.

FINLAND

1 National Civil Proceeding

1.1 Court structure

The civil court structure in Finland is divided into three instances. The courts of first instance are the District Courts. The judgments of the District Courts can be appealed to the Court of Appeal and thereafter to the Supreme Court. A prerequisite for appealing to the Supreme Court is that a leave to appeal has been granted.

The Courts of Appeal are located in the cities of Turku, Vaasa, Kuopio, Helsinki, Kouvola and Rovaniemi. The Supreme Court is in Helsinki.

1.2 First Instance Proceedings

Civil cases start at first instance in the District Courts. These courts have general jurisdiction in civil matters.

Maritime law cases are concentrated in certain District Courts located in the coastal areas. Concerning some intellectual property matters, such as patents, trademarks and design rights, the District Court of Helsinki has a nation-wide territorial jurisdiction. In larger cities the District Courts have special departments for tenancy cases called Housing Courts.

There are no threshold amounts for courts of first instance, and neither are there any threshold amounts for appeal. (A government bill is given to the Parliament regarding certain amendments to the procedural code containing, *inter alia*, a threshold amount of 3,350 ECU for appeals. The government bill, for this part, has raised critics and it is conceivable that such threshold will not be introduced).

1.3 Appellate Proceedings

A judgment of a District Court is appealable to the Court of Appeal. The judgments of the Court of Appeal can be further appealed to the Supreme Court subject to leave to appeal (granted by the Supreme Court itself).

A leave can be granted only on grounds of a precedent, annulment or when there otherwise is a weighty reason.

1.4 Lawyers in the Proceedings

There are no restrictions and no licences are needed for a lawyer to appear before any court in Finland.

1.5 Legal Form of Appeals

Basically, appellate proceedings take place *de novo*, however, the appellant cannot generally refer to any other facts or evidence than those referred to in the District Court or Court of Appeal, should the proceedings take place in the Supreme Court. In practice, the Supreme Court rarely grants a leave to appeal in order to weigh the evidence but rather to contemplate/settle judicial issues.

Oral hearings are held in the appellate courts subject to the discretion of these courts.

An appeal may be dismissed or the judgment may be changed partially or totally. The appellate court may also return the case to the lower court or to a relevant jurisdiction.

1.6 Further Requirements and Restrictions for the Appeal

There are no threshold amounts for appeal. However, as mentioned above, the government bill given to the Parliament, proposes a threshold amount of 3,350 ECU.

1.7 Number of Documents to be Served

In the first instance, the defendant has to be served with the writ of summons, the application for a summons and, with certain exceptions, the other documents that are part of the application (chapter 5, section 12 code of judicial procedure). This material is served as one document. In civil cases this document can be served to a person that has been authorized by the defendant to receive it. However, in most cases the document instituting the proceedings is directly served with the defendant.

In the Court of Appeal, the appellee has the right to receive a copy of the appeal, but the appellant does not have to serve it to the appellee. Also in the Supreme Court no document has to be served directly with the opponent in the appeal proceedings.

1.8 Expert Witnesses

Generally, the party who has summoned a witness or an expert witness has an obligation to cover his fees. These fees are normally agreed on between the summoning party and the witness. Should they fail to agree on the fee, the court will order the summoning party to pay a reasonable fee and cover the costs of the witness. A witness may demand to receive an advance payment. To the extent the court confirms the fee of the witness, this will be recorded in the ledger and the court will in the final judgment give an order on who shall pay the fees.

2 Time Factors

2.1 Time Frame for Appeals

When the District Court delivers its judgment, a party must state its intent to appeal within 7 days from the judgment. The letter of complaint including reasons, memoranda and supporting papers shall be lodged within 30 days from the judgment of the District Court. A late letter of complaint leads to dismissal of the appeal.

The appellee is, in order to ensure his rights, entitled to respond in writing to the appeal within 14 days of the expiration of the appeal period.

The court may grant the parties an opportunity to supplement their writs, for instance if relevant documents have been left out or other insufficiencies have been noticed. In matters where the appeal has not been responded to or where the appeal has at the request of the Court of Appeal been supplemented the court shall, should it find it necessary, request for a reply from the appellee.

The Court of Appeal may only for special reasons take into account documents that have on the initiative of a party been submitted to the Court of Appeal after the set date. Even in the absence of such a special reason, lawyers are in the habit of submitting supplementary papers because it is characteristic of referendaries/members of court to scan them.

The time provided to appeal a judgment of the Court of Appeal is 60 days from the date of the judgment. The letter of complaint together with memoranda and supporting papers and the request for leave to appeal (see above) shall be submitted to the office of the Court of Appeal within said time.

The Supreme Court may request for a reply from the appellee when considering granting the leave.

The other steps of the proceedings in the Supreme Court follow generally the pattern of those in the Court of Appeal.

2.2 Estimated Duration of Civil Cases

The duration of the proceedings is highly dependent on how piled up the relevant court is. There are no minimum periods in relation hereto set in the procedural law, but generally the minimum for a District Court could be estimated at four to six months and for the Court of Appeal one year and for the Supreme Court one year. A realistic estimate, however, would be two times of the time mentioned for each case. In its extreme, proceedings may well take 10-15 years. Should a preliminary ruling from the ECJ be required, the time for such proceedings must be added.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Lawyers generally work on an hourly basis, which could amount to rates up to 250 ECU per hour. An hourly fee of 130 ECU should be deemed reasonable. Generally, the fees are the same for each step. The court fees for a full litigation in the District Court amount to 60-130 ECU. The court fees for the Court of Appeal are 130 ECU and for the Supreme Court 170 ECU.

3.2 VAT-Rules

Lawyers fees are subject to VAT of 18%. Non-Finnish clients may be billed exempt from VAT, however, EU clients only on condition that they are VAT-registered.

3.3 Transfer of money

Collected monies are normally forwarded to foreign clients by bank transfer. Lawyers generally do not accept credit cards.

3.4 Gathering of information

Addresses in Finland can generally be located through the National Address Service at a cost of 2 ECU/min plus local call charge unless they have not been coded secret. Certain authorities are entitled to be given even secret addresses.

3.5 Cost of Recognition of Judgments

It must be considered that a estimate hereto may always represent a misleading generalisation due to the multitude of different types of problems that may appear. In principle, if a judgment is directly recognizable and enforceable and the documentation is in order when presented to a Finnish counsel, such an assignment may perhaps be carried out for costs of approximately 330 ECU. On the other hand, if translations, research or additional correspondence and documentation may be necessary, the costs for such assignments may well amount to a minimum of 1,700 ECU. Should a defendant dispute the judgment, there is basically no upper limit. The dispute value does not in principle affect the costs.

Overall, 1,000 ECU might be a realistic value and the same amount should be accounted for, for the enforcement proceeding.

SWEDEN

1 National Civil Proceeding

1.1 Court Structure

In Sweden the system of general courts consist of three instances. The hierarchy comprises courts of first instance, 97 District Courts (tingsrätter) 6 Courts of Appeal (hovrätter) and the Supreme Court, (högsta domstolen). There are also some courts of special jurisdiction such as the Labour Court, the Market Court and the Patent Court, which adjudicate cases in which the dispute has reference to specific legislation. The general courts handle both civil and criminal cases and the appellate structure is on the whole the same for both kinds of cases. (Source: Code of Judicial Procedure - 1942:740).

1.2 First Instance Proceedings

Civil cases start in the District Courts and there are no threshold amounts to be able to sue.

1.3 Appellate Proceedings

Appeals of District Court judgments are tried by the relevant Court of Appeal depending on the geographical location of the District Court. The Courts of Appeal are located in Stockholm, Göteborg, Malmö, Jönköping, Sundsvall and Umea. The Supreme Court, which is located in Stockholm, handles appeals from the different Courts of Appeal subject to review dispensation. Such review dispensation is only granted by the Supreme Court if a case is of precedential value, or if a gross procedural error has been made by the Court of Appeal. There are no special restrictions or licenses necessary for lawyers to appear in any court.

1.4 Lawyers in the Proceedings

There are no restrictions or licenses required for lawyers to appeal before higher or highest instances. In fact there is not even a requirement that counsel is a lawyer or is graduated from law school.

1.5 Legal Form of Appeals

Appellate proceedings take place *de novo* and both, questions of law and fact are tried. If only one party appeals, the judgment must not be modified to his disadvantage (*reformatio in pejus*). The Appeal Court will render a judgment that will either uphold or change the District Court's ruling. The court may also return the case to the lower court for a retrial if some procedural error has been made. If the case is returned to a lower court it may be returned to either of the previous instances depending on where the mistake leading to a retrial has occurred. Approximately 10% of District Court judgments are appealed and 20% of Appeal Court judgments (Source: The Swedish National Courts Administration).

Since 1994, a District Court can, with the consent of the parties, also refer a precedential question of law directly to the Supreme Court for cost and time saving purposes. If the Supreme Court decides on the referred question (review dispensation is needed) the District Court will then render a judgment in conformity with the decision. The parties are then barred from appealing the District Court judgment.

1.6 Further Requirements and Restrictions for the Appeal

For appeals there is a threshold amount of 4,200 ECU. To be able to appeal a judgment where the claim brought in first instance was lower than this amount review dispensation is needed. Review dispensation may be given on one of three grounds:

- if a decision is considered of importance as guidance for the lower courts,
- if there are reasons to change the judgment,
- if there are some extraordinary reasons to reconsider a case.

The appeal proceedings include a limited possibility of presenting new evidence. The Court of Appeal can decide a case without a main hearing under special circumstances. An appeal can always be decided without an oral hearing if it is apparent that such a hearing is unnecessary. If any of the parties requests the hearing of witnesses it must however always be held. Evidence already presented before the District Court, must also be provided before the Appellate Court in order to be considered. Furthermore, if a decision in a lower court depended upon the credibility of a verbal testimony, the Court of Appeal must not modify the judgment without the court itself hearing the witness.

1.7 Number of Documents to be Served

The writ of summons will be served by the Court. Generally, no documents are served directly to the defendant but all documents, including the writ of summons, shall be delivered in two copies to the court. The court will then serve the opposing party with one of these copies. The plaintiff may, however, request to serve the defendant directly in order to save time if he for example is a foreign entity. Usually, the court serves later documents not formally but by ordinary mail.

1.8 Expert Witnesses

Expert witnesses are allowed to charge their normal rate. The fees are based on reasonableness and ultimately ruled on by the court, though. In relation to the witness, it is the party who has summoned the witness to court who is liable to pay. Between the parties it is the losing party who pays the cost as part of its liability to pay the winning party's costs and legal fees.

2 Time Factors

2.1 Time Frame for Appeals

An appeal has to be lodged within three weeks from rendering of the judgment by the lower court (four weeks to the Supreme Court). The time for the appellee's answer etc. is then decided by the court and differs from case to case. It is quite common that a continuance is granted for both one and two months before the appellant has finally submitted all documents and arguments on which he bases his appeal.

The first three-week time frame is very strict and can be prolonged only by a formal decision by the court. After this there will be a dialogue between the parties and the court regarding the case schedule.

2.2 Estimated Duration of Civil Cases

Following the information of The Swedish National Courts Administration, cases in the first instance will normally take 5-18 months. Appeals likely take 8-24 months in the Courts of Appeal and another 12-24 months if review dispensation is granted for a trial in the Supreme Court. In total the whole process takes between 3 - 7 years.

Due to the estimation of lawyers the typical time frame in the first and second instances is one year each. The time frame in the third instance might vary from one month if a trial is not granted to several years if a trial is granted and followed by a full scale re-trial in the Supreme Court with about two years as a realistic minimum. In the extreme situation, however, a case may rest in the first instance court for three or four years and in the second instance for another three or four years. This is the case only in a situation where neither of the parties are really interested in carrying the case forward.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

The only court fee that is paid is a 52 ECU fee to lodge the writ of summons. Except for state aid and criminal cases there are no fixed rates for legal fees. Lawyers fees are based on hourly rates and thus vary from case to case and may be assessed by each court as to its reasonableness. An hourly rate may amount to about 200 ECU. An average figure for the first instance proceedings is 4,500-17,000 ECU with 8,500 ECU as a realistic value for each instance, regardless of the value, and 11,500 ECU for the higher instance proceedings.

3.2 VAT-Rules

VAT of 25% is added to all lawyer fees regarding Swedish and foreign individuals and Swedish companies. Regarding foreign companies no VAT is charged.

3.3 Transfer of Money

Monies collected for clients' abroad are usually transferred over bank or by check. Lawyers in Sweden do not accept credit cards in general.

3.4 Gathering of Information

If an address can be located by the telephone-number-inquiry or other public available registers it does normally not cost anything or very little. In Sweden there is, *e.g.*, a public address register for individuals run by the tax authority, which provides addresses free of charge. Swedish companies have to be registered with the Company Registration Office (Patent och

Registreringsverket), which can provide an oral statement regarding a company's address free of charge. A written extract from the register will cost 17 ECU.

3.5 Cost of Recognition of Judgments

Application costs for both situations would be around 55 ECU irrespective of the amount in question. Legal fees will depend on the individual case. Additionally, costs for employing translators, etc., arise. Accordingly, one can estimate around 1,000 ECU for such a case.

The administrative cost for enforcement of a Swedish judgment is 60-120 ECU.

UNITED KINGDOM

Introduction

Despite important and material differences between the English (Welsh and Northern Ireland) court and procedural system and the Scottish legal system, there are common similarities which distinguish U.K. courts and procedures from continental systems. The following description of a few examples is of a very summary nature and is by no means meant to cover all aspects of either differences or common issues.

Initial briefs or writs and summons to the court and their corresponding answers by the defendants are comparatively short. In continental Europe it is a common rule that all allegations and legal explanations should be made in these initiating documents, including references to all documents and witnesses that would support the factual allegations.

In the U.K., on the other hand, particularly notions of access to justice for plaintiffs require not to make the requirements too difficult. Therefore, even very short statements can be sufficient as long as they include enough information to form a ground for relief to be granted by the court.

Thereafter, in continental Europe, additional briefs may or may not be exchanged, in the discretion of either the court or the parties, but these are intended to clarify issues or to answer to and refute (new) allegations made by the other side during the previous exchange of briefs. All these exchanges are generally channelled through the court which then serves copies on the other side (or its lawyer) in its official function.

By the time trial is commenced, the legal and factual position of each side is quite clear to both sides as well as to the judge(s). The court would summon the parties' lawyers to the hearing and also the parties, in its discretion or pursuant to specific rules and, most importantly, the witnesses which the court believes are material to the outcome of the case. The witnesses are questioned mainly by the judge, the lawyers and parties are given opportunity for additional questions only. If the court believes that some issues raised by the parties are not disputed or other allegations are not important for the legal decision, such witnesses that would support these allegations are not even called. Most importantly, each side of the dispute is obligated to present all evidence that it needs. Documentation required for evidence which is in the possession of the opponent can only be

called for under very limited circumstances, if at all. In most cases, the parties are not considered true witnesses for their own cause and cannot be heard under oath. Oral proceedings in civil matters are accordingly quite short and may take between a few minutes to a few hours. In some cases, a second or more such "short" evidentiary hearing might be necessary, but not in all cases. The record consists of summaries of these proceedings.

In the U.K. the initial briefs are followed by a discovery procedure, more extensively in England and Wales, and more restricted in Scotland. During this process the parties may demand from the other side and from third parties, documentation and evidence which was not available to them. Should the other party not comply to the demand, court assistance can be sought and the court would have to decide whether the demand is justified or not.

Further, it is common for the lawyers to hear "friendly" witnesses in their office or elsewhere and take written recordings of their statements, which would be considered unethical in many continental European legal systems. In England, but not in Scotland, depositions may also be taken, where both lawyers cross-examine witnesses and take their testimony before trial.

Thereafter, the lawyers declare the case "ready for trial", advise the court how long the trial hearings will likely take and the court sets the hearing dates. Trial is commenced to which witnesses are summoned by the lawyers who examine and cross-examine the witnesses with the court asking additional questions. Such trials may take several weeks of continuous examination which is recorded by tape and court reporters word for word.

In the U.K., each additional step of the proceeding and the lawyer time spent causes additional expenses and adds to the factual knowledge. Each additional hour of trial may cost an additional hour of solicitor's, junior barrister's, senior barrister's (Q.C.'s) and court reporter's time. The parties would have to make the decision whether the additional information is worth the expenses or whether they should rather settle on the basis of their current knowledge of the facts.¹⁴ As an alternative, the U.K. legal system gives the parties the option to stipulate on the facts and ask a higher court for a legal opinion, where the legal questions are the real reason for the dispute.

¹⁴ cf. Plett, Konstanze: *Settlement on Litigation Road*, unpublished LLM thesis, Univ. of Madison, WI, 1988, copy on file with the authors.

In continental Europe, once the trial has commenced, there is little room for additional expenses and it is largely outside of the control of the parties. Settlements are therefore more common before trial commences, not during trial. Only where, as in some member states, the waiting period between the trial and the decision of the court is particularly long, plaintiffs may be pressured to settle if they are desperate for the award they are likely to receive and are willing to make an offset.

An additional factor that adds to legal costs is the common law system in which, generally, it simply takes more lawyer time to research and find the applicable law and the arguments for the same. At the same time, it is argued that there is more flexibility to react to new developments in society and the economy and find just solutions where continental European legislatures may take many years to even notice a problem and some more to find a statutory solution.

This fundamental flexibility of the U.K. legal systems can be found at other places as well. As a good example, in Scotland, there are no threshold value differentiations for access to the Sheriffs Courts or the Court of Session, respectively. Rather, the needs of the case and its importance, as seen by the parties' lawyers, will influence the decision as to where the case is commenced. The same applies to appeals where leave may be granted even for minor disputes although the costs and duration in relation to the value will be taken into account. Thus the U.K. flexibility probably leads to more justice for the individual case than strict general threshold rules which give no respect to the case and its parties and, for formal reasons only, no chance to correct injustice.

ENGLAND and WALES

1 National Civil Proceeding

1.1 Court Structure

The civil court structure in England and Wales is a three tier system. There are the courts of original jurisdiction (High and County Courts), the Court of Appeal and the House of Lords:

1.1.1 County Courts

These are local courts (about 250 of them). There is not necessarily one in every county of England or Wales, but certainly there is a County Court in most major

counties. There are about 250 County Courts throughout England and Wales. Originally, the County Court system was created to provide an economic and simple alternative to the High Court for the recovery of small debts. This function has not been abandoned, but the jurisdiction of the County Courts is now greatly enlarged. Today they are the courts of general jurisdiction and the High Court is used only for the heavy, complex or specialist cases. County Courts have unlimited jurisdiction in all contract and tort actions.

1.1.2 High Court of Justice

The High Court is one of three constituent courts which together form the Supreme Court of England and Wales (the others are the Crown Court for criminal matters and the Court of Appeal). There are three divisions within the High Court, each empowered to try any action, but for administrative purposes and convenience specific matters are allocated to each division. The three Divisions are Queens Bench Division (which includes the Admiralty and Commercial Courts) Chancery Division (which includes the Companies Court and Patents Court) and Family Division. A litigant begins an action by one of four types of originating process (writ, originating summons, originating notice of motion or petition). Once the originating process is issued (*i.e.*, the relevant document is stamped by the court) the interlocutory stage of the action begins. Interlocutory matters are mostly dealt with by a Master (a solicitor or barrister of at least 7 years' experience). Trials are heard by a High Court Judge. There are also 136 District Registries in many of the major commercial centres and cities of England and Wales which are also part of the High Court although only 8 of those have full Chancery jurisdiction. In District Registries, interlocutory matters and some trials are dealt with by a District Judge. The High Court Judge is known as a *Circuit Judge* when he is sitting in a District Registry.

1.1.3 Court of Appeal (Civil Division)

Appeals may be taken to the Court of Appeal which may uphold, amend, or reverse the decision of a lower court, or order a new trial. The Court of Appeal hears civil appeals from the High Court, County Courts and Tribunals.

1.1.4 House of Lords

The House of Lords stands at the apex of the judicial system and is the final court of appeal in civil and criminal matters. In civil matters the House of Lords hears appeals from the Court of Session in Scotland, the Court of Appeal in Northern Ireland and the Court of Appeal (Civil Division) in England and Wales. There is

no general right of appeal to the House of Lords. Leave of the Court of Appeal or the House of Lords must first be obtained.

1.2 First Instance Proceedings

Civil cases at first instance can be commenced in the County Court or in the High Court.

The general rule is that while the County Court and the High Court have concurrent jurisdiction over most categories of cases, jurisdiction will be allocated between them according to the amounts in issue. Thus, if the value of an action is 37,500 ECU or less the case will be tried in the County Court, and if the value of the action is 75,000 ECU or more, the case will be tried in the High Court. Cases involving amounts between 37,500 and 75,000 ECU are tried in either court, so the Plaintiff chooses where to commence proceedings.

In some instances the County Courts' jurisdiction is limited according to the amount involved in the proceedings. For example, an action concerning equitable interests in land, if worth over 45,000 ECU, will generally have to be commenced in the High Court.

There are a number of areas in which, irrespective of the amounts claimed, the High Court has exclusive jurisdiction. These include actions for libel and slander, and judicial review.

Finally, it is worth noting that the rules are different for personal injuries cases. Where the claim is for damages for personal injuries and the Plaintiff does not expect to recover more than 75,000 ECU, the action must be commenced in the County Court.

1.3 Appellate Proceedings

1.3.1 General Principle

A very simplistic summary would be that appeals from the County Court go to a Circuit Judge and then to the Court of Appeal. Appeals from the High Court go to the Court of Appeal and appeals from the Court of Appeal go to the House of Lords.

In certain limited circumstances it is possible to "leapfrog" a stage and appeal directly to the House of Lords from the High Court.

1.3.2 County Court

Appeals from a District Judge are to a Circuit Judge. Further appeals from the Circuit Judge are to the Court of Appeal and then to the House of Lords.

1.3.3 High Court

Appeals from a Master are to a High Court Judge in Chambers. Appeals from the High Court Judge are to the Court of Appeal and then to the House of Lords.

The High Court is located in the Royal Courts of Justice on The Strand in London but as has been mentioned before, there is a District Registry in most major commercial centres (approximately 136 of them).

1.3.4 Court of Appeal

The Court of Appeal is physically located at the Royal Courts of Justice on The Strand in the centre of London. To some extent its decisions are final (for example, in appeals in bankruptcy and from the County Courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with leave of the Court of Appeal or of the House of Lords.

1.3.5 House of Lords

The House of Lords is located in the Houses of Parliament at Westminster in London. There are rooms allocated to the hearing of appeals within the Houses of Parliament.

1.3.6 European Court of Justice

It should be noted that, during our inquiry with the exception of one Finnish and one Austrian lawyer, only English attorneys generally mentioned the European Court of Justice as part of their appellate structure, notwithstanding the jurisdiction of the ECJ is applicable for all member states under the same preconditions:

The ECJ operates as a court to which points of community law can be referred, rather than as an appellate court *per se*. These referrals can either be voluntary or mandatory.

- Voluntary Referrals: A national court can at any time decide to refer a question of European Community Law to the ECJ for a preliminary ruling. Once made, the ruling is binding on this court - but it is only preliminary in that the court is left to apply the ruling to the facts of the case, and to give judgment.

- Mandatory Referrals: References to the ECJ on questions of community law are mandatory in courts of last instance (which will, in England and Wales, generally be the House of Lords as set out above).

1.4 Lawyers in the Proceedings

There are fixed rules concerning the rights of audience for lawyers to appear before the various courts.

In England and Wales, there is a two tier system within the lawyers' profession. There are Solicitors and *Barristers* (orator). Both have the same basic legal professional academic qualification but they then undertake specialised professional qualifications tailored to each profession.

The barristers have specialist advocacy training and training in the preparation of pleadings, detailed advices on complex points of law, trial procedure and admissibility of evidence and is qualified to appear in any court in England and Wales. A barrister may be appointed Queens Counsel (Q.C.) when he or she has reached a certain level of seniority and skill. The appointment establishes him or her as an expert in their particular field. Barristers are appointed by solicitors to assist in the litigation in these fields. It is the solicitor who handles the entire litigation process from his office.

The solicitor is the person with whom a member at the public first has contact when wishing to litigate. The public does not at present have direct access to barristers although a pilot project is under way allowing limited access by members of the public to barristers where the member of the public has not appointed a solicitor but has received free advice from a pro bono agency such as the Citizens Advice Bureau or a voluntary legal advice centre. Solicitors, in addition to the advanced legal training receive professional training in the administrative skills required to run an office (*e.g.* maintaining accounts, correct handling of clients' money) and in dealing with the client face to face, collation of evidence and conduct of an action in the County Court or High Court and may also appear as advocates in any County Court action and interlocutory applications in the High Court. It is possible however for a solicitor to obtain a qualification as a "solicitor advocate" which entitles him to rights of audience in all courts including the House of Lords. To be eligible for the training the solicitor has to show that he has a certain amount of advocacy experience to begin with and at present it tends to be senior solicitors who can establish the necessary number of hours advocacy experience.

1.5 Legal Form of Appeals

The nature of the appeal (*i.e.* a rehearing of evidence or hearing on legal grounds only) depends on what is being appealed.

1.5.1 Appealing an Order of a District Judge

- High Court

Any decision by a District Judge or Master can be appealed without leave to a High Court Judge in Chambers. The Judge in Chambers hears the whole matter afresh and the parties are not limited to the evidence they called in the original hearing and the Judge in Chambers is not bound by the previous exercise of discretion by the Master or District Judge whose decision is being appealed.

- County Court

Any Order of a District Judge can be appealed as of right (without leave) to the Circuit Judge. Once again a Judge hears the matter afresh.

1.5.2 Appealing an Order of a High Court Judge

In general, appeal will lie to the Court of Appeal. In some cases leave to appeal is necessary. The general rule is that no leave is necessary where one is appealing a final order except for some limited exceptions. If one is appealing an interlocutory order, leave is usually required unless the order made affects the liberty of the subject.

1.5.3 Appealing an Order of a Circuit Judge

The rules are the same as appealing an Order of a High Court Judge with a few very limited exceptions.

- Court of Appeal

The civil division of the Court of Appeal hears and determines appeals in civil matters from the High Court, Circuit Judges in the County Court and certain tribunals. Each and every party to the action may appeal. Leave to appeal to the Court of Appeal is usually unnecessary. A hearing in the Court of Appeal is confined to the evidence relied on in the court below and one must show legal grounds for the appeal.

- House of Lords

The hearing is again limited to the evidence relied on in the court below.

1.5.4 Results of the Appeal

The possible results of an appeal are that the appeal may be dismissed in which case the decision of the original court stands. The appeal may be allowed in which case the decision of the appellate court is substituted for the decision of the original trial court or a new trial may be ordered in the limited circumstances described above.

The appellate courts have discretion to decide which party should bear the costs of the appeal. Usually, the party which is successful will obtain an order that the unsuccessful party should pay the winner's cost of the original trial and of the appeal.

1.6 Further Requirements and Restrictions for the Appeal

The decision as to which court to appeal to is not based on financial thresholds but on procedural rules as outlined above.

1.7 Number of Documents to be Served

Personal service is effected by the bailiff of the area where the person to be served resides pursuant to a court order.

Only the originating summons or originating application (*i.e.* the very first document which begins the litigation in the High and County Courts respectively) needs to be served on the opponent being sued. In case of a default, the default judgment also has to be served personally on the (unrepresented) defendant. Further, all notices for hearings at which the party is to be present to be examined personally are also served personally.

As soon as that individual or company has appointed a legal representative, it is customary for the legal representative to be given authority to accept service of all other documents including Notices of Appeal, except as stated above. Nevertheless, since it is not sure that service on counsel is sufficient for all purposes, a party would also serve final judgments for enforcement purposes on the opposing party personally in order for all limitations of time to run.

Accordingly, the total number of documents that need to be served during a proceeding is a minimum of three, in proceedings that are appealed, 5 to 6 is more likely.

1.8 Expert Witnesses

Expert witnesses are entitled to be paid for time spent in preparing their evidence, including examining documents, conducting site visits, views or inspections, performing experiments or sampling, and holding necessary communications and conferences with their clients. They are also entitled to an allowance for time spent at court and any related travel expenses, and for time spent preparing reports. The allowance is time based, although it is also related to the level of expertise of the witness. Similarly, experts may claim a moderate amount in relation to time spent reading the case papers and preparing for giving evidence at trial.

The fees can be determined in two ways. One can either negotiate a fixed fee with the expert which can only be subject to amendment if the nature of the task is to undertake changes radically or one can agree to pay him an hourly rate for his work, agreeing to pay disbursements (such as photocopying fees, fax, telephone and secretarial fees) in addition.

Where a lawyer instructs the expert it is presumed that the lawyer will accept responsibility for the experts fees unless he makes it absolutely clear in his letter of instruction that it is his client who has responsibility for payment of the experts fees and that the solicitor cannot pay the experts fee unless he has been given money to do so by his client. These are matters for negotiation between the expert, and the lawyer and can be varied to suit all parties. Payment can take place in various ways. Interim payments can be made, a fixed fee could be paid in advance or it could be paid at the end of the proceedings. Where an hourly charge out rate has been agreed, payment is usually made at production of the final report. If the matter then proceeds to trial, the expert again charges an hourly rate and submits his invoice once the trial is over.

The ultimate liability to pay the expenses of expert witnesses will depend on the outcome of the proceedings and, in particular, any rulings made as to costs. In general, costs follow the event and therefore the successful party should be able to recover all reasonably incurred costs from his opponent. Clearly, this would (in the normal course) include the cost of expert witnesses, although issues may arise as to whether the particular evidence was necessary in order to achieve the result. These issues will depend largely on the particular circumstances of the case. Further, costs in the High Court are at the discretion of the Judge and he may decide to disallow costs of evidence adduced in relation to issues on which the relevant party did not succeed. In any event, there is always a likelihood that the process of taxation will limit the amount of costs which a party can recover in

respect of expert witness fees, as some of the work undertaken will be deemed to be beyond what is necessary. To the extent that any such fees are not recoverable from the other side, and depending on the conditions of engagement of the expert witness, it may be that a further liability continues to fall on the instructing party to meet demands for experts' fees.

2 Time Factors

2.1 Time Frame for Appeals

2.1.1 County Court

The procedure for an appeal in the County Court is governed by the County Court Rules 1981. The appellant must within 14 days of the date of the order for judgment or assessment of the District Judge which is being appealed, file with the court the notice of application for appeal and serve it on the opposing party. If it is an interlocutory order which is being appealed, the time limit is 5 days. The time limits can be extended at the court's discretion but good reasons are needed.

2.1.2 High Court

An application to appeal from a judgment or order of a High Court Judge to the Court of Appeal should be made on notice, within 4 weeks of the day in which the judgment or order appealed from. A notice of appeal from a Master to a Judge in Chambers must be issued within 5 days of the Master's order and served on the other party within 5 days of issue (7 days and 5 days respectively in District Registries).

2.1.3 Court of Appeal

An application for leave to appeal should be made in the first instance to the original court rather than direct to the Court of Appeal, unless it is impossible or impracticable to do so. An application for leave to appeal must be made within 4 weeks from the date on which the judgment or order was signed, unless the limit is extended by order of the court. A cross-appeal may be lodged by the respondent to the appeal within 21 days of service of the appeal on him.

Procedure after leave has been obtained involves the draft and service of a notice of appeal within 28 days of the order appealed against being sealed or otherwise perfected. Where leave to appeal is required, and is granted by the Court of Appeal, time for serving the notice of appeal is automatically extended by 7 days from the grant of leave.

The Respondent's notice if any should be served on all parties within 21 days of the notice of appeal, the Respondent must lodge two copies one endorsed with the fee of 225 ECU and the other endorsed with a certificate of service.

The time limit for lodging bundles of documents for use of the Lords Justice who will hear the appeal is 14 days after the appeal first appears in the List of Forthcoming Appeals. On lodging the appeal bundles with the Civil Appeals Office, the Appellant's solicitors must supply the Respondent's solicitors with a set of the appeal bundles in exactly the same form as the bundles lodged with the Court of Appeal.

Documents to be lodged by Appellant: not more than 14 days after the appeal first appears in the list to be called the Appellant must cause to be lodged with the registrar the documents which are necessary for the hearing. Time limits are strictly applied but may be extended by leave.

2.1.4 House of Lords

An application for leave to appeal to the House of Lords must first be made to the Court of Appeal. This is usually done by the barrister immediately after the Court of Appeal's judgment is read out at the end of the appeal. It is a simple oral request for leave which is granted or refused on the spot.

If leave is refused, a written petition for leave to appeal may be presented to the House of Lords. A petition for leave to appeal must be lodged in the Judicial Office within 1 month of the date on which the judgment or order appealed from was made. If a petition is lodged after the prescribed time limit has expired it must be drafted as out of time. A petition for leave to appeal out of time should first set out the reasons why the petition was not lodged within the time limit. If the petition is lodged more than three months after the date of the order appealed from it will be allowed only in exceptional circumstances. The petitioners must prepare a statement of facts and issues involved in the appeal, and must also prepare and lodge an appendix containing the documents used in evidence or recording the proceedings in the courts below. The cost of preparing the appendix is borne in the first instance by the petitioners, though it will ultimately be subject to the decision of the House of Lords to the costs of the appeal.

The Respondent to the appeal has no automatic right to enter a cross-appeal but may seek leave to do so within 6 weeks of the presentation of the original appeal. He also has no automatic right to enter written objections to the appeal either. If the House of Lords Appeal Committee takes the provisional view that leave to appeal should be given, the Respondent will be invited to lodge objections by a

given deadline. He must serve those on the other party. The petitioner may be invited to submit written observations on those objections.

2.2 Estimated Duration of Civil Cases

The total time frame for a first instance proceeding is in the range of about 14 months.

The length of time before one's appeal is heard depends on the nature of the decision being appealed from and whether it is an interlocutory or final order.

In the County Court, an appeal from a final order can usually be heard within ten to twelve months of the original decision. It may be quicker if the particular County Court is not too busy. Realistically, it may take nine or ten months, but even a period up to 18 months is not unusual. An extreme duration would be anything in excess of eighteen months. Although the official time estimate for interlocutory appeals is also 10 months in practice this can be much shorter and could be as little as three or four months.

In the High Court, an appeal from an interlocutory hearing may be heard within two weeks if the issue to be determined is short. If one wishes to use Counsel for the more complex issues then one is dependent on his availability and the appeal may not be heard for at least six to eight weeks. An appeal from an application for summary judgment (where liability is not in issue) may be heard within 4 months but other appeals can involve a wait of an average of twelve months or longer. For example, appeals from personal injury cases may take 17 months and other Queens Bench matters can take up to 19 months and in Chancery the wait could be as long as 18 months. The courts are working to reduce these waits dramatically.

Appeals can be expedited but only if extremely good reasons are given, for example, the point of law which needs to be determined is of such general and public importance, that other cases in the pipeline may well be deferred in order to see what the Court of Appeal has to say on this particular point. In those circumstances, the expedited appeal may come on as quickly as four to six months from the original hearing.

An appeal from the Court of Appeal to the House of Lords may take at least six months to obtain leave for the appeal. Once leave has been granted, it may take twelve to eighteen months to get to a hearing.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

Court fees follow a complicated list pursuant to which about every item has its own fee to be stamped on the document. Notably, a summons and complaint costs 225 ECU for a case with a value of 50,000 ECU and 750 ECU for a claim with a value of 200,000 ECU. Additional costs involve setting down for trial which, in High Court, amounts to 225 ECU and miscellaneous expenses. One of the highest fees may be the taxation fee of 7,5% of the costs claimed for reimbursement. Leave to appeal to the House of Lords costs a minimum of 750 ECU and thereafter about 4,500 ECU may be charged.

A fee of 75 ECU is payable on Appeal from the Master to the Judge in Chambers. The fee on filing Notice of Appeal to the Court of Appeal is 300 ECU. A fee of 75 ECU is also payable in the County Court on appeal to the Circuit Judge.

Lawyers fees are not standardised and are usually calculated on an agreed hourly rate basis. The rate varies from firm to firm and area to area and will depend upon size, location and calibre of the firm. A Partner's time will be charged at a higher rate than that of an Assistant etc. Average rates are 75- 120 ECU per hour for a trainee solicitor, 150-225 ECU for a solicitor. The solicitors rate does not increase simply because the action has moved into the sphere of the appellate court. The barrister, however, may charge a higher fixed fee for appearing in the appellate court. The higher the appellate court, the higher the fee.

The fees are a matter of private negotiation but for example a junior barrister of 10 years qualification might charge 9,000 ECU for one day in the Court of Appeal if the case is reasonably complex requiring a lot of preparation and perusal of documents. An average trial takes about 1 and a half days as a realistic minimum. He might charge between 11,000 and 15,000 ECU for one day on a similarly complex transaction in the House of Lords. A Queens Counsel (senior barrister) might charge 15,000 ECU for one day in the Court of Appeal and 18,750 to 22,500 ECU for one day in the House of Lords.

In addition to the court filing fees, court reporters have to be paid at rates of 300 ECU per hour for all trials and hearings.

3.2 VAT-Rules

All domestic clients, whether individuals or companies, are liable to pay VAT (presently 17.5%) on amounts charged for the provision of legal services (although not necessarily on disbursements).

Foreign clients who are domiciled within the EU will only have to pay VAT if they do not have a VAT number. If EU clients provide a VAT number, which is then displayed on the face of the invoice, they will be exempt from payment of VAT.

Foreign clients in countries outside the EU are totally exempt from having to pay VAT.

3.3 Transfer of Money

Money is generally forwarded by telegraphic transfer. It is possible for a lawyer to instruct his bank to prepare a draft order which is a request for the bank to prepare a foreign currency cheque to be sent to the client if that is preferable to the client. In general, U.K. lawyers do not accept credit cards. To do so would breach professional regulations, there are detailed accounting rules established for the solicitors' profession. The basic rule is that payment is usually made in cash or by cheque and where a payment is made by cheque it is prudent to wait until the cheque has cleared before taking any action to forward money or incur costs.

3.4 Gathering of Information

3.4.1 Private Individuals

English lawyers hire investigation agencies who can obtain the individual's address. This is done by checking the electoral roll and/or other documents of public record and other investigations. The cost will depend on the length of time it takes the investigating agent to obtain a result. An hourly charge out rate of between 45 and 75 ECU per hour for the agent is usual and the lawyer generally set a ceiling on his fees, for example asking him to report to him if he has not obtained a result by the time he has incurred 200 ECU of fees.

3.4.2 Companies

Companies operating within the U.K. are under a statutory duty to lodge completed sets of accounts (as well as various other records) with a central registry known as "Companies House". A further register of companies is

maintained in Cardiff, Wales. Microfiche copies of these records can be obtained from Companies House at a cost of 5,20 ECU (or 30 ECU for an expedited service). One of the pieces of information which must be lodged is the address of its registered office, which is always a valid address at which service can be effected on the company.

3.5 Cost of Recognition of Judgments

Under the Civil Jurisdiction and Judgments Act 1982, members of European states which are parties to the Brussels or Lugano Conventions can apply to the U.K. courts for reciprocal registration and enforcement of judgments given in those states. Applications, which must contain the specified documents (including, where relevant, translations of the judgment) and must be supported by affidavit, are made ex parte to the Queen's Bench Division of the High Court. Following the scaling by the court of the order giving leave to register the judgment, the applicant must serve on the party against whom the judgment is given a notice of registration of the judgment, including full particulars and details of the right to appeal.

Generally, the work involved is identical as are the court fees whether the amount is 50,000 ECU or 200,000 ECU.

The cost of registering a foreign judgment is approximately 600 to 1,500 ECU at least, the real costs being rather in the range of 2,000 ECU as a realistic value. It involves filing an affidavit setting out the evidence in support of the application for registration and any relevant exhibits. At least two hours' work is required by the solicitor in preparing the affidavit. One then pays 7 ECU to swear the affidavit plus 3 ECU for each exhibit. The Order for registration must also be drawn up and sealed by the court and will require attendance at court by the solicitor or his clerk. The notice of registration must then be served on the debtor by personal delivery or sending to his last known address. The fee for registering the judgment is 45 ECU.

The cost of enforcing a judgment will depend to a large degree not so much on the value of the dispute, but on the precise circumstances of the case, on the method of pursuing the debtor's money which you choose to employ, and in particular the position of the parties. The average cost of a garnishee or charging order is 750 ECU but if one uses bailiffs to seize the debtor's goods, the bailiff takes a percentage of the debt recovered so that element of the cost is very variable.

NORTHERN IRELAND

1 National Civil Proceeding

1.1 Court Structure

Northern Ireland is a common law jurisdiction and the civil court structure is broadly similar to that in England and Wales. The civil court structure in Northern Ireland is as follows:

- *Small Claims Court*;
- Local Court (*County Court*);
- District Court (*High Court*);
- *Court of Appeal*;
- Supreme Court (*House of Lords* in London).

1.2 First Instance Proceedings

In first instance a proceeding may be brought before following courts:

Small Claims Court: Jurisdiction up to 1,500 ECU. This court cannot deal with claims involving personal injuries, libel or slander, a legacy or annuity, the ownership of land, the property of a marriage and road traffic accidents. Costs cannot be awarded on a Small Claims Arbitration. The Small Claims Courts are located within each of the County Court jurisdictions.

The County Court: jurisdiction up to 22,500 ECU. The County Court is divided into seven divisions.

The High Court: jurisdiction in claims of over 22,500 ECU. The High Court is divided into Queen's Bench, Chancery and Family Divisions. The Northern Ireland High Court is located in Belfast.

There is also a Northern Ireland Court of Appeal which is again located in Belfast.

Exclusive jurisdiction are mainly those conferred by statute and include the jurisdiction given to the industrial Tribunals and the Fair Employment Tribunal in relation to matters of employment law, Sex Discrimination, Race Discrimination

and Disability Discrimination. The Lands Tribunal deals with matters relating to valuation of property including disputes over rent for commercial properties, the abolition or extinguishing of any easements or rights affecting property.

1.3 Appellate Proceedings

The Position regarding Appeals is as follows:

County Court: Many statutes provide for appeals from Magistrates' and other courts, Tribunals and persons to the County Court.

The High Court: The High Court has no inherent appellate jurisdiction. Jurisdiction to hear the appeal depends upon strict compliance with the procedure for appealing laid down by statute. The Rules of the Supreme Court do not stipulate that the appeal is by way of rehearing. Accordingly the appeal is neither a full oral re-hearing nor an appeal on point of law; the court can fully review the findings of fact law whilst giving greater weight to the lower court findings especially a primary fact.

In Northern Ireland only a few statutes provide for case stated to the High Court; most are to the Court of Appeal.

Court of Appeal: The substantive jurisdiction of the Northern Ireland Court of Appeal is statutory in that it has no inherent jurisdiction to hear an appeal where no statute confers it. Subject to statutory provision, the Court of Appeal can hear an appeal from any Judgment or Order of the High Court or a Judge.

House of Lords: The final appellate jurisdiction for the Northern Ireland courts is the House of Lords which sits in London. The jurisdiction of the Lords is entirely statutory. It may hear appeals from:

- the Northern Ireland High Court in a civil cause (other than contempt) from a decision of the High Court made direct to the House of Lords;
- from the Court of Appeal where an appeal lies in a civil cause or matter from any Order of Judgment of the Court of Appeal with leave of the Court or of the Lords.

1.4 Legal Form of Appeals

Appeals from the District Judge and from the County Court are dealt with by the Court of Appeal on a point of law only. Any appeal on other issues can be dealt with by way of appeal to the High Court.

Appeals from the High Court on any issue are dealt with by the Court of Appeal, which has a purely appellate jurisdiction and will deal with appeals on points of law but also on the evidence. An appeal from the Court of Appeal will lie only to the House of Lords and in such situations the Appellant must have leave to appeal. Thus, it is possible to appeal only on a point of law and those appeals will be dealt with by the Court of Appeal and perhaps if there is any further appeal, by the House of Lords.

Appeals on issues of fact and against the award or an order made by the court of first instance at each stage must be decided in favour of one party or the other. The Appeal will not usually lead to the return of the court of the lower court in civil matters.

1.5 Further requirements and Restrictions for the Appeal

There is no appeal from the decision of the District Judge who hears small claims.

2 Time Factors

2.1 Time Frame for Appeals

In general Appeals must be lodged within 14 days of the date of Judgment from the County Court to the High Court or from any of the lower courts to the Court of Appeal by a way of case stated. Once the Notice of Appeal is lodged there are then further time limits for supporting documents to be lodged. The time frames are not always strictly applied. Part of the difficulty is that the Solicitors must on occasion instruct the Barristers to draft Proceedings and Papers and this can take some time. In a fused profession this difficulty should not arise (in theory).

2.2 Estimated Duration of Civil Cases

In the Small Claims Court the matter can be heard and determined within one to two months, unless an adjournment has to take place for some reason. In the

District Judges Court and the County Court (which are administered together) a case will not be listed for Hearing until the Solicitor for the Plaintiff has lodged a Certificate of Readiness which confirms to the Chief Clerk that all papers have been lodged, all information exchanged and attended to. Realistically a County Court case will not come up for Hearing for 4 to 6 months after the issue of the Civil Bill unless interim relief is sought which will be dealt with separately and more quickly.

In a High Court case, Pleadings normally take approximately 6 months to be completed. A case will come up for Hearing approximately 6 to 9 months after the end of Pleadings being lodged.

If pretrial stages are added to these times, one can reckon with a minimum of 10 months in High Court, 12 months in the Court of Appeal and at least 2 years in the House of Lords. Thus, the proceeding may be slightly faster than in England and Wales.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

No legal costs are awarded in a Small Claims Court and in the District Judges Court and County Court these are usually awarded at the rate set down by the County Court scale. Both Solicitors costs and Counsel's fees are set by the County Court scale which is amended from time to time. Court fees will also vary according to the amount of the claim. In the High Court the fee for issuing a Writ is 225 ECU. Legal fees are normally a matter either for award by the court or for agreement between the parties. Fees are usually calculated on a time basis. If there is a dispute as to the fees, there is a system for costs to be assessed by the Taxing Master and his Order will be final.

3.2 Gathering of Information

The normal way of locating an address for a private individual in Northern Ireland is by the telephone book or by way of instructing an enquiry agent at a cost of approximately 75 ECU. This information can normally be obtained within a period of 2 weeks. For companies the address of a company's registered office can be obtained by conducting a search at the Companies Registry at a cost of 3 ECU.

3.3 Cost of Recognition of Judgments

The cost of applying to register a foreign Judgment is generally in the region of 300 ECU including court fees.

For Enforcement of Judgments to a valuation of 50,000 and 200,000 ECU the fees would be 2,000 and 4,770 ECU respectively.

SCOTLAND

1 National Civil Proceeding

1.1 Court Structure

Actions in Scotland are divided into 3 types of procedures. These are:

- a. Small Claim procedures (less than 1,125 ECU);
- b. Summary Cause procedures (greater than 1,125 but less than 750 ECU);
- c. Ordinary Cause procedure (greater than 2,250).

The courts dealing with these procedures are:

- Local Court (*Sheriff Court*);
- District Court (*Court of Session/Outer House*);
- Court of Appeal (*Court of Session/Inner House*);
- Supreme Court (*House of Lords* in London).

1.2 First Instance Proceedings

Civil cases may be started at the first instance in either the Sheriff Court or where the matter is considered to be important or involving complex matters of law the Outer House of the Court of Session. There are 49 Sheriff Courts in Scotland in the various regions or "Sheriffdoms". The Court of Session is situated in Edinburgh.

1.3 Appellate Proceedings

Appeal from the Sheriff Court in a Summary Cause matter would be to the Sheriff Principal and further to the Inner House of the Court of Session provided the Sheriff Principal gives leave to appeal. This would be unlikely given the size of the sum involved compared to the expense which would be incurred.

Further appeal from the Inner House of the Court of Session lies to the House of Lords in London. Hearings will only take place when the House of Lords is not sitting for public business and therefore delays can be expected.

Appeal lies without leave of the Inner House against final Interlocutors disposing of the action and with leave of the Inner House of any other Interlocutory Judgment. There is on average only around 6 cases appealed to the House of Lords from the Inner House per year and considerable delay and expense would be incurred.

In Ordinary Cause cases which have commenced in the Sheriff Court appeal leads to either the Sheriff Principal and subsequently to the inner House of the Court of Session or, alternatively, straight to the Inner House of the Court of Session. This Appeal would be made by a Note of Appeal framed by the Appellant's Solicitors, without leave in respect of Interlocutors disposing of the action and with leave of the Sheriff in respect of Interlocutors which do not dispense with the action.

1.4 Lawyers in the Proceedings

Solicitors are licensed to plead up to the Sheriffs Courts only. As in England, with a special license after examinations, Solicitors may become Solicitor Advocates which entitles them to plead before all courts. While it is by no means common for Solicitors to be Solicitor Advocates, there is a larger percentage than in England. In all other higher court cases, only Advocates are allowed to plead which is, largely, the Scottish term for Barristers.

1.5 Legal Form of Appeals

The above mentioned appeal in a Summary Cause matter which leads from the Sheriff Court to the Sheriff Principal and further to the Inner House of the Court of Session would be on point of law, only.

A further appeal from the Inner House of the Court of Session is heard at the House of Lords on both fact and law.

1.6 Further Requirements and Restrictions for the Appeal

There is no threshold amount for appeals.

1.7 Number of Documents to be Served

The usual number of documents which must be served directly on the Opponent would only include the Initial Writ /Summons commencing the action. The Initial Writ requires service by the Sheriff Officers, all other documents may be sent to the Opponents Lawyer. There is a specific provision in Sheriff Court rules for the service of Initial Writs, Degrees, Charges, Warrants etc. on persons outwith Scotland.

1.8 Expert Witnesses

Expert witness fees are generally met by the client throughout the action, and recoverable by way of judicial expenses if the action is successful.

2 Time factors

2.1 Time Frame for Appeals

An appeal must be noted within 14 days of either the Interlocutor or leave having been granted. Final Interlocutors are appealable at any time within three months of the Interlocutor.

A Reclaiming motion to the inner House may be made within 21 days of an Interlocutor disposing of the action and within 14 days of any other Interlocutor.

Interlocutors disposing of the action from the Inner House must be appealed within 14 days of the Interlocutor or from leave to appeal in respect of intermediate Interlocutors. There are certain specialised Appeals which must be made within 7 days. A final Interlocutor is appealable at any time within 3 months.

2.2 Estimated Duration of Civil Cases

Appeal to the Sheriff Principal and to the Inner House of the Court of Session might be on fact or law in ordinary cause matters. However the court will usually only consider a transcript of the evidence heard in the lower court and argument

thereon. These transcripts would require to be paid by the parties. It would not be unreasonable to expect an appeal to take in the region of 1 year to be held.

3 Costs Factors

3.1 Lawyers Fees and Court Fees

A fee of 85 ECU is payable to the Sheriff Court for making an appeal. Solicitors only have rights of audience in the Sheriff Court. Should an appeal be marked to the Inner House of the Court of Session, junior Counsel (Advocate) would be from 1,275 to 1,800 ECU and for senior Counsel (Q.C.) 2,250 to 3,000 ECU and to the Inner House of the Court of Session around 12,000 ECU obviously depending on the complexity of the matter etc. In most cases, both junior and senior counsel is employed. In addition, the solicitor has to be paid whose fees for the proceeding itself are in the range of junior counsel fees. Since the solicitor will have been involved a long time before trial, the eventual total solicitor fees may well exceed the aggregate fees for the advocates.

If the action is raised in the Outer House of the Court of Session initially, appeal will lie by way of a Reclaiming Motion to the inner House. The court fee in respect of this Motion will be 140 ECU and Counsel will be involved in the framing of it and in the hearing of the appeal increasing the expense.

In addition to the court filing fees, court reporters have to be paid at rates of 300 ECU per hour for all trials and hearings.

3.2 Gathering of Information

Addresses may be located in respect of individuals by reference to the voters roll of the country. My firm has computer access to the voters roll at a relatively low cost (*i.e.* a few pounds per minute). Should this not be appropriate, *i.e.* if the name is a common one, attempts would be made, initially of all in-house to ascertain the address from *e.g.* information provided by the client and if all else fails enquiry agents could be instructed. The expense of this would be dependant on the difficulty of locating the person. If a persons address cannot be found using reasonable endeavours, actions may still be raised by posting the Initial Writ / Summons on the walls of court. In respect of companies, companies which are registered in the U.K. must have a registered office which is easily identifiable by contacting the Registrar of Companies. Actions may be served on a company at its registered office.

3.3 Cost of recognition of Judgments

Scottish judgments may be enforced using several methods *e.g.* pointing or arrestment. The expenses in executing these methods of enforcement might amount to around 150 ECU in respect of disputed values between 7,500 and 300,000 ECU but expenses would fall to be paid by the debtor.

In respect of the recognition of foreign judgments by way of diligence in Scotland, this would require the appropriate authority from a Scottish court by the common law, and the method of obtaining this authority would be to raise an action in the Court of Session for a Decree of Conform. The cost of this would be 140 ECU in respect of court dues for raising the action. The legal expenses would entirely depend upon the facts of the matter. If undefended and uncomplicated the lawyer's fee might amount to 1,500 to 3,000 ECU. In matters where the case has not been appealed to the highest court or where the party defending could not be put back into the position it was in prior to the litigation (*i.e.* due to sequestration / liquidation) the matter would be much more complicated and there is no guarantee of success. The fee might amount to 30,000 ECU. However, this would apply in respect of countries which are not a party to international conventions on enforcement of foreign judgments. Foreign judgments which are encompassed by the Administration of Justice Act 1920 and the Foreign Judgments F (with Reciprocal Enforcement) Act 1933 may be enforced by applying to the Court of Session by Petition for registration of the judgment. The fee for this Petition at the Court of Session would be 140 ECU. The legal expenses in framing the Petition might amount to around 3,000 ECU if unopposed. In addition it would require to be accompanied by a certified copy of the judgment issued by the original court authenticated by its seal and a certified translation of the judgment together with an Affidavit stating to the best information and belief of the Reponent certain information *e.g.* that the Applicant is entitled to enforce the judgment, it remains unsatisfied at least in part etc.

Facts / Efficiency

Whereas the U.K. procedures tend to cause more working time and thus to be much more expensive than continental proceedings, the latter trade in some additional factual knowledge that the U.K. system provides for a little more efficiency. Nevertheless, as the country reports and tables show, the eventual total costs and durations do not exactly follow this concept as many additional factors, such as court overload and inefficiencies or party and lawyer attitudes have an important influence.

III. Summary of the Country Reports

1 The Civil Proceeding in the Member States

1.1 Access to Higher Instances

In most European countries the civil court structure is divided into three instances. The courts of first instance are the District Courts. In some countries (*e.g.*, Austria, France, U.K.) an additional lower instance for smaller claims exists (Local Court). Only claims that exceed a certain amount are brought directly before the District Courts in first instance. In these countries the dispute values which lead directly to the District Courts range between 5,000 ECU (Germany) and 38,000 ECU (U.K.).

In some countries an additional fifth small claims court level exists. A Justice of the Peace is provided as special jurisdiction for claims up to about 3,000 ECU. Only in Spain the Justice of the Peace has jurisdiction over claims of not more than 300 ECU.

In the case that there are constitutional issues involved, some countries offer the appeal to a Constitutional Court, which is treated as being outside the civil court system, though. In some cases the law suit may be brought before supranational instances as well.

The following table outlines the court structure of all member states:

| | SMALL CLAIMS COURT | LOCAL COURT | DISTRICT COURT | COURT OF APPEAL | SUPREME COURT | CONSTITUTIONAL COURT |
|------------------------|---------------------------------------|---|---|--------------------------------|---------------------------------------|--------------------------|
| B | Joge de Paix | | Tribunal de première Instance | Cour d'Appel | Cour de Cassation | Court d'Arbitrage |
| DK | | | Byret | Landsret | Højesteret | |
| D | | Amtsgericht | Landgericht | Oberlandesgericht | Bundesgerichtshof | Bundesverfassungsgericht |
| GR | Justice of the Peace/ Eirinodikeio | one member - District Ct./ Proto dikeio | three members- District Ct./ Proto dikeio | Court of Appeal/ Efeteio | Supreme Court/ Arios Pagos | |
| E | Juzgado de Paz | | Juzgado de Primera Instancia | Audiencias Provinciales | Corte Supremo | Corte Constitutional |
| F | | Tribunal d'Instance | Tribunal de Grande Instance | Cours d'Appel | Cour de cassation | |
| IRL | Smaller Claims Court | District Court / An Chuirtd Duiche | Circuit Court / An Chuirtd Chuarda | High Court / An t-Ard Cuirt | Supreme Court / An Chuirtd Uachgarach | |
| I | Giudice di Pace | Pretore | Tribunale | Corte di appello | Corte di cassazione | Corte Costituzionale |
| L | | Tribunal de Paix | Tribunal d'Arrondissement | Court Superiour de Justice | Court de Cassation | Cour Constitutional |
| NL | | Kantongerecht | Arrondissementsrechtsbank | Gerechtshof | Hoge Raad | |
| A | | Bezirksgericht | Landesgericht | Oberlandesgericht | Oberster Gerichtshof | Verfassungsgerichtshof |
| P | pequena instância | | 1. instância | Relacao | Supremo Tribunal de Justica | Corte Constitucional |
| SF | | | käräjaoikeus / tingsrätt | hovioikeus / Hovrätt | korkein oikeus / Högsta Domstolen | |
| S | | | Tingsrätt | Hovrätt | Högsta Domstolen | |
| ENG Wales N-Irl. | Small claims Court | County Court | High Court | Court of Appeal | House of Lords | |
| SCO | | Sheriff Court | Court of Session (Outer House) | Court of Session (Inner House) | House of Lords (London) | |

Generally, an appeal against a decision of the Local Court or Justice of the Peace is lodged with the appellate division of the District Court. In most countries under certain conditions a second appeal against the decision of the appellate division of the District Court is allowed either to the Court of Appeal or to the Supreme Court. It should be noted that in some countries procedures that are considered particularly important may be commenced in first instance in a higher court which usually would be an appellate court.

In some countries as, *e.g.*, Finland, there are no threshold amounts for courts of first instance and neither there are any threshold amounts for appeals. In some countries to a certain extent disputes below a threshold value are entirely barred

from appeal: in Germany *e.g.*, there is no appeal for cases below 750 ECU and no further appeal for cases that have been appealed from the Local Court (*Amtsgericht*), *i.e.* cases with a value in dispute of less than 5,000 ECU. In Sweden, a claim on less than 4,000 ECU may be appealed only if the appellate court believes that there is an objective cause for the claim being that the case is of particular interest or that there is an obvious reason to change the previous verdict. In France a claim of less than 22,000 ECU may not be appealed at all.

Finally, in some member states, court services are free of charge or only a nominal fee is charged, whereas in other countries, considering a value in dispute of about 200,000 ECU, the fees may amount to more than 4,500 ECU. But in all countries for the values which are the subject of this study, the lawyers fees are higher than the court fees.

1.2 Right of Audience

In a number of member states there are special restrictions and licences for lawyers to appear before higher and highest instances whereas in some states there are no restrictions (Austria) or they have recently been overruled (Italy, Spain).

In Germany, for example, there are no restrictions before Local Courts (*Amtsgericht*). A party need not be represented by a lawyer and, therefore, any lawyer may appear before any Local Court in general civil matters. However, representation by non-lawyers on a regular basis or for a fee of any kind is illegal. Access to District Courts requires an attorney licensed exclusively in that court. In some *Länder* an attorney may simultaneously be admitted to a District Court and to the respective Court of Appeal. In other *Länder*, the admission to a District Court or Court of Appeal is exclusive of the other. In both cases admission to the Courts of Appeal is subject to having been in practice for at least five years. Only a select group of attorneys are admitted before the Supreme Court (*Bundesgerichtshof*).

In Finland and Sweden there are no restrictions and no licences are needed for a lawyer to appear before any court. In Sweden there is not even a requirement that the counsel is a lawyer or is graduated from law school.

In Italy currently the only restriction for lawyers to appear before higher courts regards the Supreme Court (*Corte di Cassazione*): in this case the lawyers have to be enrolled in a special law list named *Albo degli avvocati cassazionisti*. To be admitted in this role, the lawyers must demonstrate that they have effectively

exercised the profession at least for ten years. But even at the Local Court level due to the necessity of knowing the courts practice it is advisable to use local counsel.

In the U.K. (England and Wales) only the *barrister* is qualified to appear in any court. Usually *solicitors* have rights of audience only in Local Court (*County Court*) and for interlocutory applications to the District Court (*High Court*). Even then, *barristers* are utilized habitually in interlocutory applications where the matter is more complex. It is possible however for a *solicitor* to obtain a qualification as a *solicitor advocate* which entitles him to rights of audience in all courts including the Supreme Court (*House of Lords*).

Thus, in higher instances the cost and access barriers may increase because of the necessity to find an additional lawyer who is permitted to plead before such higher courts. On the other hand, since appellate courts are centralised in most member states, even in jurisdictions of liberal access the cost of travel expenses for the lawyers and the necessity of knowing the practice at a particular court have to be considered when appellate counsel is selected.

1.3 Type of Proceedings

It can be regarded as a basic principle of most member states that the courts of second instance hear appeals on both facts and law. As a common rule, the third instance appeal can be on a point of law only.

The Portuguese doctrine gives a good example for different types of appeal systems. It defines three possible types of appeal:

- a) Cassation system: the superior court annuls, rescinds or cancels the appealed decision, and sends the process back to the inferior court, where the cause will be decided *de novo*.
- b) Substitution system: after having received the appeal, the *ad quem* court will substitute the appealed decision by one of its own.
- c) Intermediary system: after having received the appeal, the *ad quem* court will order the *a quo* court to pronounce a new decision, in accordance with the instructions provided by the superior court, namely concerning legal matters.

In a general view, substitute appeals prevail in the Portuguese civil appeal proceedings.

However, the cost and duration of the whole proceeding may increase significantly, when, as in most member states, under certain conditions the appellate court returns the case to the previous instance where the case is retried and at least one additional hearing has to take place.

1.4 Duration

The procedural law of all member states provides certain time frames in which appeals have to be notified or lodged, to be provided with reasons, memoranda and supporting papers, to be answered by the appellee and to be replied again by the appellant.

The initial time period, within which the notice of appeal has to be filed is short and strict in most countries. It ranges between five days (Spain) and three months (Italy).

Thereafter, in some countries, such as Austria and Germany, the following time frames for the actual filing of the full reasons and documentation for the appeal are also relatively short and strict, and may only be extended under certain limited conditions.

In other countries, the court may freely grant a continuance which may last up to a year. In even other countries, the duration available for the appellant for the preparation of the supporting documentation depends largely on the workload of the responsible judge. In Spain, as an example, durations for the filing and first hearing of the completed appeal may, depending on the efficiency of the court, differ from eight to sixteen months. This time period does not include the proceeding itself.

Interestingly, in Greece, the time frame provided for a party to prepare the appeal is specifically extended when the party resides abroad or is of unknown residence.

The duration of the proceeding itself can only be estimated roughly. In any jurisdiction, within the parameters set by the procedural rules and practice, the length of proceedings will still depend on variable parameters such as the nature of the case, the availability of witnesses and the approach of the individual judges.

In the case of Portugal, *e.g.*, it is quite difficult, if not impossible, to predict realistically the duration since many procedural incidents may arise and even if

they do not, the *ad quem* court does not have a defined time frame to take a decision. Portuguese lawyers only state that, as a rule, Portuguese justice is very slow and procedures are long.

In Sweden the time frame in the third instance might vary from one month if a trial is not granted, to several years if a trial is granted and followed by a full scale trial in the Supreme Court. In extreme situations, a case may rest in the first instance court for three or four years and in the second instance for another three or four years. However, this would usually occur only in situations where neither of the parties is really interested in carrying the case forward.

Another example is given by the High Court in the U.K: an appeal from an interlocutory hearing may be heard within two weeks if the issue to be determined is short. If one wishes to use a *barrister* for the more complex issues then one is dependent on his availability and the appeal may not be heard for at least six to eight weeks. An appeal from an application for summary judgment (where liability is not in issue) may be heard within 4 months but other appeals can involve a wait of an average of twelve months or longer. For example, appeals from personal injury cases may take seventeen months, other Queens Bench matters can take up to nineteen months and in Chancery the wait could be as long as eighteen months. The courts are working to reduce those waits dramatically. But these time frames do not include the pre-trial process in the U.K.

Summing up it can be stated that, whereas in some member states no appellate proceeding will be concluded within a year's time, in other countries the duration of proceedings before the appellate courts may be a few weeks. Nevertheless, due to the complication of an individual proceeding even in these countries it may last for years.

In summary, the estimated average duration of a proceeding in second or third instance in the EU would range between approximately 6 and 18 months. Only in Italy a minimum of four years for each instance must be calculated in almost all cases.

An additional factor concerns letters rogatory. While these usually are not very expensive they can cause extreme delays.

2 Tables of Costs and Durations

The following tables provide a summary of the figures as described in more detail in the country reports. As these tables show, the additional costs that arise in the enforcement procedure or similar aspects of a cross-border litigation become negligible in relation to the costs and durations that arise in most members states when the cases go on appeal.

Even in the previous study on the *Cost of Judicial Barriers* comparisons and averages were already problematic in that it is quite difficult to estimate the costs and durations of an actual case with all its possible features.

All figures and numbers on each instance are based on the assumption of a rather "normal" case, such as a the claim of a consumer against a real estate agent for the return of his money paid for a house in a holiday resort which did not live up to his expectations. It is further assumed that such a claim, as opposed to a plain debt collection, will involve some necessary evidentiary hearings but no extreme expert witness fees as may be incurred in some member states when a medical expert is to give an opinion on a medical malpractice claim. Therefore, the case is deemed rather standard as its legal and factual complexity is presumed to be "average".

When it comes to appeals, an additional aspect has to be considered. As has been described in some of the country reports and, in more detail, in some of special reports, the practices as to how often and under which circumstances appeals are taken from first instance decisions differ quite significantly between the various member states. Also, the procedure differs: in a member state where appeal is subject to a request for leave, it is ensured that appeals are less frequently used as delay tactic or in order to raise costs but can be taken only in cases which raise a valid point.

As to the cost and duration with regard to the preparation of an enforcement abroad the country report from Finland phrases as follows:

In principle if (...) the documentation is in order when presented to a Finnish counsel [then the cost will be] 330 ECU. On the other hand, if translation, research or additional correspondence and documentation may be necessary, the cost for such assignments may well amount to a minimum of 1,700 ECU.

This statement explains why thorough preparation by the lawyer in the country where the litigation has taken place is of utmost importance for the later recognition. Of course, such work costs fees.

As to the ECJ, it has been mentioned that the number of cases which are forwarded to the ECJ for a preliminary ruling are (a) few and (b) very different between the various member states. Therefore, again, the figures become utterly incomparable.

The interesting result is this: All fees and durations calculated for each instance are even on the low side. But when all avenues of appeal are taken, which is rare, the fees become skyrocketing in almost every member state.

Belgium

| NO. | B ACTION | COST (Lawyer & Court) | COST (Lawyer & Court) | DURATION (in months) |
|-----|----------------------------------|--------------------------|--------------------------|-------------------------|
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 250 | 250 | 1 |
| 2 | Add. for foreign client | 100 | 100 | 1 |
| 3 | Domestic service of process | 200 | 200 | see No. 4 |
| 5 | 1st inst. proceeding | 7,132 | 18,332 | 12 |
| 6 | 2nd inst. proceeding | 3,138 | 6,438 | 30 |
| 7 | 3rd inst. proceeding | 3,275 | 6,575 | 30 |
| 8 | Constitutional Court | 0 | 0 | 0 |
| 9 | Proceeding at ECJ | 3,000 | 6,300 | 14 |
| 10 | Corresp. Counsel | 75 | 75 | 0 |
| 11 | Recognition of foreign judgement | 500 | 500 | 1 |
| 12 | Domestic enforcement | 500 | 500 | 4 |
| 13 | Prep. of service abroad | 100 | 100 | 1 |
| 14 | Prep. of enforcement abroad | 100 | 100 | 1 |
| 15 | incoming service req. | 200 | 200 | 2 |
| 16 | Adress Location | 8 | 8 | 0 |
| 17 | V.A.T. private domestic party | 0% | | |
| 18 | V.A.T. corp. domestic party | 0% | | |
| 19 | V.A.T. private foreign party | 0% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 2 |

Denmark

| DK | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 500 | 500 | 1 |
| 2 | Add. for foreign client | 50 | 50 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 3,955 | 10,245 | 8 |
| 6 | 2nd inst. proceeding | 3,955 | 10,245 | 18 |
| 7 | 3rd inst. proceeding | 4,290 | 11,483 | 18 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 4,500 | 4,500 | 14 |
| 10 | Corresp. Counsel | 100 | 100 | 0 |
| 11 | Recognition of foreign judgement | 1,420 | 4,800 | 3 |
| 12 | Domestic enforcement | 1,420 | 4,800 | 4 |
| 13 | Prep. of service abroad | 0 | 0 | 1 |
| 14 | Prep. of enforcement abroad | 500 | 500 | 1 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | 6 | 6 | 0 |
| 17 | V.A.T. private domestic party | 25% | | |
| 18 | V.A.T. corp. domestic party | 25% | | |
| 19 | V.A.T. private foreign party | 25% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 1 |

Germany

| D | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 830 | 2,533 | 1 |
| 2 | Add. for foreign client | 50 | 50 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 4,710 | 10,190 | 8 |
| 6 | 2nd inst. proceeding | 6,408 | 14,145 | 12 |
| 7 | 3rd inst. proceeding | 6,759 | 15,084 | 30 |
| 8 | Constitutional Court | 3,507 | 5,611 | 30 |
| 9 | Proceeding at ECJ | 3,590 | 5,695 | 14 |
| 10 | Corresp. Counsel | 1,095 | 1,905 | 0 |
| 11 | Recognition of foreign judgement | 1,166 | 1,956 | 1 |
| 12 | Domestic enforcement | 1,100 | 3,200 | 4 |
| 13 | Prep. of service abroad | 0 | 0 | 1 |
| 14 | Prep. of enforcement abroad | 344 | 586 | 1 |
| 15 | incoming service req. | 0 | 0 | 1 |
| 16 | Adress Location | 10 | 10 | 1 |
| 17 | V.A.T. private domestic party | 16% | | |
| 18 | V.A.T. corp. domestic party | 16% | | |
| 19 | V.A.T. private foreign party | 16% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 1 |

Greece

| GR | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 100 | 100 | 2 |
| 2 | Add. for foreign client | 80 | 80 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 1,750 | 4,200 | 36 |
| 6 | 2nd inst. proceeding | 1,750 | 4,200 | 36 |
| 7 | 3rd inst. proceeding | 1,750 | 4,200 | 36 |
| 8 | Constitutional Court | 2,000 | 2,000 | 36 |
| 9 | Proceeding at ECJ | 2,400 | 2,500 | 14 |
| 10 | Corresp. Counsel | 50 | 50 | 0 |
| 11 | Recognition of foreign judgement | 700 | 800 | 18 |
| 12 | Domestic enforcement | 500 | 500 | 12 |
| 13 | Prep. of service abroad | 100 | 100 | 2 |
| 14 | Prep. of enforcement abroad | 100 | 100 | 10 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | x | x | x |
| 17 | V.A.T. private domestic party | 0% | | |
| 18 | V.A.T. corp. domestic party | 0% | | |
| 19 | V.A.T. private foreign party | 0% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 2 |

Spain

| E | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 500 | 500 | 1 |
| 2 | Add. for foreign client | 50 | 50 | 1 |
| 3 | Domestic service of process | 30 | 30 | see No. 4 |
| 5 | 1st inst. proceeding | 8,000 | 20,000 | 18 |
| 6 | 2nd inst. proceeding | 3,200 | 8,000 | 24 |
| 7 | 3rd inst. proceeding | 6,000 | 17,000 | 36 |
| 8 | Constitutional Court | 6,000 | 17,000 | 18 |
| 9 | Proceeding at ECJ | 7,500 | 18,500 | 14 |
| 10 | Corresp. Counsel | 200 | 400 | 0 |
| 11 | Recognition of foreign judgement | 1,500 | 3,100 | 2 |
| 12 | Domestic enforcement | 5,276 | 14,940 | 6 |
| 13 | Prep. of service abroad | 200 | 200 | 1 |
| 14 | Prep. of enforcement abroad | 500 | 500 | 1 |
| 15 | incoming service req. | 200 | 200 | 12 |
| 16 | Adress Location | 200 | 200 | 2 |
| 17 | V.A.T. private domestic party | 16% | | |
| 18 | V.A.T. corp. domestic party | 16% | | |
| 19 | V.A.T. private foreign party | 16% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 1 |

France

| F | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 500 | 500 | 1 |
| 2 | Add. for foreign client | 50 | 50 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 2,800 | 3,500 | 12 |
| 6 | 2nd inst. proceeding | 3,750 | 5,010 | 12 |
| 7 | 3rd inst. proceeding | 6,200 | 6,200 | 65 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 6,500 | 6,500 | 14 |
| 10 | Corresp. Counsel | 500 | 500 | 0 |
| 11 | Recognition of foreign judgement | 500 | 500 | 1 |
| 12 | Domestic enforcement | 1,250 | 1,250 | 4 |
| 13 | Prep. of service abroad | 200 | 200 | 1 |
| 14 | Prep. of enforcement abroad | 650 | 650 | 1 |
| 15 | incoming service req. | 40 | 40 | 2 |
| 16 | Adress Location | 135 | 135 | 1 |
| 17 | V.A.T. private domestic party | 0% | | |
| 18 | V.A.T. corp. domestic party | 0% | | |
| 19 | V.A.T. private foreign party | 0% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 1 |

Ireland

| IRL | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 500 | 500 | 1 |
| 2 | Add. for foreign client | 300 | 300 | 1 |
| 3 | Domestic service of process | 50 | 50 | see No. 4 |
| 5 | 1st inst. proceeding | 30,000 | 45,000 | 24 |
| 6 | 2nd inst. proceeding | 0 | 0 | 0 |
| 7 | 3rd inst. proceeding | 35,000 | 35,000 | 36 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 6,000 | 7,000 | 14 |
| 10 | Corresp. Counsel | 500 | 500 | 0 |
| 11 | Recognition of foreign judgement | 2,600 | 9,000 | 2 |
| 12 | Domestic enforcement | 2,600 | 9,000 | 4 |
| 13 | Prep. of service abroad | 500 | 500 | 3 |
| 14 | Prep. of enforcement abroad | 500 | 500 | 3 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | x | x | x |
| 17 | V.A.T. private domestic party | 21% | | |
| 18 | V.A.T. corp. domestic party | 21% | | |
| 19 | V.A.T. private foreign party | 21% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 1 |

Italy

| I | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 400 | 400 | 2 |
| 2 | Add. for foreign client | 100 | 100 | 2 |
| 3 | Domestic service of process | 75 | 75 | see No. 4 |
| 5 | 1st inst. proceeding | 2,500 | 2,500 | 36 |
| 6 | 2nd inst. proceeding | 4,200 | 4,200 | 40 |
| 7 | 3rd inst. proceeding | 5,450 | 5,450 | 40 |
| 8 | Constitutional Court | 5,450 | 5,450 | 24 |
| 9 | Proceeding at ECJ | 7,000 | 7,000 | 14 |
| 10 | Corresp. Counsel | 400 | 400 | 0 |
| 11 | Recognition of foreign judgement | 2,500 | 3,000 | 2 |
| 12 | Domestic enforcement | 2,000 | 2,000 | 24 |
| 13 | Prep. of service abroad | 200 | 200 | 2 |
| 14 | Prep. of enforcement abroad | 200 | 200 | 2 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | x | x | 2 |
| 17 | V.A.T. private domestic party | 22% | | |
| 18 | V.A.T. corp. domestic party | 22% | | |
| 19 | V.A.T. private foreign party | 0% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 2 |

Luxembourg

| L | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 350 | 350 | 1 |
| 2 | Add. for foreign client | 100 | 100 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 3,000 | 3,200 | 24 |
| 6 | 2nd inst. proceeding | 3,000 | 3,200 | 18 |
| 7 | 3rd inst. proceeding | 4,000 | 4,300 | 24 |
| 8 | Constitutional Court | 2,500 | 2,500 | 4 |
| 9 | Proceeding at ECJ | 2,500 | 2,500 | 14 |
| 10 | Corresp. Counsel | 0 | 0 | 0 |
| 11 | Recognition of foreign judgement | 1,250 | 1,250 | 1 |
| 12 | Domestic enforcement | 1,950 | 1,950 | 4 |
| 13 | Prep. of service abroad | 0 | 0 | 1 |
| 14 | Prep. of enforcement abroad | 350 | 350 | 1 |
| 15 | incoming service req. | 0 | 0 | 1 |
| 16 | Adress Location | 5 | 5 | 2 |
| 17 | V.A.T. private domestic party | 12% | | |
| 18 | V.A.T. corp. domestic party | 12% | | |
| 19 | V.A.T. private foreign party | 12% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 1 |

Netherlands

| NL | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 550 | 1,100 | 1 |
| 2 | Add. for foreign client | 50 | 50 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 4,050 | 7,350 | 18 |
| 6 | 2nd inst. proceeding | 4,050 | 7,350 | 18 |
| 7 | 3rd inst. proceeding | 4,050 | 7,350 | 18 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 4,050 | 7,350 | 14 |
| 10 | Corresp. Counsel | 200 | 200 | 0 |
| 11 | Recognition of foreign judgement | 550 | 1,100 | 1 |
| 12 | Domestic enforcement | 1,100 | 2,200 | 4 |
| 13 | Prep. of service abroad | 0 | 0 | 1 |
| 14 | Prep. of enforcement abroad | 400 | 800 | 1 |
| 15 | incoming service req. | 0 | 0 | 1 |
| 16 | Adress Location | 7 | 7 | 1 |
| 17 | V.A.T. private domestic party | 17.5% | | |
| 18 | V.A.T. corp. domestic party | 17.5% | | |
| 19 | V.A.T. private foreign party | 17.5% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 1 |

Austria

| A | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 400 | 400 | 1 |
| 2 | Add. for foreign client | 100 | 100 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 5,350 | 11,170 | 12 |
| 6 | 2nd inst. proceeding | 3,255 | 6,595 | 11 |
| 7 | 3rd inst. proceeding | 3,220 | 7,430 | 11 |
| 8 | Constitutional Court | 0 | 0 | 12 |
| 9 | Proceeding at ECJ | 18,340 | 23,800 | 14 |
| 10 | Corresp. Counsel | 0 | 0 | 0 |
| 11 | Recognition of foreign judgement | 1,114 | 1,443 | 4 |
| 12 | Domestic enforcement | 700 | 1,070 | 6 |
| 13 | Prep. of service abroad | 100 | 116 | 1 |
| 14 | Prep. of enforcement abroad | 100 | 116 | 1 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | 2 | 2 | 0 |
| 17 | V.A.T. private domestic party | 20% | | |
| 18 | V.A.T. corp. domestic party | 20% | | |
| 19 | V.A.T. private foreign party | 20% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 2 | 2 | 2 |

Portugal

| | P | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 600 | 600 | 2 |
| 2 | Add. for foreign client | 150 | 150 | 2 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 4,000 | 4,000 | 21 |
| 6 | 2nd inst. proceeding | 2,200 | 2,200 | 9 |
| 7 | 3rd inst. proceeding | 1,200 | 1,200 | 9 |
| 8 | Constitutional Court | 2,700 | 2,700 | 24 |
| 9 | Proceeding at ECJ | 9,000 | 9,000 | 14 |
| 10 | Corresp. Counsel | 300 | 300 | 2 |
| 11 | Recognition of foreign judgement | 450 | 450 | 4 |
| 12 | Domestic enforcement | 1,800 | 1,800 | 6 |
| 13 | Prep. of service abroad | 100 | 100 | 1 |
| 14 | Prep. of enforcement abroad | 200 | 200 | 1 |
| 15 | incoming service req. | 0 | 0 | 3 |
| 16 | Adress Location | 10 | 10 | 4 |
| 17 | V.A.T. private domestic party | 17% | | |
| 18 | V.A.T. corp. domestic party | 17% | | |
| 19 | V.A.T. private foreign party | 17% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 2 |

Finland

| | SF | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 1,300 | 1,300 | 1 |
| 2 | Add. for foreign client | 1,000 | 1,000 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 3,380 | 3,480 | 8 |
| 6 | 2nd inst. proceeding | 3,380 | 3,480 | 24 |
| 7 | 3rd inst. proceeding | 3,420 | 3,520 | 24 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 4,750 | 4,850 | 14 |
| 10 | Corresp. Counsel | 0 | 0 | 0 |
| 11 | Recognition of foreign judgement | 1,000 | 1,000 | 1 |
| 12 | Domestic enforcement | 500 | 500 | 8 |
| 13 | Prep. of service abroad | 50 | 50 | 1 |
| 14 | Prep. of enforcement abroad | 1,000 | 1,000 | 1 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | 10 | 10 | 0 |
| 17 | V.A.T. private domestic party | 18% | | |
| 18 | V.A.T. corp. domestic party | 18% | | |
| 19 | V.A.T. private foreign party | 18% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 1 | 1 | 1 |

Sweden

| S | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 800 | 800 | 2 |
| 2 | Add. for foreign client | 1,000 | 1,000 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 8,500 | 8,500 | 12 |
| 6 | 2nd inst. proceeding | 8,500 | 8,500 | 12 |
| 7 | 3rd inst. proceeding | 8,500 | 8,500 | 24 |
| 8 | Constitutional Court | x | x | x |
| 9 | Proceeding at ECJ | 10,000 | 10,000 | 14 |
| 10 | Corresp. Counsel | 1,000 | 1,000 | 0 |
| 11 | Recognition of foreign judgement | 1,000 | 1,000 | 2 |
| 12 | Domestic enforcement | 1,000 | 1,000 | 8 |
| 13 | Prep. of service abroad | 0 | 0 | 1 |
| 14 | Prep. of enforcement abroad | 500 | 500 | 1 |
| 15 | incoming service req. | 0 | 0 | 2 |
| 16 | Adress Location | 5 | 5 | 0 |
| 17 | V.A.T. private domestic party | 25% | | |
| 18 | V.A.T. corp. domestic party | 25% | | |
| 19 | V.A.T. private foreign party | 25% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 3 | 3 | 1 |

United Kingdom

| UK | | | | |
|-----|----------------------------------|------------------|------------------|-------------|
| NO. | ACTION | COST | COST | DURATION |
| | | (Lawyer & Court) | (Lawyer & Court) | (in months) |
| | Value | 50,000 | 200,000 | |
| 1 | Preparation of proceeding abroad | 1,000 | 1,000 | 1 |
| 2 | Add. for foreign client | 750 | 750 | 1 |
| 3 | Domestic service of process | 0 | 0 | see No. 4 |
| 5 | 1st inst. proceeding | 27,000 | 27,000 | 14 |
| 6 | 2nd inst. proceeding | 16,000 | 16,000 | 14 |
| 7 | 3rd inst. proceeding | 60,000 | 60,000 | 24 |
| 8 | Constitutional Court | 0 | 0 | |
| 9 | Proceeding at ECJ | 8,000 | 8,000 | 14 |
| 10 | Corresp. Counsel | 0 | 0 | 0 |
| 11 | Recognition of foreign judgement | 3,000 | 3,000 | 2 |
| 12 | Domestic enforcement | 3,000 | 3,000 | 4 |
| 13 | Prep. of service abroad | 500 | 500 | 1 |
| 14 | Prep. of enforcement abroad | 100 | 116 | 1 |
| 15 | incoming service req. | 0 | 0 | 3 |
| 16 | Adress Location | 100 | 100 | 0 |
| 17 | V.A.T. private domestic party | 17.5% | | |
| 18 | V.A.T. corp. domestic party | 17.5% | | |
| 19 | V.A.T. private foreign party | 17.5% | | |
| 20 | V.A.T. corp. foreign party | 0% | | |
| 4 | No. of doc. to serve | 4 | 4 | 1 |

When attempting to estimate the actual costs that arise in a particular **cross-border** proceeding, the figures shown in the preceding tables have to be calculated in a specific manner. As mentioned before, depending on the situation, a cross-border proceeding may generally take place at either of the parties' residences. Depending on whether the proceeding takes place in the plaintiff's or in the defendant's country of residence, different steps of the proceeding (*i.e.*, items of cost and duration) would occur in either country and some may not occur at all. As an example, in the case of a proceeding at the defendant's residence, the only activity that occurs in the plaintiff's country ("A") is "the preparation of a proceeding abroad". All other activities will take place at the defendant's residence ("B") and should the plaintiff win no "recognition of a foreign judgment" would be required.

Accordingly, total costs and duration as they arise in country "A", the plaintiff's residence, and in country "B", the defendant's residence, have to be calculated separately and for each of the two scenarios. In the following table, based on the tables of costs and durations in the 15 member states, the respective minimum, maximum and average values have been calculated and added for a cross-border proceeding. VAT has also been included as it arises for the individual consumer plaintiff in the respective member state "A" or "B" where the costs occur.

Table: Cost and Duration for a proceeding at Defendants residence

| Country | 50,000 | 200,000 | months |
|-------------------------|---------|---------|--------|
| "A" minimum | 100 | 100 | 1 |
| "A" maximum | 1,534 | 2,938 | 2 |
| "A" average | 669 | 844 | 1 |
| "B" minimum | 10,280 | 17,730 | 66 |
| "B" maximum | 128,919 | 128,919 | 194 |
| "B" average | 36,366 | 51,084 | 104 |
| Total procedure min | 10,380 | 17,830 | 67 |
| Total procedure max | 130,453 | 131,857 | 196 |
| Total procedure average | 37,035 | 51,928 | 105 |

Table: Cost and Duration for a proceeding at Plaintiff's residence

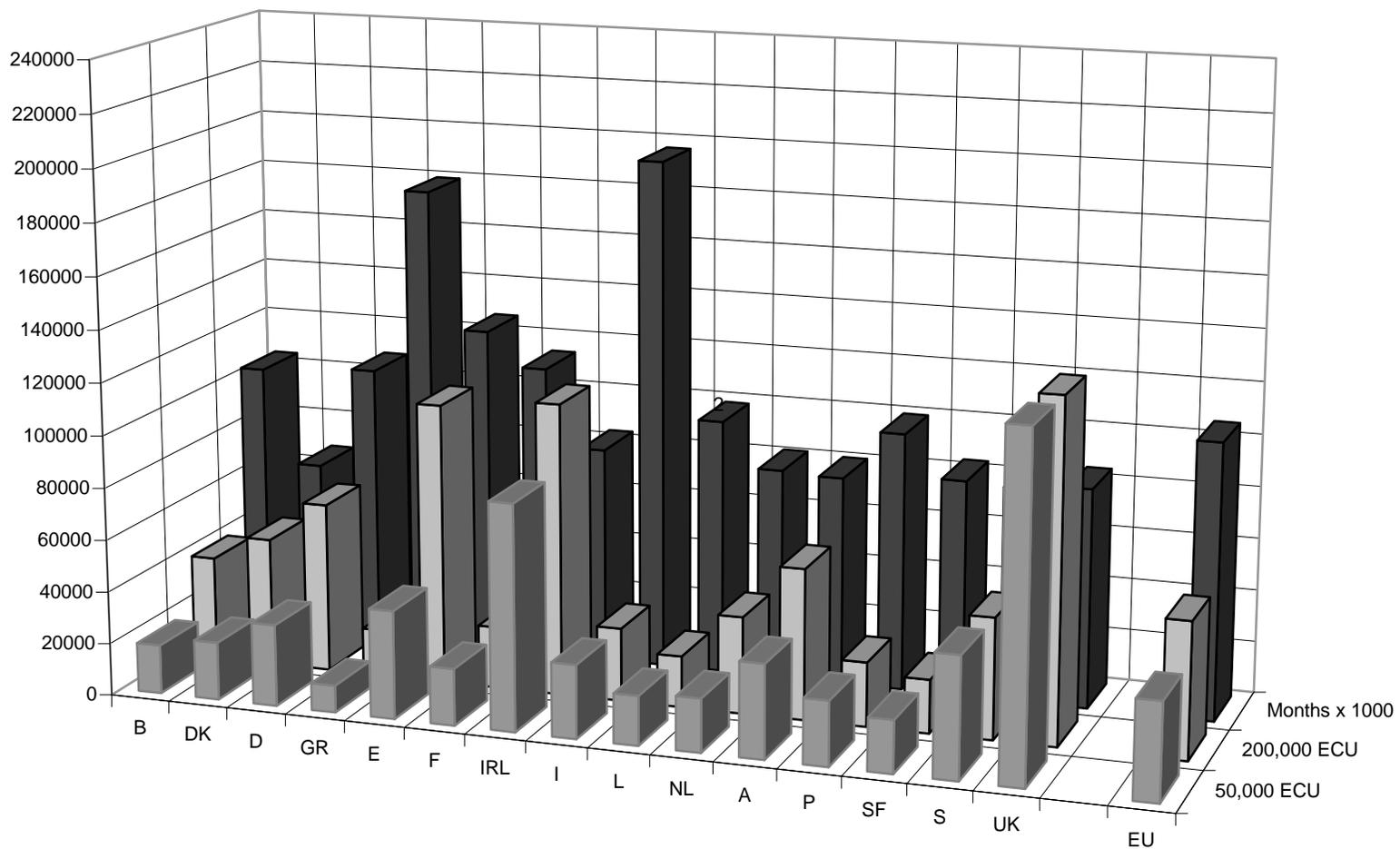
| Country | 50,000 | 200,000 | months |
|-------------------------|---------|---------|--------|
| "A" minimum | 9,850 | 17,300 | 66 |
| "A" maximum | 125,271 | 125,289 | 184 |
| "A" average | 34,748 | 47,707 | 106 |
| "B" minimum | 1,200 | 1,208 | 7 |
| "B" maximum | 7,980 | 20,646 | 32 |
| "B" average | 3,299 | 6,073 | 13 |
| Total procedure min | 11,050 | 18,508 | 73 |
| Total procedure max | 133,251 | 145,935 | 216 |
| Total procedure average | 38,048 | 53,780 | 119 |

These minimum, maximum and average figures can be further compared to the actual figures as they occur in the various member states in the following diagrams. In Diagram 1, the total costs and duration for a proceeding at the defendant's residence are shown. Diagram 2 outlines the total costs and duration for a proceeding at the plaintiff's residence.

The country reports, the tables and diagrams also take reference to proceedings before the constitutional courts, where applicable, and to the ECJ. It should be noted that both proceedings are extremely rare in practice, and even more so in civil disputes.

Therefore, the following diagrams, Diagram 1 and Diagram 2, which do refer to the sum of all potential cost and durations including the constitutional courts and the ECJ has to be read with additional caution. The summary figures as shown in the following diagrams can therefore be titled: This is what can happen in situations from an average case, if for some reason the "legal system" gets out of control.

Diagram 1: Total cost and duration for a cross-border consumer claim at the defendant's residence (EU 1998)



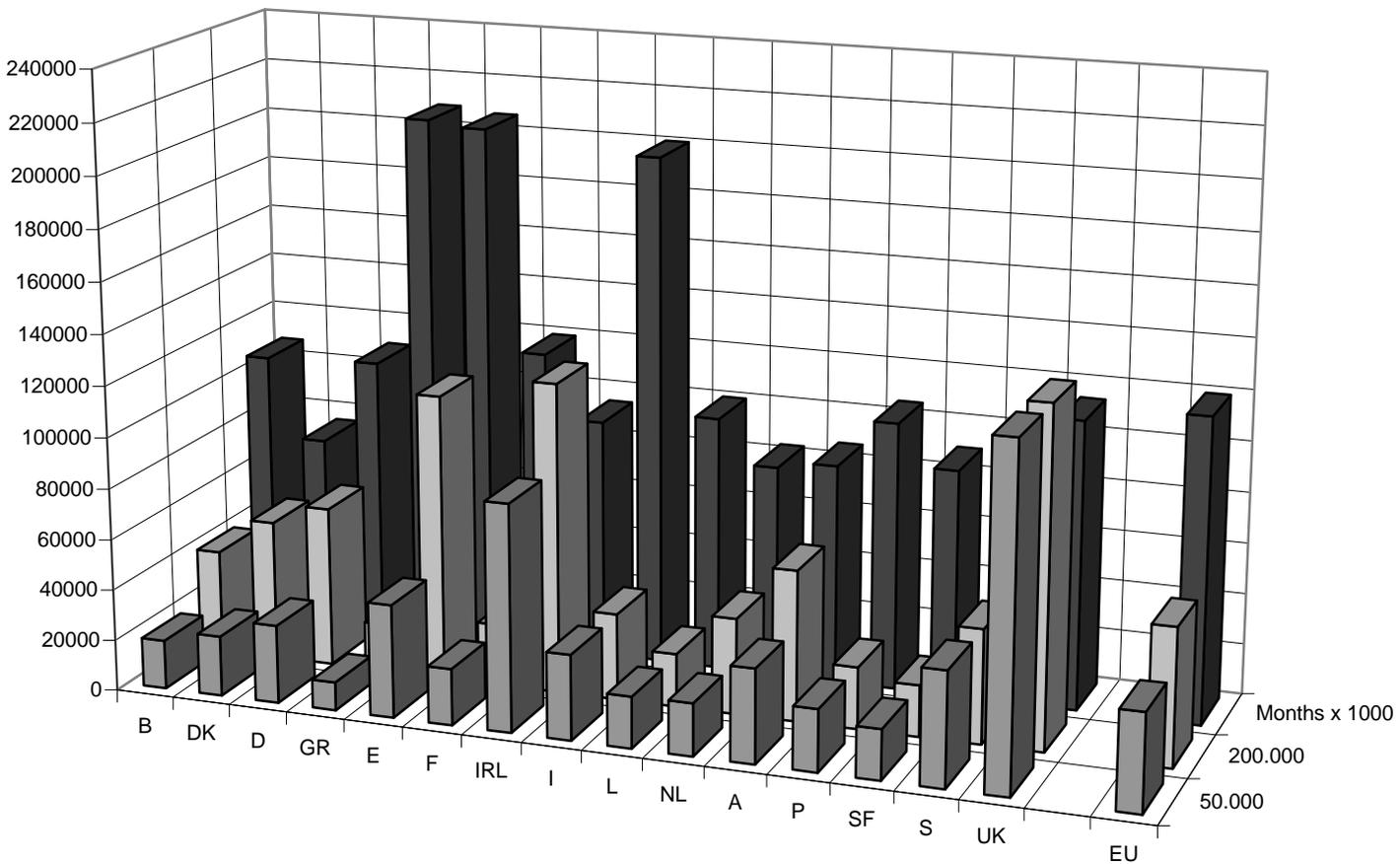
Remarks:

For purposes of graphical representation, the duration (in months) has been multiplied by 1,000; costs are provided in ECU.

Costs and durations must not be compared with each other but with the same item in other member states.

The totals given include costs incurred both at the plaintiff's residence and at the defendant's residence for the "impossible" hypothetical case that both parts of the proceeding take place in the same member state.

Diagram 2: Total cost and duration for a cross-border consumer claim at the plaintiff's residence (EU 1998)



Remarks:

For purposes of graphical representation, the duration (in months) has been multiplied by 1,000; costs are provided in ECU.
 Costs and durations must not be compared with each other but with the same item in other member states.
 The totals given include costs incurred both at the plaintiff's residence and at the defendant's residence for the "impossible" hypothetical case that both parts of the proceeding take place in the same member state.

3 The Real World

The previous study on the *Cost of Judicial Barriers for Consumers in the Single Market* showed that the sum of one party's lawyers' and court fees for a first instance proceeding for a claim of 2,000 ECU in the European member states amount to an average of more than 1,000 ECU. Additional costs related to the cross-border situation, the recognition and the enforcement of the judgment raise these costs to an average of more than 2,500 ECU.

The higher the value in dispute is, the lower is the share of litigation cost in all member states. This has led to the conclusion in the previous study on the *Cost of Judicial Barriers for Consumers in the Single Market*, that a first instance cross-border proceeding with a value of 2,000 ECU is never worth the cost or effort.

Therefore, at a first glance, notwithstanding litigation cost are rising with higher disputes in value, it seems to be a problem of *small claims proceedings* that the amount of costs restrains any reasonable consumer from bringing his claim before court.

However, two objections should be considered.

a. Notwithstanding that, the litigation cost represent a smaller percentage of the value in dispute if compared to a small claims procedure, the **absolute** amount of money to pay is still high. In the view of a typical consumer, 30,000 or even 10,000 ECU are always an immense amount to pay. If the activity of lawyers and courts is regarded as a service, provided for the benefit of legal certainty and of the citizens, obviously it is a quite costly one.

The calculations in the preceding diagrams were based on the total cost that one side, i.e. the plaintiff consumer, would have to invest to pursue and enforce his money claim. If, in the meantime, after an average of 105 months (more than 8½ years), the defendant company has declared bankruptcy, he will not be able to recover either his claim nor these costs. Therefore, the stated amounts are the costs which he will have lost in addition to his original claim.

As an example, a consumer may have invested not only all his money but also has raised a loan for buying a summer house on a Spanish island as a retreat after having retired. Then he loses an amount of 50,000 ECU to a dubious real estate enterprise.

If, to pursue his claim, the case goes through all three regular instances of German civil procedure, the consumer is left with a debt of additional total lawyers and court fees in excess of 30,000 ECU, as a minimum, after several years of litigation. These amounts are increased by other costs related to the procedures, such as expert witness fees, translation costs, bank fees for cross-border payments, costs for address location, for gathering information abroad, for service of documents abroad and for requests for assistance in evidence and discovery abroad. The results of our study confirm that both the likelihood of these activities and the costs arising thereof rise with higher dispute values. Accordingly, the consumer who has already spent all his savings deposits and has to pay back his loan will find himself in the situation that the claim has caused additional debts of 30,000 or 40,000 ECU he will have to reimburse.

b. It must be considered that a full appellate proceeding covers at least two, in extreme cases three, four or even more instances. The cost of all these steps have to be added.

Imagine, however, that said consumer loses his case on the last leg due to a new interpretation of the applicability of a statute of limitations. In most member states the lawyer's costs of the opposite party have to be reimbursed by the losing party for the entire procedure which means that, calculating the cost risk, the fees outlined heretofore have to be almost doubled. Thus, the information that an appellate procedure with a dispute in value of about 50,000 ECU may cost less than 10,000 ECU in some member states is only one part of the truth.

Taking the example of Austria, which as regards the total costs for both values (50,000 ECU and 200,000 ECU) is almost the most "average" jurisdiction in the EU, the following table shows the whole risk a consumer has to face when initiating a law suit.

For the purpose of the hypothetical example and for completeness, we have assumed that the law suit is commenced by a Luxembourg consumer who has a claim against an Irish company about real estate in Austria. Some issue brought about a question which lead to requests for a preliminary ruling first by the Constitutional Court of Austria and then by the ECJ. For some formal reason the consumer ultimately lost the case and thereafter, recognition and enforcement of the judgment is sought by the defendant company against the plaintiff consumer for the legal fees incurred.

The following costs (in ECU) would arise with respect to dispute values of 50,000 ECU and 200,000 ECU:

Table: Costs to be prepaid by Plaintiff for a full cross-border proceeding in Austria

| Value | 50,000 | 200,000 |
|--|---------------|----------------|
| Out of court preparations | | |
| Preparation of proceeding abroad (in Luxembourg) | 350 | 350 |
| + 12% VAT | 42 | 42 |
| Address location for service in Ireland | 100 | 100 |
| + 21% VAT | 21 | 21 |
| Additional Austrian lawyer fees and costs for foreign client | 100 | 100 |
| + 20% VAT | 20 | 20 |
| Preparation for Service in Ireland by Austrian lawyer/court | 100 | 116 |
| + 20% VAT | 20 | 23 |
| Incoming service of Process in Ireland | 0 | 0 |
| Total costs out of court | 753 | 772 |
| 1st Instance | | |
| <i>Lawyer fees</i> | | |
| 1. Instance Complaint | 875 | 1,650 |
| Re-reply | 875 | 1,650 |
| 1st hour, 1st day | 875 | 1,650 |
| 1st hour, 2nd day | 875 | 1,650 |
| 2nd+3rd hour | 875 | 1,650 |
| Total | 4,375 | 8,250 |
| + 20% VAT | 875 | 1,650 |
| <i>Other Costs 1st Instance</i> | | |
| Expert Witness | 1,000 | 1,000 |
| + 20% VAT | 200 | 200 |
| Translation 4 hours | 150 | 150 |
| + 20% VAT | 30 | 30 |
| Normal witness reimbursements (travel expenses etc.) | 300 | 300 |
| Foreign party's travel expenses | 1,000 | 1,000 |
| Court fees | 975 | 2,920 |
| Total costs 1st Instance | 8,905 | 15,500 |
| 1. Appeal | | |
| Lawyer fees Complete Proceeding: (flat fee as of 1.1.98) | 1,825 | 2,300 |
| + 20% VAT | 365 | 460 |
| Court fees | 1,430 | 4,295 |
| Total costs 2nd Instance | 3,620 | 7,055 |
| 2. Appeal | | |
| Appellate Brief (no evidentiary hearings) | 1,310 | 1,700 |
| + 20% VAT | 262 | 340 |
| Court fees | 1,910 | 5,730 |
| Total costs 3rd Instance | 3,482 | 7,770 |
| <i>... carry-over (costs until 3rd instance)</i> | 16,760 | 31,097 |

| Value | 50,000 | 200,000 |
|---|---------------|----------------|
| ... carry-over (costs until 1st instance) | 16,760 | 31,097 |
| Constitutional Court | 0 | 0 |
| Total Constitutional Court | 0 | 0 |
| ECJ | | |
| Brief | 2,620 | 3,400 |
| 1st hour oral hearing | 2,620 | 3,400 |
| Further 2.5 hours | 3,930 | 5,100 |
| Subtotal | 9,170 | 11,900 |
| Double fee for court being outside the lawyers' residence | 9,170 | 11,900 |
| Subtotal ECJ | 18,340 | 23,800 |
| + 20% VAT | 3,668 | 4,760 |
| Total ECJ | 22,008 | 28,560 |
| Recognition and Enforcement (Defense) | 2,000 | 4,000 |
| Total Defense | 2,000 | 4,000 |
| Total | 37,100 | 58,897 |

Table: Summary of Costs to be prepaid by Plaintiff for a cross-border proceeding in Austria

| Value | 50,000 | 200,000 |
|----------------------------------|---------------|----------------|
| Out of Court | 753 | 772 |
| 1st Instance | 8,905 | 15,500 |
| 2nd Instance | 3,620 | 7,055 |
| 3rd Instance | 3,482 | 7,770 |
| ECJ | 18,340 | 23,800 |
| Recognition & Enforcement | 2,000 | 4,000 |
| Total costs to be prepaid | 37,100 | 58,897 |

As the losing side would have to pay the winning side's lawyer's fees as well as his own, additional fees have to be added to the total figures:

Table: Defendant's costs in a cross-border proceeding in Austria

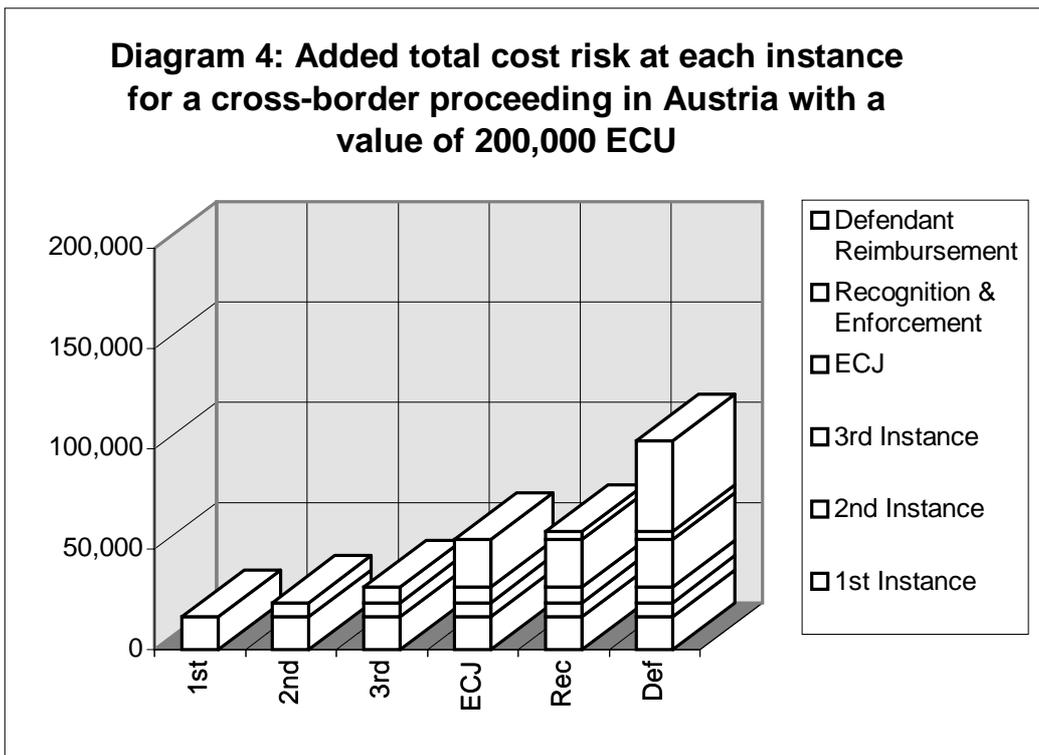
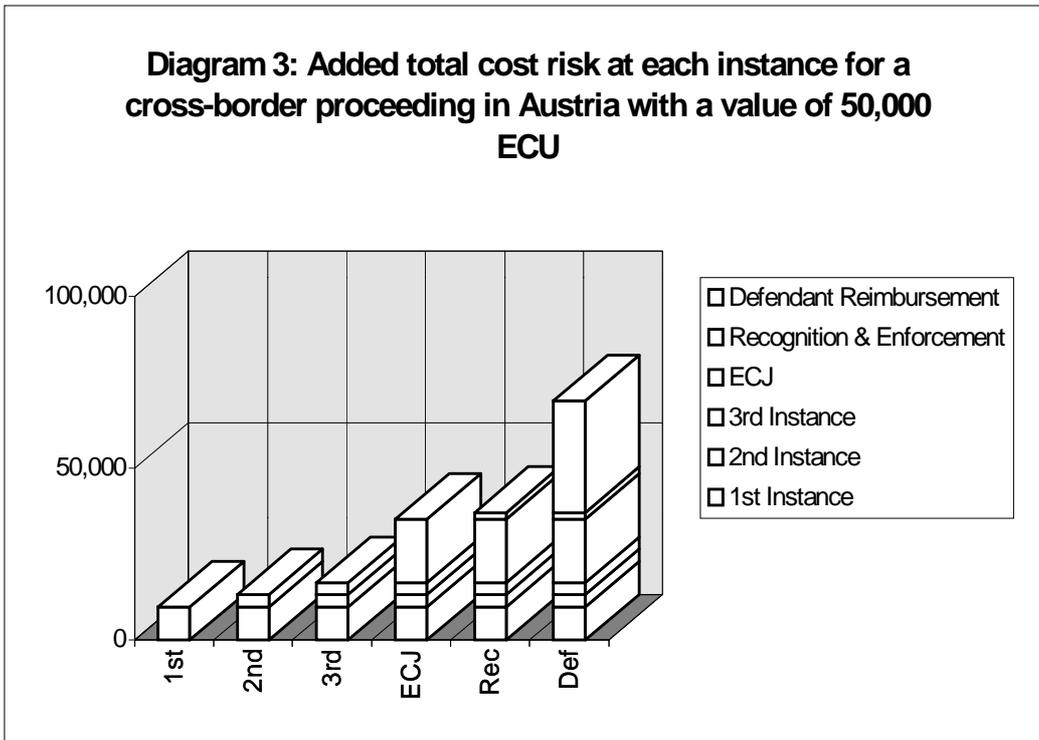
| Value | 50,000 | 200,000 |
|---|---------------|----------------|
| 1. Instance Defense | 575 | 1,050 |
| 1st hour, 1st day | 875 | 1,650 |
| 1st hour, 2nd day | 875 | 1,650 |
| 2nd+3rd hour | 875 | 1,650 |
| Total | 3,200 | 6,000 |
| + 20% VAT | 640 | 1,200 |
| 1st Instance Total | 3,840 | 7,200 |
| 2nd Instance | 2,190 | 2,760 |
| 2nd Instance Total | 2,190 | 2,760 |
| 3rd Instance | 1,572 | 2,040 |
| 3rd Instance Total | 1,572 | 2,040 |
| ECJ | 22,008 | 28,560 |
| ECJ Total | 22,008 | 28,560 |
| Preparation of Enforcement abroad | 100 | 116 |
| + 20% VAT | 20 | 23 |
| Proceeding for Recognition in Luxembourg | 1,250 | 1,950 |
| + 12% VAT | 150 | 234 |
| Execution/Enforcement in Luxembourg | 1,250 | 1,950 |
| + 12% VAT | 150 | 234 |
| Total costs for recognition and enforcement | 2,800 | 4,368 |
| Total Defendant's costs | 32,530 | 45,067 |

If all the above figures are added, they amount to the total risk that a party potentially has to bear for the outlined proceeding:

Table: Total risk of costs for a cross-border proceeding in Austria

| Value | 50,000 | 200,000 |
|-------------------|---------------|----------------|
| Plaintiff's costs | 37,100 | 58,897 |
| Defendant's costs | 32,530 | 45,067 |
| Sum | 69,630 | 103,964 |

The following diagrams, Diagram 3 and Diagram 4, put these figures into perspective with the value of the claim. The cost of each instance is shown as a block building up on each other. The final block contains the other side's legal fees with which the party is charged at the very end.



In addition to the above figures, money transfer costs would have to be paid, probably several times as the lawyer asks for a retainer and upon final payment after losing the case. Apparently there is no lawyer in Europe who accepts credit cards.

In extreme cases, appeals or even a further request for a preliminary ruling to the ECJ may take place during the recognition and/or enforcement proceeding again. Such procedure may be imaginable where questions arising out of an interpretation of the Brussels convention arise during that proceeding.

It appears that, even if the value in dispute is 50,000 ECU, is not unlikely that the cost of the proceeding exceed the value in dispute. A case which is heard in three or more instances including the ECJ, may happen and has happened, in fact.

In 1985 the German Supreme Court (*Bundesgerichtshof*) decided a case which, up to that time, had gone on for about nine years and was heard before 8 different courts and instances.¹⁵ The matter in dispute was the reimbursement of a loan debt by an Italian borrower who was sued by the German creditor in 1976. The issue was filed to the District Court of Munich which declared to have no international jurisdiction over the case. The plaintiff raised appeal to the Munich Court of Appeal which confirmed the first instance judgment. The creditor raised a cassation to the German Supreme Court which, in the year 1979, filed a request for preliminary ruling to the ECJ. Ten months later, due to its interpretation of art. 5 no. 1 Brussels Convention, the ECJ affirmed the international competence of the German court. Accordingly, the case had to be returned to the District Court of Munich. Now the court refused its jurisdiction with reference to art. 21 Brussels Convention. Again, the decision was appealed to the Court of Appeal which, in the year 1983, submitted a question on the interpretation of art. 21 Brussels Convention to the ECJ. This time the ECJ decided to the disadvantage of the creditor and the Court of Appeal finally dismissed the case because of not having jurisdiction under art. 21 Brussels Convention. The creditor filed a cassation to the Supreme Court arguing that the decision of the Court of Appeal would refer him to the Italian jurisdiction, where the case due to formal reasons would not be heard any more. Accordingly, the decision would leave him without any legal protection. The Supreme Court denied a lack of legal protection and the file was finally closed in the year 1985 without ever having been heard on the merits.

¹⁵ Zelger/Salinitri, a summary of the case is provided by: Rauscher, *Ausländische Rechthängigkeit und Rechtsschutzeinwand*, IPrax 1986, p. 275-277.

IV. The Use of International Conventions

1 The role of Conventions

Several international and European conventions exist with the aim to facilitate, accelerate and simplify cross-border legal interactions and dispute processing. Most notably, the Brussels/Lugano conventions on jurisdiction and enforcement of judgments within the European Union and the EFTA-states, the Hague Convention on the taking of evidence and discovery abroad in civil or commercial matters, the European Convention on information on foreign Law and the European Convention on the transmission of applications for legal aid have been ratified by all or most member states and are the most prominent conventions which would apply to the matters which are the subject of the study.

The working of these conventions may thus be an important factor in cross-border legal practice.

2 Ratification of Conventions Concerning Civil Proceedings

The *Brussels Convention* and the *Lugano Convention* are both in force in Belgium, Denmark, France, Germany, Greece, Ireland, Italy, The Netherlands, Luxembourg, Portugal, Spain, England/Wales, Scotland .

In the newly accessed member states Austria, Finland and Sweden, only the Lugano Convention is in force. The Brussels Convention is not yet in force but accession is under way.

The *Hague Convention on the taking of evidence and discovery abroad in civil or commercial matters of 18 March 1970* is in force in all member states, with the exclusion of Austria, Belgium, Greece and Ireland.

However, for some of these countries the taking of evidence and discovery in cross-border proceedings is effected via the Hague Convention 1954 or additional bilateral conventions.

The *European Convention on information on foreign Law of 7. June 1968* has been ratified by all member states with the exclusion of Ireland.

The *European Convention on the transmission of applications for legal aid of 27. January 1977* is in force in all member states except Germany.

3 Application of the Conventions

The following information is based on statistical data, interviews and short reports provided by different authorities, mainly ministries of justice, of all member states. As these authorities have the most practical knowledge about the execution and the application of international conventions, their impressions shall lead to a realistic analyse of the international legal practice within the EU. However, it must be taken into account that not all countries do collect the same kind of data and the practical knowledge of the respective officials may differ. The Danish *Ministry of Justice*, e.g., explains that it is not in the position to evaluate and draw conclusions of a general nature concerning the application of all conventions, because of the lack of statistical information and the small numbers of cases where registration is available. Therefore, this evaluation does not cover all proceedings in all member states that are effected under the aforementioned conventions. But it may give an idea about their general acceptance and point out a number of problems arising in legal practice.

3.1 The Brussels Convention and Lugano Convention

Both the conventions are considered as being quite usefull in practice. The German *Bundesministerium der Justiz*, e.g., designates the Brussels and the Lugano Convention as "the most important conventions regarding the civil proceeding that do exist. They are very usefull in practice and support both legal security and the speeding up of international litigation." The Irish *Department of Justice, Equality and Law Reform* states that the Brussels and Lugano Convention have made an important contribution to the cross-border recognition and enforcement of judgments. The Luxembourg *Parquet Général* considers the aforementioned conventions as a success and as "very usefull for cross-border litigation".

Since applications for recognition under these conventions are usually made to the different District Courts without notice being given to any central authority, most member states cannot provide statistical data about the application of the Brussels/Lugano Convention. However, in some countries the court administrations collect data about the application of the Brussels/Lugano Convention and can provide statistics of or, at least, general estimates.

Taken into account the very positive comments of the abovementioned ministries, it is surprising that in some member states the application of the conventions is quite limited:

Only 15 applications for recognition have been filed to Portuguese courts during 1997. By begin of December 1997, 13 of these judgments had already been recognized and declared as executable, the other cases were still pending.

The Spanish *Ministerio de Justicia* does not keep official statistics. However, due to informal information of the Ministry, in the years 1996 and 1997 the *Tribunal Supremo* has not dealt with any case in which one of the Conventions was applied.

Other countries, however, report that the conventions have a more important role in their legal practice. Though, it appears that in most of these cases the conventions are used to facilitate the "legal traffic" between countries which already had close commercial contacts or networks even before the Single European Market was invented.

Within the Nordic Alliance, *e.g.*, the Lugano Convention is applied quite often. In Sweden 122 applications for exequatur according to the Lugano Convention have been made in 1996. Another example is given by the Finnish authority which estimates that more than ten but less than one hundred applications are made each year, pointing out that most applications come from another nordic state.

However, due to the Finnish Ministry of Justice (Law Drafting Department) the Lugano Convention has not been considered all that successful when applied between the Nordic States. The reason for this is that the Lugano Convention did supersede the Nordic Judgment Convention of 1977, which among practitioners and responsible authorities was considered to work very well since the procedure was both swift and cheap. The problem with the Lugano Convention is the level of costs arising for the exequatur procedure. It is a necessity to use legal counsel in the country where recognition is sought and often also in the country where the judgment was given, and in addition to this there are the costs of translation of the needed documents and the costs of the court proceedings. The ministry states that "when the costs of the procedure are so excessive, it is only possible to enforce judgments concerning vast interests in another member state".

The President of the *Tribunal d'Arrondissement* of Luxembourg receives about 200 applications for recognition per year, which mainly come from France, Belgium and Germany.

The largest number of applications is reported from the *Lord Chancellor's Department*, London: on average about 500 judgments per year are registered by

courts in England and Wales. Yet, this amount can easily be explained by the fact that England/Wales, Northern-Ireland and Scotland use the Brussels Convention to facilitate "cross-border" proceedings within the U.K. itself; during 1995 out of 547 incoming applications for the recognition of a foreign judgment, 444 were filed by a Scottish or an Northern-Irish party. During 1996, 494 judgments were registered in total, including 393 applications from Scotland and Northern-Ireland.

Pointing to Ireland, it appears that the Convention is mainly used for cross-border claims involving U.K.-parties: Out of 33 applications for enforcement of foreign judgment filed in Ireland in 1997, 27 concerned U.K. judgments; in 1996 out of 35 applications 32 were filed by U.K. parties and 1995 the amount was 39 applications out of 47.

Obviously, the statistical informations of the national authorities do not support the theory that the Brussels and Lugano Convention are a decisive step for an European Single Market for trade and litigation. However, at least in regions where commercial and/or private contacts do already exist, as it is the case in the countries of the British islands or within the Nordic Alliance, the Conventions are applied quite frequently and are regarded as being very helpful in facilitating cross-border litigation.

3.2 The Hague Convention of 18 March 1970

As outlined above, the Hague Convention on the taking of evidence and discovery abroad in civil or commercial matters is in force in most of the EU-member states. Austria, which may be taken as an example for a state who has not ratified the convention, is party to the Hague Convention 1954 and has signed several additional bilateral conventions. Under these conventions, the treatment of an application for legal aid addressed to another EU-member state requires between 4 and 7 months. Yet, if the application is addressed to Portugal or Spain, a time frame of 1 to 1,5 years is realistic. Legal aid in interactions with Germany, Luxembourg, The Netherlands and Italy is exercised between the courts, directly. Generally, the Austrian Ministry of Justice considers the judicial cooperation between institutions of the EU-member states in this field as unproblematic. If in a single case a problem arises, it is usually resolved by direct contact to the ministry of justice of the relevant member state.

Also under the application of the Hague Convention on the taking of evidence and discovery abroad in civil or commercial matters the cooperation with Spain

seems to cause problems. The Finnish Ministry of Justice describes the experience in dealing with the other member states as positive, generally. However, it mentions that Spain is "a bit on the slow side" when handling applications concerning the service of documents and applications on taking of evidence and discovery abroad. It takes approximately 1 year before the request is met. The answers are always in Spanish, which does not speed up the procedure either. Therefore, the Ministry states that it would be preferable if at least the letter accompanying the answer would be in English.

The German Ministry of Justice simply states that the Hague Convention of 18 March 1970 is very useful.

Due to the information we received from several ministries of justice of the member states, the time frame for answering requests is about a few months, usually: in Denmark incoming requests under the 1970-Convention are usually processed within approximately two months. Also the Finnish ministry, which counted two outgoing and 15 incoming requests in 1997, estimates that they take approximately 2 months when incoming and 2 months when outgoing. The ministry states that the time handling these requests did not differ much between different member states, however, in the Southern Europe States the handling of the requests took more time than in other states. Additionally, the ministry explains that the reason why so few requests have been sent and received is that the co-operation in this field between the courts in the Nordic countries is not covered by this convention. Since the co-operation is informal and direct and takes place between the local courts and authorities, there are no statistics available. That may be considered as a further example that cross-border litigation still takes place mainly between European states that have traditionally been commercially and legally connected.

The Luxembourg central authority receives about 25 incoming requests per year, answers take about 4 or 5 months. For outgoing requests (about 4 or 5 per year) a duration of one year is indicated.

Not all member states are satisfied with the execution of the convention.

The Finnish Ministry of Justice states that, although the Hague Convention is considered being a successful convention and is of use in practice, it is not used more often due to the poor knowledge of its existence among judges in Finland.

The *Ministério da Justiça* of Portugal reports that, notwithstanding the frequent application of the convention, the duration of the enforcement of outgoing

requests is quite long: whereas the ministry estimates that the Portuguese courts need between 1 and 6 months for carrying through an incoming request, outgoing requests are usually done by the foreign authorities in times of up to a year. There are still pending outgoing requests which have been filed in 1987.

Also from England and Wales problems with the application of the Convention seem to arise. In the year 1995 270 incoming requests were processed by the London Supreme Court. In the years 1996 and 1997 (up to 16. December) 313 and 200 requests were processed, most of them being filed from Germany, Portugal and Spain. Round about 5-10% of requests are returned to the transmitting authority because they are incorrect (mainly from Spain and Portugal). The average time the Supreme Court takes to try a request - from date received to sending the evidence/deposition back - is approximately 4-5 months. The delay in processing such requests is due to a shortage of examiners. The Supreme Court reports that it only has 4 court appointed examiners for the London area. When evidence has to be taken outside of the London area it has to rely on district judges. There are only a few outgoing requests - in 1995 and 1996 only 7 and 9 requests, respectively, were processed by the court. For 1997 (up to 16. December) the court has processed 6 requests.

In Scotland during 1997 the *Crown Office*, as central authority under this Convention, received 14 requests to take evidence in Scotland to assist with proceedings in an EU country. Of those fourteen, eight related to family law and, accordingly, only six related to standard civil cases as follows: Austria: 1; Spain: 3; Germany: 1; Netherlands: 1. No statistics are kept by the Scottish Courts Administration regarding the time taken to process such requests. However, the Crown Office roughly estimates that it usually takes around two months to provide the evidence requested. No information is held concerning outgoing requests to other EU countries as these do not require to go through the central authority.

The number of requests sent and received under this Convention in Sweden have for the last year amounted to approximately fifty. Over the last year there has been noted a decrease in the number of requests sent and received under the Convention.

Though, it should be considered that in several countries no data are available as the transmission of applications is effected directly from court to court (*e.g.*, in the case of requests between France, Germany, Italy and Luxembourg).

3.3 European Convention on Information on Foreign Law of 7. June 1968

The European Convention on information on foreign Law is considered as being of "little practical importance" (*Bundesministerium der Justiz*, Germany).

Only the Finnish Ministry of Justice states that the Convention is of frequent use in practice, 26 requests have been sent and received during 1996 and 37 during 1997. However, this has to be led back not on civil proceedings but on situations when it is necessary to find out if a crime committed abroad is penalized in that country.

The modest practical role of the convention in civil matters is confirmed by the data provided from the other member states:

In Belgium within the last 24 years in total only 51 applications have been effected under this convention. Also the ministries of several other member states counted less than ten incoming and outgoing requests per year (Austria, Denmark, France, Luxembourg, Sweden, England and Wales).

Only the *Ufficio Legislativo* at the Ministry of Justice in Italy, reports to have received even about 150 to 200 requests per year. That is surprising as earlier empirical studies lead to the result that also in Italy the convention was applied only in a very few cases.¹⁶

As regards the Nordic countries (Sweden, Finland, Denmark), it must be considered, that this convention is not applied for interactions between these states, since information is transferred through informal channels.

As to the duration of answering a request, all ministries stated that, on average, they would need between 1 and 4 months, in extreme cases between 6 and 12 months for answering an incoming request.

3.4 European Convention on the Transmission of Applications for Legal Aid of 27. January 1977

The authorities of some member states which were asked for information about the application of this convention state that, as the European Convention on the transmission of applications for legal aid is rarely used, there is no practical

¹⁶ For further discussion and reference, see, Vial, Enzo: *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr - Eine rechtssoziologische Untersuchung* - (Diss. - Baden-Baden: Nomos, forthcoming 1998).

experience and that it does not play a constant major role in everyday legal practice (Denmark, Belgium).

As far as statistics are provided, they confirm that the use of the convention is not overwhelming:

In Belgium, from 1992 to 1997, in total 43 incoming and 26 outgoing applications from and to EU-member states were treated by the Ministry of Justice.

In Austria under this convention round about 3 incoming and 3 outgoing applications are treated each year.

In Finland, there are approximately 1 to 3 requests sent and received every year.

In France in 1997, 23 incoming and 23 outgoing applications were filed under this convention.

In Luxembourg, mainly from U.K. and France, about 20 requests for legal aid are received per year.

In Portugal, the amount of the incoming and outgoing requests was 6 in 1996 and 3 in 1997.

In Sweden the number of requests sent and received under this Convention is below ten.

The data from Ireland confirms that, as under the abovementioned conventions, the Strasbourg Agreement is mainly used to facilitate cross-border interactions between Ireland and the United Kingdom: during the year 1997, 31 incoming applications were received, mainly from the U.K. (28). In 1996 the amount was 10 applications including 9 from the U.K.; in 1995 the amount was 40, including 32 applications from the U.K.

In Scotland for this convention the Scottish *Legal Aid Board* is the designated receiving and transmitting authority under this Convention. The Board has not yet received any incoming application from a member state. In 1997 one outgoing application has been dealt with (going to Ireland, regarding an executory dispute), the same in 1998 (going to France, regarding a capital sum claim). In the year 1996 four outgoing applications were made, all regarding family law.

An interesting conclusion is drawn by the Finnish Ministry of Justice. The Ministry states that the European Convention on transmission of applications for legal aid is not often used, since persons who benefit from legal aid seldom have international connections. Obviously, the consumer who does any shopping in another member state is not yet noticed as a recognizable value in the statistics.

On the time frame, the member states give the following information:

An Austrian court needs 1 or 2 months for the treatment of an application. An outgoing application (mainly addressed to United Kingdom, Ireland and France) usually requires between four and six months. Requests are usually processed within a week.

The time handling the incoming and outgoing requests in Finland is approximately 1 month.

The Irish *Department of Justice, Equality and Law Reform* only states that the length of time taken to process applications can vary depending on such factors as financial eligibility, accompanying documentation and the nature of the case in hand. In general, cases dealing with family law matters are prioritised and processed in a shorter time span.

It must be considered that these time frames are mainly provided by the executing authorities themselves, so cases that took an extraordinary long time or that have even not been executed at all may have been omitted.

As to the Scottish *Legal Aid Board*, e.g., the figures given above, show that most applications have been sent to France. The Board reports that French authorities indicated that applications would be dealt with in 3 to 4 months but the Scottish *Legal Aid Board's* impression was that they take considerably longer in practice.

However, a more precise picture of the practical execution of the convention may be drawn by the report of the *Legal Aid Board - Policy and Legal Department* - of England and Wales. The Board tries applications under the *Convention on the transmission of applications for legal aid* and provided us with descriptions of several applications it filed or received in its practice. As these descriptions point on the individual cases and demonstrate what may happen to a single consumer who finds himself in the situation to face all the practical problems and the bureaucracy of the public offices in two member states, these examples tell more than any statistic.

Receiving country:

| | |
|----------|---|
| Portugal | Delay from October 1993 to September 1995, outcome unclear. Included confusion about details of receiving authority. |
| Portugal | Delay from February 1995 to January 1996 at which point an amended application form was sent for completion. Again this included confusion over the receiving authority and includes correspondence indicating that the Portugese authorities had had a meeting to decide who was to deal with such applications to Portugal! |
| Spain | Delay from June 1994 to June 1995 when a lawyer was appointed. In September 1995 the English solicitor complained that the Spanish lawyer nominated in June had not contacted him or his client and that he had been unable to obtain a response from them. |
| France | Delay from December 1993 to late October 1994 when legal aid was eventually granted This applicant suffered from a disability and was represented here by the Official Solicitor. |
| Spain | Delay from June 1992 to May 1993 when legal aid was granted The nominated lawyer then indicated that he could not deal with the case and in January 1995 another lawyer was eventually appointed. Difficulties appear to have been that the court had to appoint a lawyer and the lawyer first appointed renounced the appointment. The appointment of the second lawyer then took time to organise. The difficulty is the dependence of the Ministry of Justice on the local courts who actually make the decisions. |
| France | This application was speedily handled it was passed to France in early June 1995 and legal aid was granted on 6 July. Strangely, however the French authorities nominated the firm of solicitors in Aylesbury who had sent the application in. The firm then dealt directly with France and we do not know how the case ended. A one off? |
| Denmark | Delay from 12 July 1994 to 28 April 1995 when the application was refused on the merits. This was upheld on an appeal, the outcome of which was notified on 1 November 1995. |
| Belgium | Application forwarded to the Belgian receiving authority on 25 September 1995 and returned on 27 September 1995, indicating that the application should be sent to the relevant local authority. |

This was done and on 11 January a lawyer in the relevant Belgian town confirmed that she had been nominated. The return of this application for us to forward was in breach of Belgium's obligations.

- Belgium Application transmitted 31 December 1992. Acknowledgement and enquiry letter dated 16 March 1993 followed by a notification dated 8 July 1993 that it had been forwarded to the relevant geographical area followed by a letter dated 22 November 1993 indicating that the enclosures had become separated and the application could not be processed. The application was re-sent on 17 December 1993 and acknowledged on 27 April 1994. It was only on 7 February 1995 that Belgium indicated that a lawyer had actually been nominated in July 1993 and had done work on behalf of the assisted person it appears that this was done without legal aid ever being granted and after correspondence with the solicitors we informed Belgium that they could close their file.
- Greece Application sent to Greece on 27 August 1992 followed by a means assessment on 24 September 1992. Four reminders eventually prompted a letter dated 12 October 1993 indicating that the application had been received and sent to "the competent Greek authorities". The letter referred to an "obstacle" concerning the handling of cases under the Agreement having been removed. Three reminders were not replied to and finally on 23 October 1995 a letter dated 24 August 1995 was received. This was in Greek and after a chaser the solicitors involved indicated that the applicant had decided to "abandon the claim" after having received "no response from the Greek Authorities".
- Spain Application received 27 January 1995 and transmitted 14 March 1995. On 19 April the Spanish Authorities indicated that the application had not been processed and was awaiting translation into Spanish. Despite a reminder in October 1995, nothing had been heard by 24 January when a further reminder was sent, which crossed with a letter from Spain dated 23 January which, although it quoted our reference, related to a different client - the Spanish had allocated the same reference number to two separate applications and we discovered that an enquiry letter had been sent on 19 October indicating that further information was required. On 14 February 1996, however, Spain indicated that the relevant documents had been sent to the particular court on 2 February 1996. On 1 April following a chaser, a letter was received from Spain indicating that a lawyer had been appointed on 8 February 1996 and a

letter was sent to us confirming this on 9 February 1996. The letter of 9 February 1996 is not on our file.

- Spain This application was first forwarded to Spain on 8 August 1989 and the application was not dealt with until 5 August 1991 when a lawyer was nominated. The assisted person travelled to Spain to see the lawyer and then heard nothing from him. By May 1992 Spain was indicating that the lawyer had given up the case and that they were considering nominating another lawyer. In October 1993 another lawyer was finally appointed but the case did not end happily because somewhere along the line the applicant's documents appeared to have been at lost or at least were not passed to the new lawyer, so that by May 1995 she was asking how the case could be taken forward. Her letter was forwarded to Spain and no reply was ever received. She was an elderly lady involved in a property dispute and presumably she gave up. Our file was closed six years after it had been opened.
- Italy Application transmitted 17 September 1992. Legal aid granted 26 May 1994. The lawyer nominated was however retiring and did not wish to take on the case. It was only on 19 May 1995 that another lawyer was nominated - nearly 3 years after the original application had been transmitted.
- Greece Application transmitted 15 June 1993. Means assessment forwarded 25 August 1993. Acknowledgment dated 12 October 1993 referring to "the obstacle concerning the delegation of cases" under the Strasbourg Agreement having been removed. Two chasers in April 1994 and September 1994 were ignored and a letter dated 20 August 1995 then received, effectively indicating that insufficient information on the merits had been provided. The applicant did not pursue the application by providing further information.
- France Application transmitted February 1995 and then rejected for a means form to be completed. The application was then acknowledged in May 1995 and the solicitors then indicated that they had been dealing with the French authorities direct who had referred them to a particular firm of lawyers who had then failed to deal with letters, faxes and telephone calls. In January 1996, the English solicitors indicated that a new French lawyer had been appointed by the local court, although the French authorities never came back to us regarding the outcome of the applications at all.
- Spain It took from mid-1989 to mid-1991 to obtain legal aid and thereafter the nominated lawyer failed to respond to letters sent

by the assisted person. It is not clear to what extent a new lawyer was appointed but the assisted person's application to the court for enforcement of an ancillary relief order was then rejected as not being "properly formulated". The Spanish authority then indicated that the assisted person had failed to provide the original court order for enforcement (which she denied) pointing out that of 118 applications under the Strasbourg agreement received by Spain 96 came from England and they had only sent us 2! They also stressed that the relationship between the lawyer and the client was not a matter for them under the Strasbourg Agreement.

France Application forwarded to France in March 1995. After much toing and froing regarding confirmation of receipt of income support we were notified on 4 January 1996 that the case had been passed to the relevant court and on 15 January 1996 we were informed that legal aid had been granted on 22 September 1995!

Spain Application forwarded 29 March 1993. It appears that we were only notified of the grant of legal aid in March 1996. Admittedly the applicant had withdrawn and then reinstated her application but nonetheless there was an unacceptable delay.

Spain Application transmitted July 1994. Legal aid granted February 1995 but in November 1995 the client's English solicitors indicated that they had written to the nominated lawyer in Spain on 5 occasions but could not get any response. Spain was notified but then our file was closed.

Spain Application transmitted Nov 1994. Granted reasonably smoothly in July 1995. This kind of timescale seems typical for Spain (at best).

Spain Application transmitted Nov 1994 but not granted until January 1996. There is no obvious reason for the long delay although it appears that the application was only sent to the relevant court from the Ministry of Justice in May 1995.

As a general commentary the Legal Aid Board states as follows:

We consider that the Strasbourg Agreement is of little practical use in relation to incoming applications, given the availability of green form legal advice and assistance to both non-nationals and non-residents as well as the large number of firms in England and Wales who undertake civil legal aid and are familiar with its availability.

So far as outgoing applications are concerned the existence of the Agreement tends to some extent raise the expectation of applicants that they will obtain legal aid abroad - that is often not so.

Applicants are also disappointed in the time which it takes for an application to be processed and the fact that the Board is only obliged to transmit the application and cannot necessarily assist applicants beyond that. The Council of Europe has tried to set up a system to exchange information between signatories regarding their own legal aid systems as well as to arrange for urgent applications to be dealt with as quickly as possible but these initiatives have been of limited success.

If an applicant to or for an authority is actually successful in obtaining legal aid abroad, it is clear that there are remaining obstacles which may make the grant of legal aid "hollow". This will depend on the local legal system and legal aid system but it is generally the case that the assisted person and the lawyer assigned will not speak the same language, any legal aid granted will not cover translation costs (even if interpreting costs of any final hearing are covered) and on this basis it is quite likely that the assisted person and the lawyer will be unable to communicate. Furthermore, the systems of other member states do not generally recognise the concept of agency and it is not possible therefore for someone in England and Wales to take instructions from the client and liaise as between the client and the foreign lawyer or indeed to undertake other work on behalf of the foreign lawyer.

These particular difficulties have been experienced with Spain which receives the largest number of applications from England and Wales and although the Council of Europe has tried to encourage the assignment of a lawyer who speaks the client's language, we are sure that you will appreciate that this is not without problem. This may be because the Receiving Authority is not responsible for actually dealing with the legal aid position and cannot require any such assignment, as well as because a foreign speaking lawyer simply may not be available. Similar difficulties arise where the nominated lawyer fails to deal with the case - any ongoing difficulties after the grant of legal aid abroad are not covered by the Strasbourg Agreement and again the Receiving Authority does not have control over the position.

We are aware from meetings previously held by the Council of Europe that England and Spain are the main users of the Agreement and that this is in the form of applications being sent from England and Wales to Spain. We are also aware that the Spanish Ministry of Justice finds it difficult to appreciate that

Spanish nationals and residents can have the benefit of civil legal aid in England and Wales without recourse to the Agreement when the Ministry itself receives a number of applications transmitted from the Board which appear to create a dis-proportionate amount of work and difficulty.

The Hague Convention on taking evidence/discovery and the European Convention on information on foreign law are of relevance in relation to the extent to which cases can effectively be taken forward abroad, in the event that foreign legal aid is actually granted.

It should be noted that the Spanish *Ministerio de Justicia* did not report any problems with the applications of international conventions. Notwithstanding official statistics do not exist, the Ministry considers the practice of international civil litigation between parties of the EU member states as being positive.

4 Commentary on the Convention's Use in General

The Finnish Ministry of Justice outlines that, concerning the use of some international conventions, it was apparent that the use of standard forms would be of help in the situations where applications are written in a foreign language.

Furthermore, considering the problems that arise in the practice of the execution of the abovementioned conventions, the ministry draws the following conclusions:

One area where improvements should be made is the enforcement of judgments. It is impossible to enforce modest money claims in another Member State the way things are now. The enforcement procedure should be made more simple and less expensive and be brought to the reach of ordinary people.

A possibility for a summary proceeding for simple cases concerning debt collection or/and cases that are undisputed by the defendant should be made available throughout Europe. This would also lower the costs for the litigation.

In respect of European Convention on the transmission of applications for legal aid, the following information has been supplied by the Scottish Courts Administration:

The Scottish Legal Aid Board participates in the multi-lateral Committee on the Convention along with UK colleagues and representatives from other member states. The Committee reports

to the Committee of Ministers of the Council of Europe and holds bi-annual meetings. At the last meeting of the Committee, the Scottish Legal Aid Board aired concerns over the length of time taken to determine applications and the lack of progress reports. The main concern is perhaps not so much the overall time taken to determine applications but rather the need to address quickly those cases in which there is some urgency either because of the nature of the case, for instance, time bar or custody or because of an impending court diet in the foreign jurisdiction. Acting as the central authority under this Convention as a post-box, they are also met with numerous requests for progress reports from applicants. This is something which is still lacking under the system. It was agreed at the meeting that applications should be dealt with within a reasonable timescale. No specific timescale was however stated.

The Scottish Legal Aid Board experience has been that the *Convention on the Transmission of Applications for Legal Aid* has been a success by and large. It provides a mechanism by which the applicant can obtain access to the legal aid system of the foreign jurisdiction without the necessity of passing through several agencies at home and abroad.

For the agreement to operate effectively, a number of issues still need to be addressed. These may be summarised as follows:

All member states should ratify the Convention. The Scottish Legal Aid Board receive a number of requests each year to deal with applications to Germany. It is understood that while the Federal Government is willing to ratify the agreement, it has yet to persuade the *Länder*.

The issue of reservations can also create barriers. For instance, the insistence by certain members that applications are submitted in the language of the receiving state can radically slow down the making of an initial applications. This in turn creates difficulties where there is a degree of urgency involved in the particular case. If a reservation to this effect is not to be withdrawn, then at least the receiving state should recognise that in certain circumstances it may not be possible to make an original application in the language of the receiving state where there is for instance some urgency. This is the approach which is adopted by France but Portugal has, it is understood, still retained its reservation. The Scottish Legal Aid Board have no difficulty with receiving an application in a foreign language.

Communications between central authorities can also create barriers. There are three distinct concerns here. The first is the

translation of documents to accompany applications for legal aid. The second is the translation of documents needed for the conduct of the case itself. The third is interpretation of communications between client and lawyer in the home country. Of these, the first is really the only one which affects the application of the Convention directly. This difficulty arises where, as alluded to above, the receiving state has a language reservation in place. There needs to be flexibility in approach. As regards the other situations these are matters properly for the state in which the action is raised. The home based legal aid administration should not have to expect to meet the costs of the translation of documents necessary to conduct the case in the foreign jurisdiction nor to cover the costs of interpreting communications received from the foreign jurisdiction concerning the conduct of the case itself.

Although there is now a mechanism to deal with urgent cases under the Convention, there is still a need to have an end stop placed on the length of time it takes to determine an application. If within the individual case that timescale cannot be met, then it would be a simple process for the foreign jurisdiction to explain why that is the case so that the applicant could be kept fully informed. Likewise, there needs to be a regular system of progress reports to enable the central authority to advise the applicant what is happening with his application.

The practical Guide to Legal Aid in Europe which has been produced by the Secretariat to the Multi-Lateral Committee and also the Guide to Legal Aid in the European Economic Area produced by the European Commission have greatly assisted in the dissemination of information relating to the individual legal aid systems. If this is to be of any effect however there needs to be greater awareness within the individual member states of the existence and operation of the transmission Convention. It needs to have a much higher profile.

The operation of the agreement is only as good as the legal aid systems which are in place within the individual member states. Anything which can be done to speed up the determination process should be supported. For instance, it is understood that in so far as the legislation affecting legal aid in Spain is concerned, there has been a transfer of the handling of applications of legal aid from the courts to a central agency in the Ministry of Justice.

If the application of the agreement is not to lose its credibility it is essential that applications are seen to be dealt with as quickly as possible, in a quality way and with regular progress reports made.

Comparing these statements with the data described above, it becomes clear that, although the most important international conventions concerning the civil proceeding are known and are - more or less - applied by the member states, there are still significant problems arising in practice. The statements of the different national authorities lead to the result that in many cases the effectiveness of the convention is hindered by organizational problems of the member states or by language problems. Some of these problems may be attributed to the bureaucracy or to the high workload of national public authorities, thus they are in the responsibility of the autonomous legal administration of the respective member states and may only be solved by the states themselves. Although, a little outside pressure might help.

As far as language problems are concerned, it is striking that while the Finnish ministry complains about applications being formulated in foreign languages which causes a delay of time, the Scottish Legal Board states that the insistence on the applications to be submitted in the language of the receiving state could radically slow down the making of an application. Thus, the proposal of the Finnish Ministry of Justice regarding the use of standard forms appears to be a good solution. Standard forms for applications under several conventions may be introduced by the EU and could reduce the workload of the national public authorities and speed up international proceedings significantly. Whereas the EU could only prescribe or recommend such forms to be accepted among the member states and not with regard to non-EU signatories, there is no rule against adopting individual measures under any of those conventions. It may validly be assumed that a good example would be followed by many of the other signatories as well.

Finally, it should be noted that, whereas several of the ministries regard the Brussels / Lugano Convention as being very successful (which is confirmed by telephone interviews with lawyers), no proof could be found that the convention is a decisive step to a conquest of the frontiers between different legal systems and to the creation of a *Single Litigation Market* in Europe. Rather, the convention is used mainly within already existing legal networks. Even here, it is criticized that it would be still impossible to enforce claims of a small value because of the high costs arising thereof.

Part C: Special Reports

I. Shortened Civil Procedure for Consumers in Denmark? (Birgit Feldtmann)¹⁷

1 Introduction

As in many other member states of the European Union, the issue of the access to civil litigation and its limitations within the existing system of justice is of a general interest in Denmark. Denmark can be described as being in a phase of creating and discussing new ways of dealing with civil legal conflicts; at the same time the restrictions and the difficulties of such an attempt can be observed by examining the Danish example.

The following chapter will illustrate and analyse the recent discussion and innovations in Denmark. On a first view it might raise the question of the use for subject of this study, especially because the activities in Denmark focus on "smaller claims" and on the solutions to problems of first instance proceedings. Nevertheless the Danish experience should be valuable in the context of the study, not only because it raises issues of general interest concerning civil litigation, but also because the problems concerned and the innovations designed to take action towards better *access to justice* are relevant for the European context and the task aimed at with this study.

Furthermore it could be used as an example for the difficulties of the member states in finding useful and functioning means to ensure the persons involved an effective, affordable and useful resolution to civil conflicts.

This struggle for a efficient system of justice for civil cases focuses very much on national conflicts and its solutions, nevertheless there is no doubt that these activities of the member states will have its direct input on all kinds of conflicts, cross-border or not, and will influence the construction of a functioning system of civil conflict resolution within the European Union.

17 Staff author.

2 Recent plans to Improve Civil Procedures

The present Danish Minister of Justice, Mr. Frank Jensen, described the reformation of the legal system in Denmark as a major obligation:¹⁸ Concerning civil cases the decline of the number of cases brought to the courts shows that the system of civil litigation is not "user-friendly" for the individual who wishes to settle a civil conflict. It was formulated in Denmark that the legal system works too slowly and there is a tendency towards distrust in the efficiency of the means to solve legal conflicts within the justice system.

In this context the Minister of Justice described recent activities on this issue in Denmark, with new rules already implemented in legal practice as well as draft laws, which are in the process of being discussed, as major means towards a better functioning legal system for civil conflicts, resulting in what he calls a "silent revolution" of the legal system.

The analysis of the Minister concerning a declining use of the legal system to deal with civil conflicts can be illustrated by the official Danish Court Statistics, which shows for the last 4 years a falling number of civil cases dealt with by the courts, especially concerning first instance proceedings.

¹⁸ So recently at a public hearing at the Law Faculty of the University of Århus (on 10.02.1998), where he explained his policy concerning "*Retssystemets reformering - en aktuel debat om retssystemets fremtidige struktur*" (The Reformation of the Legal System - An Actual Debate on the Structure of the Legal System in the Future) (hereinafter: "*Århus, 10.02.1998*").

Civil Justice in Denmark: Cases concluded in courts 1993 -1996¹⁹

| | 1993 | 1994 | 1995 | 1996 |
|--|----------------|----------------|----------------|----------------|
| Cases concluded in courts of First Instance | 130,971 | 114,463 | 106,395 | 100,535 |
| of those: cases with a declared value in dispute | | | | |
| - up to 100,000 Dkr | 112,458 | 95,123 | 8,7028 | 82,057 |
| - 100,000 - 200,000 Dkr | 3,470 | 3,269 | 3,252 | 3,030 |
| - 200,000 - 500,000 Dkr | 1,919 | 1,938 | 1,667 | 1,537 |
| - more than 500,000 Dkr | 576 | 489 | 430 | 417 |
| Cases concluded in Appellate Courts | 5,505 | 5,583 | 5,329 | 5,194 |
| of those dealt with by | | | | |
| - østre Landsret | 2,616 | 2,710 | 2,716 | 2,489 |
| - Vestre Landsret | 2,602 | 2,555 | 2,317 | 2,316 |
| - Højesteret | 287 | 318 | 296 | 389 |
| Total | 136,476 | 120,046 | 111,724 | 105,729 |

Between 1993 and 1996, a decline in the number of cases decided by the courts of first instance of about 23% can be observed. The decline is even slightly higher concerning cases with a smaller value in dispute (up to 13,260 ECU), here the number of concluded cases went from 112,458 (1993) down to 82,057 (1996), which is a decline of 27% .

Concerning decisions of appellate courts the tendency is less clear, nevertheless it can be observed that at least cases of appeal at Courts of Appeal (*østre landsret* and *venstre landsret*) have also the general tendency of a decline.

For the Danish Supreme Court (*højesteret*) the situation is different, the figures remain inconclusive.

This generally falling number of decided civil cases in courts could have several reasons, *e.g.* longer periods to proceed the individual case, but it is in fact connected with the observation that there are actually less cases being instituted in court. The explanation of this reduced use of courts in civil conflicts is seen in

Denmark in the individuals and the professionals decision not to lodge a claim in court even if they could choose to do so.²⁰

This presumption is, besides other aspects like the length of proceedings and costs, the main assumption for recent discussions and law reforms in Denmark.

2.1 Speeding up of Civil Court Proceedings

In June 1997 the Danish Administration of Justice Act (*retsplejelov*) was changed with the aim to give the courts better means to speed up civil proceedings²¹. The amendments, which came into force on 1. July 1997 consisted of the following:

- possibilities to amend the claim at a later stage in the proceedings were reduced;
- possibilities to stay the proceedings were reduced;
- parties may be required to submit final statements of claim at a certain time before the trial;
- a party who fails to submit a written statement or, on appeal, supporting documents within a time limit set by the court will be considered to be in default;
- possibilities to allow a party in default additional time to remedy the failure were reduced;
- a special preparatory meeting with a view to make clear the dispute between the parties and plan the further proceedings in the case will be held in more cases; and
- judgment must be given within certain time limits after the end of the trial.

²⁰ See: Småsagsudvalgets betænkning, betænkning nr. 1341/1997, page 39; this study of the *Commission on Small-Claims* is the basis for the current discussion on the treatment of those cases (hereinafter: "*betænkning 1341/1997*").

²¹ Lov nr. 414 of 10. juni 1997.

The amendments are generally directed towards sharper time frames and less possibilities to stay the civil proceedings, which can be summarised as a *concentration of the civil procedure*²².

This change of the law was the result of a process of evaluation and discussion in which lawyers as well as judges played a major role and prepared a the draft, which to a wide extent is the basis for the new rules.

2.2 The Chance of the System of Instances

In November 1997, the permanent commission on procedural law (*retsplejerådet*) published a report on the system of instances in civil cases with suggestions concerning the competences of the various instances.²³

The main aspects of the commissions proposals include:

- raising the threshold value from 66,418 ECU to 132,837 ECU for starting a case at first instance at the Court of Appeal (*Landsret*);
- raising the threshold value from 13,283 ECU to 66,418 ECU for cases concerning a maritime or commercial issue starting at the Copenhagen Maritime and Commercial Court (*Sø- og Handelsretten*); and
- the restriction of appeals (*kære*) to the highest Danish court, Supreme Court (*Højesteret*), to ensure that mainly cases of *general interest / principle character* are reviewed by this court.

The commission on procedural law was asked by the ministry of justice to focus on civil procedure in Denmark and to make suggestions concerning the system of instances. The following report (*betænkning* 1348/1997) was distributed to interested authorities, institutions and associations for comments. In the

²² This term was used by the Advokatrådet (Danish Lawyers Council) in its official statement to the Ministry of Justice concerning the small claims procedure from 15. December 1997, page 2 (hereinafter: "*Advokatsrådets Statement, 15.12.1997*").

²³ Retplejerådet (eds.), *Betænkning om instansordningen i civile retssager* (report on the system of instances in civil cases), *betænkning* nr. 1348/1997; (hereinafter: "*betænkning 1348/1997*").

meantime the commission's proposals were transferred to a draft law edited by the ministry of justice.²⁴

2.3 Other Activities of Reform to the (Civil) Litigation System

Besides the described activities to reform the civil litigation system, various other aspects of the legal system are under a review. One example is the recruiting of judges and the creation of more independence, *e.g.*, financially, of the different courts.

Another issue of importance is the reform of the court structure. Here the suggestion to cut down the 82 judicial districts into fewer larger districts has been made and was widely criticised in the public.²⁵ The current situation results in that there are 82 District Courts (*byret*), meaning that there is one in every city / village of a certain importance / size. A reduction in the number of judicial districts would result in longer distances - geographically - for the individuals to the legal system.

The argumentation for a reduction focuses on the need of qualified and experienced judges and professionals, with the assumption that in smaller judicial districts with less cases such a situation might not occur. In this context the argumentation concludes that fewer but more concentrated courts will lead to a higher competence and therefore will be able to proceed faster and more competent.²⁶

On the other hand, experts warn against a move of the legal system away from the people's places of residence. A move away of some of the District Courts might result in a move away by the legal professionals, *e.g.* lawyers, to the places where the courts are.²⁷ If this were true, it would also result in more difficult access to justice. The individual has a larger distance to obtain legal advice, plus that in general the concentration of courts in fewer places creates the danger of a

²⁴ The draft law can be found (in Danish) on the internet; homepage of the Danish Parliament (*Folketing*); sub <http://www.folketing.dk>, April 10, 1998.

²⁵ See, for example, the newspaper *Politiken*, 16.03.1998, page 2 (1. sektion).

²⁶ See, also, Århus, 10.02.1998.

²⁷ See *Politiken*, 16.03.1998, page 2 (1. sektion), with the example of the small judicial district Vordingborg, which is likely to be integrated into a larger one, if the proposals will be transferred into practice.

general manifestation of a distance between the single individual and the legal system.

Opposite to such a movement, the importance of an easy access to justice for individuals is pointed out as an important aim of the reform of the legal system in Denmark. This aim is especially formulated in connection with the so called small-claims-procedure (*småsagsprocessen*), which was proposed in a report of the commission on Small-Claims (*småsagsudvalget*)²⁸ and has been discussed controversially ever since it was first published.

Following these proposals will be described and discussed, focussing on the question if this procedure could be an example for a useful procedure concerning consumer claims or if it would result in a restriction and in a cut down of legal security and of rights of the weakest participants in the legal system.

3 The Small Claims Procedure

The commission on small claims was established in December 1994 by the ministry of justice with the aim to study the possibilities to establish an easier proceeding for small claims, which will give the individuals an easy, fast and cheap access to justice concerning minor everyday civil conflicts. Furthermore the commission was asked to review the system of legal aid, especially concerning minor cases, and the system of enforcement. Also the need and the form of legal advice in smaller conflicts was an issue, as well as the question of means to ensure that a new created small claims procedure will be within the demands of legal security, and the rule of law.²⁹

The issue of cross-border claims within the European Union was not part of the commission's focus. The report points out that in connection with Denmark's participation in the European Union the legal settlement of cross-border conflicts is a major obligation and furthermore the report refers to the *Green paper on the Access of Consumers to Justice and the Resolution of Disputes by Consumers in the Single Market*,³⁰ and the activities of the European Commission to achieve a better position for consumers in cross-border legal conflicts. Nevertheless, the report points out, that this issue was not part of the work and the proposals of the

28 See betænkning 1341/1997.

29 Betænkning 1341/1997, page 29 f.

30 COM (93) 576 final of 16 November 1993.

commission, at the same time it stresses the point that an improvement of the national civil procedure and a reduction of cost will reduce difficulties as well as far as cross-border conflicts as concerned.³¹

The commission consisted of different professionals in the legal field. In addition to persons connected to the ministry of justice, various practitioners, such as judges, lawyers and representatives of consumer associations and other interest groups, were part of the commission as well as academics. The commission started its work in February 1995. *Inter alia*, some of the members went on study tours, particularly to Sweden and England, to gather information and inspiration from other systems of civil litigation.³² In 1997 the commission finished its work with the publication of the report, which includes specific suggestions concerning new forms of proceedings.

3.1 The Suggestions of the Commission

The suggestions of the commission on small claims which are described and explained in a report of nearly 700 pages contain the following main aspects:

- the introduction of a new simplified *small claims procedure* (*småsagsprocessen*);
- a simplified and more effective procedure for enforcement;
- better devices for settling civil cases;
- better access to legal aid before a cases is brought to court;
- better co-ordination between court proceedings and institutions offering legal aid (*retshjælp*); and
- specific changes in the system of legal aid and insurance of costs brought about by court proceedings.

Concerning the results of the work of the commission and the following proposals the members of the commission did not always agree. The report contains several information on the fact that some of the proposals were decided

31 Betænkning 1341/1997, page 87 ff.

32 Betænkning 1341/1997, page 30 ff.

by majority only and at some points alternative suggestions made by some of its members are described.³³

This controversy about the results of the work of the commission continued after the publishing of the report and its distribution to interested groups and organisations. Especially the proposal concerning the small claims procedure provoked criticism and became a major issue of interest in the media.

3.2 The Proposals Concerning Small Claims Procedures³⁴

The proposal on the small claims procedure has its starting point in the assumption that the civil procedure, especially concerning the citizens' access to justice in what can be called "everyday cases", is too complicated, too slow and too expensive.³⁵

The means which are seen by the commission to react to this assumed situation are a general modernisation of the rules concerning civil procedure, an improvement concerning the existent offers on legal advice and finally the introduction of the small claims procedure.

The small claims procedure is a special type of proceeding which is designed for less complicated civil disputes, typically involving citizens / consumers as one part. It is designed as a new form of proceeding outside the existing system of civil litigation - but within the court system - , with a new concept of dealing with civil conflicts within the system of justice:

- The majority of the commission suggests that this type of civil proceedings should be restricted to claims which usually would be initiated at the District Court (*byret*), with an economic value of 20,000 Dkr.(2,658 ECU). Claims in connection with real estate should be generally excluded from this type of proceeding independent of the economic value of the conflict concerned.
- For other cases it is suggested that the parties can agree on the use of the small claims procedure even if it would be a case of ordinary civil litigation.

33 See the introduction with a summary of the proposals, betænkning 1341/1997, page 32 ff.

34 chapter 9 of the report; betænkning 1341/1997, page 181 ff.

35 Betænkning 1341/1997, page 181.

- The majority of the commission suggests that the court dealing with small claims should be able to transfer the case to an ordinary proceeding on one of the parties' request. The minority suggested such a procedure even without the request of one of the parties.
- To initiate the proceeding, for the summons and complaint and for the first response standard forms should be introduced.
- The role of the judge should be changed towards a larger obligation to inform and to advise the parties (without a lawyer). This includes the continuing information on the facts and the legal background of the case, resulting in the obligation to inform a party on the need to comment specific questions or legal issues.
- The court should have more responsibility to lead the cases with respect to the major obligation to proceed in a way which makes *lawyers unnecessary*. In this connection it is also suggested to establish an office at the District Courts to provide the "users" of the courts a better service.
- The suggestion to prohibit lawyers from this type of civil litigation did not become part of the proposal, nevertheless it is clear that the major direction of the commission's statement leads to a "*lawyer-free procedure*". In this connection the commission majority suggested that the recovery of lawyers fees - not concerning fees resulting from information and advice up to 200 ECU including VAT - should not be possible in cases of a successful claim.
- In this connection it is proposed that the appointment of a lawyer by the court for one of the parties will be restricted to very few cases only when it is clear that one of the parts is not able to proceed without help.
- The small claims procedure should be lead by judges or persons in traineeship towards the profession of judges (*dommerfuldmægtige / retsassessorer*) who are qualified as judges.
- Within the procedure the court should be more active in reaching an agreement between the parties. In this connection the introduction of specific rules on the settlement of agreements was proposed, including rules giving parties without a lawyer the possibility to renounce the settlement agreement within a week. These rules have the aim to ensure legal security for the parties.

- For the small claims procedure new, easier forms of getting information / evidence should be introduced and the viewing of evidence should be decided with respect to the actual need of the proceeding.
- Furthermore possibilities for a written dealing with claims are to be extended.
- For the judgment is suggested that it should be decided within 14 days after the trial and that it should be written on a specific form.
- Concerning appeal of decisions in small-claim-proceedings it is proposed that they will be restricted to *kære*, resulting in that the appellate proceeding is mainly written and that the appeal does not stop the enforcement. The majority of the commission also wants to restrict appeal in cases under 13,283 ECU to the permission of a special commission (*procesbevillingsnævnet*).
- Finally for all cases with a value of less than 2,656 ECU the court fees should be reduced to a flat fee of 66 ECU.

The concept of the proposed small claims procedure can be summarised as a simplified procedure, where lawyers are unwanted and with a judge who's role changes from a neutral instance of decision towards a mixture of mediator and source of information / advice for the parties. The obligations for this type of civil proceedings seem to be an easy proceeding as possible with as little distraction and interruption as possible.

On the other hand stands the suspicion that this type of civil conflict resolution will lead to a "fast food access to justice" with the danger of a reduced quality of the system of justice for cases which are defined as less important.

3.3 The Discourse on Small Claims Procedures

The discourse on the proposed small claims procedure raises various questions and concerns several different aspects of the procedure and the system of civil litigation. A major direction of the discussion and criticism focuses on the situation of "ordinary citizens", or to put it in the context of this study, on the unadvanced consumer in civil litigation and the assumed results of the small claims procedure on the access to justice and its quality.

The criticism on the proposed small claims procedure agrees with the general aim of the commissions proposal: to create an functioning system of civil

litigation, where a balance between the cost, the length of the proceedings and the conflicts to be solved exists and which provides an easy and effective access to justice for every person with a civil conflict. Nevertheless, serious doubt was formulated concerning the solution presented to achieve this task and the basic assumptions which formed the background for the solutions presented.

3.4 Cost

For the commission's work a basic assumption was that on the one hand the existing forms of civil proceeding were too expensive for the "users" of the system. This seems to be true if one keeps in mind that the costs of civil proceedings - not only in Denmark and not only concerning smaller values in dispute, as this study shows - might be higher than the actual value in dispute.³⁶

On the other hand it is argued that for the person pursuing a reasonable claim these cost are of less importance, because in the case of success the cost will be paid by the opponent. Furthermore, the proposed small claims procedure will even restrict the situation of a person with a successful claim in reducing the possibilities of recovery of lawyer fees.³⁷

On the one hand, this might lead to a reduced use of lawyers in civil proceedings, resulting in a reduction of lawyers fees as part of the total cost, but on the other hand it contains the danger of inequality in civil conflicts. Persons with a good economic situation might choose a lawyer independently of the possibility of recovery of costs, whereas persons with a less financial means might not be able to obtain professional advice if they have no chance of recovery.³⁸

The point raised that the possibility of recovery of cost in civil litigation reduces the importance of the cost involved for the individual with a successful claim, is not convincing in all situations. Civil litigation has, as any legal action, a general risk and contains in itself an uncertainty concerning the out-come. The persons involved very often can not be entirely sure that their claim will be successful.

³⁶ This is documented in the report, where the total cost of both parts involved are estimated for values in dispute of Dkr. 5,000 (11,825), 10,000 (11,925), 20,000 (15,250) and 30,000 (17,125); betænkning 1341/1997, page 144-147 (146).

³⁷ See Eva Smith, *Dommeren som enhedsfunktionær*, Lov & Ret 01 1998, page 23 f.

³⁸ The argumentation concerning a possible inequality of parts in the small-claim-procedure was also a general pointed in the official statement of the *Advokatrådet*, Advokatsrådets Statement, 15.12.1997, page 12 ff.

Part of the conflict often is that also the opponent has reasons to believe that his/her position in the conflict is reasonable. Furthermore, in case of an out of court settlement, both parties usually have to bear their cost already incurred.

But another point raised reduces the importance of cost in civil proceeding. In Denmark, as in other member states, the possibilities of obtaining legal aid (*fri proces*)³⁹ and the large number of *legal insurances (retshjælpforskring)* result in an actual limitation of the economic risks of civil proceedings for some of the persons concerned. It is estimated that the existing ways to reduce the economic risks cover about 95% of the Danish population.⁴⁰ Furthermore, this forms of legal aid or insurance usually also has the function of a preliminary control of claims. In Denmark the granting of *free procedure* and the coverage of cost through 'legal insurances depend on the preliminary assumption that the claim is reasonable. This means that in case of an unjustified claim the claimants involved obtain the information that their claim will obviously not be successful before the civil litigation is started within the system of justice.

The commission on small-claims realized the importance of *free procedure* and *legal insurance* for the cost in civil proceedings. Nevertheless, it still argued that the cost connected with civil proceedings may be a major aspect which "frightens away" people from the system of justice and sees the reduction of cost, mainly in connection with lawyers fees, as an important mean to a better access to justice.⁴¹

The means to reduce the economic risks of civil litigation are important for the discussion on an effective access to justice. Surely schemes of *free process* and *legal insurances* do not really reduce cost of civil litigation; they transfer the economic risk from the individual to a collective instance (society or the group of insurance holders). For the person concerned this is very likely to make a difference for his/her position in the legal system, even if at the end of the day the individual person has to bear a share of the costs anyway. The assumption that costs are keeping people away from the legal system, might be true as those might be seen as a psychological barrier, nevertheless it is more likely that

39 Concerning *fri proces* in Denmark see *rpl* § 330 and betænkning 1341/1997, page 461 ff.

40 See Advokatsrådets Statement, 15.12.1997, page 2.

41 betænkning 1341/1997, page 461 ff.

schemes to reduce the economic risk of a claim are an useful mean to ensure an effective access to justice for everybody with a legal conflict.

This means that, an important question in this context is not if forms of legal aid to reduce the cost of civil litigation *are* improving the access to justice, but the question is, if society as a whole is willing to pay the price.

3.5 Time

Another basic assumption of the commissions work concerns the length of proceedings. The commission considers the working of the system of civil litigation as too slow.⁴² This argumentation, which is to a wide extent also used in other member states of the European Union, has to be seen in the context of the European Convention on Human Rights. A basic principle guaranteed through the convention is the principle of court proceedings within *reasonable time* (Art. 6 I EHRC). This guarantee is a basic one for legal systems; legal protection and a system to obtain legal decisions loses its power and importance if it can not deliver solutions to conflicts in a reasonable period of time. The denial of justice within reasonable time frames result in a general denial of justice.

On the other hand stands the fact that the process of finding solutions to legal conflicts is a demanding one; the hearing and discussing of argumentation, the gathering of evidence as well as the decision-making need its time. A time frame for civil litigation must guarantee the possibilities of solid qualitative legal work. If the legal system fails to ensure this, it results in a reduction in the quality of legal justice as a whole.

The commission sees a way to reduce the length of civil proceedings concerning "smaller cases" in the creation of the proposed new form of proceeding with a changing role of the judge. Instead of lawyers, for whom it seems suspected that their appearance in court is likely to extend the length of proceedings, the court - or to be precise: the judge involved - is assigned a function between adviser, mediator and decision-maker.

This means a move away from the general adversarial principles in Danish civil litigation, in which the parts, or their lawyers, present the case and the information necessary, and the judge leads the proceedings with the aim to

42 betænkning 1341/1997, page 181.

enlighten the case and finally the court decides on the basis of the argumentation and evidence presented.⁴³

In connection with the time-argument the proposals of the commission have to face two important remarks. First of all, the functions of lawyers in civil proceedings seems to be underestimated. A major function lawyers undertake in civil litigation can be described as a *filtering effect*.⁴⁴ In the phase of preparing a civil case the legal advice for the client and the preparation and formulation of the claim by the lawyer which focusses on the legal needs of the system, result in a situation that the selection of useful information is done before the claim reaches the courts. It is unlikely to expect that "amateurs" in the legal system are able to prepare cases and decide which information is important in the legal context to the same extent as they would in case of professional assistance.

Furthermore, a consultation with a legal professional before initiating civil proceedings might have the function to stop obviously unreasonable cases before they are actually brought before the courts. And finally, lawyers often settle cases out of court, thus further reducing the courts' work load.

The proposal of the commission tries to face this situation with changed role of the judge. The filter-function of the lawyers is to be exercised by the judge. This means an additional main aspect to the work of judges, which leads to the second remark. The commission tries to reduce the length of proceedings by giving one of the key-persons in the proceedings more functions and to - more or less - ban another group of professionals from the process. This concept leads to serious doubts. The judges might be confronted with, from the legal point of view, less prepared claims and besides his/her obligation to evaluate the claim, he/she has to lead the parts through the proceedings, has to guarantee that the parties are informed and has to give advice to them in all stages of the proceeding.

In this context one might argue that the proposal focuses on small-claims which includes the likelihood of the cases being less complicated. Furthermore it can be pointed out, that an easier procedure will be attractive even for those persons who in the existing system of civil litigation choose not to interact with the legal system at all.

43 Concerning the general principle in Danish civil procedure in this context see Eva Smith, *Dommeren som enhedsfunktionær*, Lov & Ret 01 1998, page 23.

44 This function of lawyers in civil cases was also pointed out by the *Advokatsrådet*, Advokatsrådets Statement, 15.12.1997.

Nevertheless, the argumentation might be true for some cases. Yet, a low dispute value is no guarantee for lesser complications. Additionally, it is important to keep in mind, that the "value" of a civil conflict might be relative for the persons involved. The main question in this context should not focus on "values", but on a reasonable balance between the length of the proceedings and the needs of the civil conflict concerned.

At this point another distinction should be clear. Analysing the length of civil litigation one has to be aware of what actually causes the amount of time used. If the actual conflict needs its time to be enlightened and be solved, a restriction of the time frame will result in a reduction of the quality of conflict resolution. On the other hand, procedural rules and practises might be too complicated and too formal, which leads to a waste of time. Additionally, unnecessary waiting time and phases where no legal action is taken and the conflict is "parked" somewhere in the system of justice may be the real reason which causes a problematic length of civil litigation.

As pointed out before, the functioning of the system of civil litigation depends on a reasonable balance between the conflict involved and the length of proceedings.

3.6 Complication

In this context another approach of the commission can be seen. The commission tried to find means to create a form of civil proceedings which is less complicated for litigants than the existing one, by at the same time guaranteeing a solid quality of civil litigation.

The means proposed by the commission to achieve this aim are, beside the general introduction of the small claims procedure, the use of standard forms to initiate civil proceedings and the introduction of new, easier forms to gather information and introduce evidence into the procedure.

In this connection, one might ask why the innovation concerning a concentrated, less complicated procedure is only designed for a certain group of civil legal conflicts? The creation of new forms of proceedings only for a specific group of civil conflicts, defined as the "smaller" ones, might raise the suspicion that for those cases a procedure of minor quality is seen as sufficient. For the commission, the task was defined towards the direction of a small claims procedure right from the beginning - but in the context of the whole system of justice and its difficulties, such an approach seems not convincing. Conflicts with

a higher value in dispute might also be, from the legal point of view, less complicated and could be settled within a more concentrated form of proceeding. Furthermore, the task to improve the access to justice in civil conflicts through a procedure with reduced economic risks for the parties involved and within a reasonable amount of time, is relevant for all types of claims, independently of the dispute in value and its defined importance.

Nevertheless, concerning the effect of a reduced complication of the proposed small claims procedure, serious doubt can be formulated.⁴⁵ As pointed out before, the change of the role of the judges towards a "service provider" for the parties besides his / her role as the "decider" and the exclusion of a professional group, able to advise the parts and to prepare the claim before the proceeding starts, have a reasonable likelihood for not producing the desired results.

Furthermore, a kind of a "lean procedure" entails the danger of a reduction in legal security and the rule of law. The Danish system of civil litigation is, as all others in the European Union, a complex one, which was developed and improved towards a system of justice, trying to achieve a balance between effectiveness and legal principles to provide both the practical/functioning means to settle civil conflicts as well as guaranties to ensure a procedure within the rule of law.

Any new implementation to the legal system, which is not of a minor relevance, is in danger to interfere with this balance. This does not mean that development is not possible or undesirable but that is has to consider the legal system as a whole.

In this context an example from the commission's work is of importance. The commission gathered inspiration for its proposals by the study of other systems of justice and their solution concerning civil litigation and the improvement of efficiency.⁴⁶

This approach might be a good source of inspiration and information about the functioning of certain innovations in civil litigation, on the other hand they have to be handled with care.⁴⁷ Legal systems are complex structures, in which the

⁴⁵ See, for example, Eva Smith, *Dommeren som enhedsfunktionær*, Lov & Ret, page 23.

⁴⁶ Betænkning 1341/1997, chapter 4 (page 93-112), were examples from Norway, Sweden, England and the USA are described.

⁴⁷ See also Advokatsrådets Statement, 15.12.1997, page 5 ff.

out-come of each aspect depends on the rest of the system with its dependencies and influences. A functioning innovation in one system of justice might result in a lack of legal security in another. The *import* of law from one legal system to another is therefore a difficult task. It is not possible without the analysis of both systems and the knowledge that a simple import is not possible, but only a transformation. As a part of this process, special attention on the balances between the needs of effective legal conflict resolution and legal guaranties and securities within the system of justice is needed.

4 Final Remarks

The example concerning the small claims procedure proposed in Denmark seems relevant for this study and the general issue of cross-border conflicts within the European Union because of several aspects.

First of all, the Danish example illustrates the struggle of the member states to find and establish reasonable solutions to the problems of a functioning system of civil litigation. The aim to speed up proceedings and to reduce costs is seen as an important obligation for the improvement of the system of justice.

A starting point for this activities is the assumption that for the users of the system, the individual with few contacts to the legal system, as well as professionals with various contacts, the available means to react to and solve civil conflicts are not always adequate.

A special focus is here set on the one-shotters⁴⁸, described as ordinary citizens who have few legal conflicts in their life time with not very high values in dispute and for whom it is assumed that the access to justice is too difficult because of lack of information, cost, protracted proceedings and a general psychological barrier to interact with the legal system. On the other hand stands the picture of the advanced professional as the other party, having the means to use the system of justice and to interact adequately within the process of civil litigation, the repeat players⁴⁹. This possible inequality of such counterparts in a legal conflict is a major issue to solve for all legal systems, this can be shown by the Danish example.

48 Galanter, Marc: Why the "haves" come out ahead: Speculations on the Limits of Legal Change, *Law & Society Review* 1974, 95, 96.

49 Galanter, Marc: Why the "haves" come out ahead: Speculations on the Limits of Legal Change, *Law & Society Review* 1974, 95, 96.

In this connection an important aim is seen in an easier proceeding, less complicated for the parts involved and with a more effective achievement of solutions. This task concerning the direction of reformation of the system of civil justice finds its restrictions in the need to ensure a *fair trial*, with the aim to find the best solution possible, and raises the question of *legal security* and the *rule of law*. The tension between easier proceedings and legal principles and legal guaranties have been pointed out in the Danish discourse.

Furthermore the Danish example shows that the issue of civil conflicts and its legal resolution to a wide extent is handled as a national task - national systems of justice try to find solutions to the problems of proceeding civil disputes within the existing legal system and its legal culture.

As shown in Denmark in the report on small claims procedures: the member states seem to have a general awareness of the specific problems of cross-border litigation, obviously influenced by the latest activities within the European Union, but concerning actual activities the focus is still on national solutions, with national participants in the proceeding.

Nevertheless, a tendency to get inspiration from other legal systems can be illustrated by the Danish example as well. In this connection another problem of finding useful means for a functioning system of civil litigation becomes obvious. The difficulties to transfer aspects of legal proceedings of other legal cultures into an existing legal system. Legal systems are complicated structures with their very own connections and dependencies. The criticism in Denmark on the examples from Sweden and England give an impression of the difficulties of the process of transferring ideas and methods functioning in one system into another system with a different structure or even a different concept of civil litigation.

For the European context, this existing variety of systems of civil justice creates a specific problem. The consumer who is participating and acting within the Single Market is faced with different systems to react to civil legal conflicts depending where the problem does occur. Europe-wide solutions to those conflicts have to face the problem that they need to be implemented into existing legal systems, which means that they usually need to be transferred into the existing system of justice which again means a development and a transformation of those solutions within the single member states. A reaction towards this might be the creation of a special procedure for cross-border claims, which might be established outside the existing systems of justice as a special

mean of conflict resolution, before those conflicts finally - in case no solution can be obtained - reach the national systems of civil litigation.

For the context of this study, it finally should be mentioned, that the issues raised in connection with the Danish approach to small claims have also their relevance concerning other claims. As this study shows, the problem of the costs of civil litigation which can easily reach or exceed the value of the claim is not only connected to smaller claims. The questions traditionally raised in connection with smaller cases might have the same relevance also concerning other, more "valuable", cases.

And even if the total cost are less than in those extreme cases, it is important to keep in mind that the issue of values of civil conflicts is a relative one. For the ordinary consumer in the Single Market a claim concerning 50,000 ECU or 200,000 ECU might result in the situation that he / she is at the end of his/her economic means and every extra economic risk leads to stepping-out of the legal proceedings.

If the approach is to find systems of legal civil conflict resolution which provide the settlement of conflicts with a minimized economic risk and within a reasonable period of time, there seems to be no justification for the creation of solutions only for a part of the conflicts which occur.

II. The Impugnments in the Italian Law (Roberta Pierobon)⁵⁰

1 Terminology

Initially, some remarks about the terminology used in this chapter shall be made. As some terms which are part of the Italian juridical terminology may not easily be translated into English they shall be explained here.

Udienza is the hearing in which the lawyers file their applications and motions to the court. Usually the parties are not present. An oral hearing is provided only in the last *udienza*, where the lawyers may plead before the bench (composed of three judges).

Iscrivere la causa al ruolo means to register the claim in the court's registry. The registration has to be effected by the plaintiff and starts the court proceeding.

Costituirsi means that the parties deposit their files in the chancellery of the court, from that moment the judge takes notice of the claim.

Atto di citazione is the first document written by the plaintiff's lawyer on first or second instance. It has to be notified to the defendant (*convenuto*). In this case the defendant knows of the appeal before the judge. The judge will take notice of the case only when the plaintiff *iscrive la causa al ruolo*.

Ricorso is also a document to initiate a proceeding in first or second instance. Here, the lawyer does not notify it, but deposits it in the judge's chancellery and the judge decides the day of the first hearing; afterwards the *ricorrente* makes a copy of the *ricorso* with the judge's *decreto* and notifies it to the opponent.

Sentenza, *decreto* and *ordinanza* are three kinds of judge's measures. The judge uses a *sentenza* (judgment) when he decides on a case, it must be reasoned. The *sentenza* starts to produce its effects from the day of the publication.

Decreto is the most simple of the judge's measures. It does not provide reasons, the judge uses it to decide any problems related to the proceeding itself. The *decreto* does not solve any conflict of interest between the parties.

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with a contribution by Cristiano Alessandri, Avvocato, Venice, Italy.

Ordinanza it is a measure that a judge makes during the proceeding deciding a problem of procedure. Here, a conflict of interest between the parties does exist and has to be solved by the *ordinanza*.

Gravame is the instrument with which it is possible to contest the substance of the sentence.

2 Types of Impugnments and Time Frames

The impugnments are regulated by art. 323 *et seq.* of the code of civil procedure (*c.p.c.*).

Usually, the impugnments are distinguished from other kinds of encumberment (*gravami*). Impugnments are based on *error in procedendo* and the encumberment on *error in iudicando*. The *error in procedendo* contests the sentence as an act because of a mistake in the procedure; with the *error in iudicando* the content of the decision is contested.

In reality this distinction is not always respected.

Italian law distinguishes also between the substitutive impugnments (which lead to a review of the case) and rescindable impugnments (the decision is removed and a new proceeding starts on the first level). One of these, *e.g.*, is the appeal to the Supreme Court. In any case, it should be underlined that the kind of impugnments are typical and restrictive.

The impugnment is the only remedy in a trial for changing the judge's decision. The appeal is *revision of prioris instantiae*.

To lodge an appeal, the appellant must serve the appeal summons not later than 30 days from the day in which the original sentence was served on him. If the first instance decision was not served it is possible to appeal up until 1 year and 46 days from the publication of the decision; after that it has become a final judgment. Later than this time it is not possible to appeal and the sentence becomes final.

Then only the *revocazione straordinaria* and the *opposizione di terzo* as means of extraordinary contest are possible. The appeal must be served on the party's lawyer because during the trial all actions are effected by the lawyers.

If during this time one of the parties or the lawyer dies, the time for the appeal is interrupted.

If the parties have accepted the decision, it is not possible to appeal any more.

3 Second Instance: the Appeal Proceeding

3.1 The appeal in General

The appeal is the only encumbrance (*gravame*) for contesting the *error in iudicando* and the *error in procedendo*. Whoever lodges an appeal has the interest to modify the provisions that are not to his satisfaction. Only the parties of the first level are legitimated to appeal. An appeal is possible until the sentence is not final. The appeal is treated by a judge of second level. Even if his decision confirms exactly the first instance decision, the latter is replaced.

Before the reform of 1990, the appeal suspended the enforceability of the first sentence. After the legal reform this is not the case any more.

The first instance courts in Italy are *Giudice di Pace*, *Pretore* and *Tribunale*. The decision of *Giudice di Pace* and *Pretore* are appealed at the *Tribunale*. The first instance decision of the *Tribunale* is appealed at the Court of Appeal. After the reform the appeal judge is always a collective, in fact even the *Tribunale* and the Court of Appeal are composed of a president and two judges. The legislator decided to create bench trials because it is presumed that more people give a better and a deeper understanding of the facts.

The general rule is that all first instance decisions can be appealed. The only exceptions are:

- the judgment of *Giudice di Pace* when the value of the case is under 1,030 ECU;
- when the judgment is pronounced in equity because the parties wanted it;
- when the decision rules the cognizance;
- the judgment of labour when the value is under 25 ECU;
- when the sentence has recognized a foreign judgment; or
- arbitration's award.

Only the losing party has the legitimation and the interest to appeal.

3.2 Appeal's Form

The appeal starts with the notification of the summons which must describe the facts and the reason for the impugment in detail. The Supreme Court has stated in a ruling of 6. 6. 1983, n. 499: "if any part of the judgment is not appealed clearly enough, the appeal is null and void". Moreover, the writs of appeal have to contain all the requisites for the summons on the first level.

Between the day of the notification and the day of the hearing (*1 udienza*) there must be at least 60 days.

When the parties appeal a labour judgment the procedure is not the same: the appeal does not start with the notification of the summons, but with the depositing of the appeal (*ricorso no atto di citazione*) in the chancellery of the Tribunal. The content of the paper (*ricorso*) is the same as that of a summons.

On appeal it is not possible to introduce new claims or objections unless they are brought up by a judge. New evidence may not be admitted, unless the judge considers it necessary or the party proves that due to external causes it has not been possible to present the evidence in first instance.

On appeal it is further not possible to introduce new claims; if they are introduced they are declared inadmissible. Nevertheless, in the appellate procedure, for the first time, it is possible to ask for interest and to claim compensation for damages.

The appellant chooses the date for the first hearing which must be indicated in the summons.

3.3 The Appearance before the Court by the Appellant (*la costituzione dell'appellante*)

Within 10 days of the serving the summons to the appellee, the appellant has to appear before the court (*costituirsi*). For the appearance before the court the appellant has to leave his file, including a copy of the first level sentence, in the chancellery and he has to ask to register the case (*iscrizione a ruolo*) which is usually done at the same time. After this the clerk of the court enters the case in the general roll, prepares the office's file and asks the first instance court for all the documents concerning the case.

Before the legal reform the appellant could appear before the court (*costituirsi*) until the day of the first hearing. After the reform the appellant has to appear in front of the court on time, otherwise the appeal can not go ahead.

3.4 The Appellee's Appearance before the Court (*la costituzione del convenuto/appellato*)

The appellee has to appear in front of the court (*costituirsi*) at least 20 days before the day of the hearing and he must respect this time if he wants to appeal part of the decision with the interlocutory appeal (*appello incidentale*).

The appellee may also appear in front of the court later, *i.e.*, until the first hearing, but in this case he can not make his demands with the interlocutory appeal. The interlocutory appeal is the instrument with which the appellee contests the first decision, asking for the reform of the original sentence. Before the 1990 reform of the *c.p.c.* the appellee could propose his appeal in the first hearing or at the adjournment of the case.

To propose an interlocutory appeal it is necessary for the appellee to succumb to a part of the decision and this must be effective, it is not enough to ask for a change of the reasoning.

Usually the appellee asks for the confirmation of the first judgment. In this case he does not propose an interlocutory appeal, but in any case he has to prepare his plea.

3.5 The Treatment of the Case

In the first hearing the court, composed of three judges, checks if the service of the summons and the parties' appearance before the court has met the form. If it should be necessary to serve the appeal with other parties of the first instance, the court orders the notification of the summons to these parties.

If applicable, in the same hearing the court pronounces the appellee's absence.

Before the reform, the case in Tribunal and in the Court of Appeal, was treated by one judge only: the G.I. (*giudice istruttore*) for the Tribunal and the C.I. (*consigliere istruttore*). Before the reform each lawyer verbalized his reasons, now this is done by the chancellor of the court.

If one of parties asks for the suspension of the sentence, in the first hearing the bench (judge) always makes a decision, with ordinance, on the necessity of the suspension of the first decision.

If the parties have legitimate and serious reasons for an immediate suspension of the judgment they can ask for it, and the suspension will be decided before of the hearing. In this case they must write an appeal (in this case called *ricorso*) to the President of the court. The President hears both the parties' and then decides about the immediate suspension.

This decision of the President, made solely by him, can be changed by the bench the day of the hearing. This time the decision becomes definite until the sentence of the second level is pronounced. The rule of the collective treatment of the case is the most important novelty of the reform of 1990.

The legislator of the reform wanted to speed up the time for appeals, giving to the bench the tasks of the G.I. and C.I. When the treatment of the case is finished the bench calls in the parties to conclude and to exchange the final pleading with their replies. The c.p.c. provides that the appellate court must pronounce its sentence within 60 days but in practice this does usually not occur.

Further, the law provides that yet in the first hearing, the parties shall give their conclusions if they do not have to ask for a new appraisal or if they do ask not to rehear witness. In practice, this never happens, at least in Venice the Court of Appeal always pronounces an adjournment. This same practice is reported also from other courts.

The parties can never conclude in a way that differs from the statements in the original documents. When the parties want to plead and to specify their conclusions they have to ask for it writing.

3.6 The Actual Situation

Pursuant to Art. 90 law n. 353/90 procedures which have started before the reform of 1990 are treated entirely under the regulations of the old law, until their very end.

Accordingly, at the moment there are not many appeals treated under the new procedure, because most of the cases started after this date are still pending in first instance, particularly those which were lodged to the Tribunals where the duration of the proceedings is longer. In 1997, roughly 2,000 appeals were

pending at the Court of Appeals of Venice, of which only 10% of them were treated under the new procedure.

Following my experience at the courts of Venice, in the few appeal proceedings which are treated at the Court of Appeal the new procedural rules are not respected because very often the cases are adjourned. In any procedure, one of the parties always wants to prolong the procedure as long as possible, so this person asks for an adjournment and the judge agrees. However, despite the adjournment times are somewhat shorter. In fact, for the appeals that follow the old procedure the last hearing is fixed for the year 2,000, for the appeals with the new procedure the last hearing is fixed for only a few months after the first hearing.

The situation is different when one has to appeal the sentence of a *Giudice di Pace*. The *Giudice di Pace* is competent for cases in which the value is under 2,575 ECU, for damage claims concerning traffic accidents until 15,450 ECU and also for certain specified matters. Starting a procedure in front of this judge is not complicated and not expensive, moreover the procedure is quick, in fact it does not take such a long time as the procedure in front of the *Tribunale*. The procedure before a *Giudice di Pace* usually takes a couple of months and sometimes it is finished after one hearing. In front of the *Giudice di Pace* of Venice only a few proceedings which started more than 2 years ago are still pending.

Therefore, considering the low value of the case, it often is not convenient to appeal the sentence. As outlined above, appeal from a *Giudice di Pace's* sentence is lodged at the *Tribunale*. In the year 1998, the *Tribunale* of Venice has been published 800 judgments to date and only three of these are judgments of appeal on a decision of a *Giudice di Pace*.

However, notwithstanding that usually it makes no sense to appeal a judgment of the *Giudice di Pace*, a particular situation just happened in my office to one of my colleagues and made it necessary to lodge such an appeal for formal reasons. This colleague lost a case at the *Giudice di Pace* concerning the emission of noise among neighbours. The client of my colleague, who was the defendant, lost and the judge condemned him to pay 2,320 ECU for compensation for damages and to pay another 8,240 ECU for lawyers fee and interest. In order to have reexamined the order for costs the decision had to be appealed in both its parts: the merits of the case and the legal charges. The judgment was appealed at the *Tribunale* and it is still pending. If at the end the *Tribunale* decides on the merits against the client of my colleague but revises the order for costs, my colleague's

client will still be satisfied with the outcome of the appeal. However, again it should be underlined that this special case is an extraordinary situation, usually only few sentences are appealed.

I would like to give another example concerning one of my clients: the client bought some goods for her store from a wholesaler who did not respect the conditions of the purchase contract, so, when the goods arrived, the client sent them back. After some exchange of letters between the lawyer of the wholesaler and the lawyer of the purchaser my client thought that the question was explained and that the conflict was settled. However, the client was sued by the wholesaler before the Court of San Remo. As the two parties were living in two different cities, San Remo and Venice, the summons was served on her by mail but to a wrong address. Neither the plaintiff nor the judge could know that the defendant had not received the notification, because it was the same address that was written on the letters. The plaintiff asked to the judge to declare the absence of the defendant. The procedure finished with a judgment against the defendant.

At the end of the trial, the plaintiff served the sentence and the injunction to the defendant at the same address, but this time, there was a friend of hers living there so he picked up the sentence and the injunction. It was only in that moment that my client got to know anything about the case. He could appeal the sentence because it was null and void, since he had never received the summons and consequently all the proceeding were null and void and therefore also the sentence.

In this case, the party would have to start the appeal in San Remo, having to spend money for a lawyer in San Remo, therefore paying two lawyers: one in Venice and one in San Remo. I explained to my client that normally, when the time to appeal has passed, the winner starts the enforcement of the judgment with the distraint of the property. Since the procedure against the enforcement would have to be placed where the personal property is, in this case it would take place in Venice and not in San Remo. Therefore I suggested not to appeal but to wait for the enforcement proceeding and then to appeal against the enforcement (*fare opposizione all'esecuzione*).

In fact the plaintiff distrained the personal property of the wrong person, *i.e.*, of the person living at the address written on the summons, so this man had to raise an objection. An objection must be raised until the creditor does not ask the judge for the forced sale of the personal properties. If the creditor had distrained the personal property of the defendant, my client who bought the goods, would have had only five days to raise her objection.

Generally, in my experience I have seen that the first judgment is usually confirmed by the judge on the second level. Under lawyers it is privately discussed that it is almost useless to appeal a sentence because the second judge almost always confirms the first judgment and so the situation does not change. Most Venetian lawyers agree.

There are exceptions, though. I personally had the opportunity to observe a very strange case.

The case started in 1989 when the parents of a young girl sued an equitation club at the *Tribunale* because during an equitation lesson their daughter had fallen from the horse and had been injured. The *Tribunale* (first instance) found against the club, the teacher and the insurance company and condemned them to pay a sum of money.

The defendants appealed and the judge of second level decided that there had been no fault on the part of the club so the first decision was changed and it was decided that no money be paid to the girl, and that the girl had to pay the legal charges for the proceedings of both levels. This case started in 1989, appeal was taken in March 1995 and the judgment on appeal was rendered in June 1997.

As to the number of appeals I would say that, in Venetian practice, as already explained above, only a few sentences of the *Giudice di Pace* are appealed, but about 50% of the sentences of the *Pretore* are appealed and 70% of the sentences of the *Tribunale*.

About 25% of the sentences of second level take recourse to the Court of Cassation.

The outcome of appellate proceedings is usually a sentence, withdrawals or settlements are the absolute exception at this stage. Each year in the Court of Appeal of Venice there are between 7,000 and 8,000 cases, among them only 5 or 6 are finished by settlement and about 50 which get abandoned for a year.

These observations are based on my own experience and on conversations with the lawyers and with the clerk of the court.

3.7 General Considerations for Lodging an Appeal

Generally, to decide whether or not to appeal a sentence, the party, or better its lawyer has to consider many aspects. First of all, the lawyer has to read the reasons written by the judge on the sentence, to check if there is a clear mistake

of the judge or not and to understand what the reasons are for the judge to make the decision.

On the other hand, the party has to consider the possibility of loosing also on the second level and therefore of being condemned to pay the cost of the procedure of both levels.

Before the legal reform of 1990 it was quite common to appeal without regard to the actual chances of the particular case, because the appeal was used as a tactic of delay. Now, after the reform, the situation is different because the judgment is immediately executive, other than under the old procedural law, which provided that the appeal stops the execution of the sentence.

A kind of tactic that I have seen a few times is as follows: the lawyer serves the appeal summons but later he does not *iscrive la causa a ruolo*. Thus, the case is pending for one year and in this time the interested party can reconsider the case. Under the new proceeding this tactic cannot be used any more because the first instance sentence is executive. However, with cases started before 1990, the tactic does still apply as they follow the old proceeding.

I want to underline that in my experience such tactics of delay are used only by lawyers that are not Venetian, perhaps because the particular structure of the city induces the lawyers to be more friendly and as a consequence more straightforward.

It is possible that a lawyer appeals in a case where the chances of success are extremely slim, only to receive a higher fee. While this lawyer obviously would not be very honest, at any rate there are these kinds of lawyers and for sure they are known by the court. Normally a lawyer must explain the situation (cost, time) to his client, and at the end the client decides to appeal or not.

In the opposite, I do not think that a Venetian lawyer would not appeal although he feels that the first instance judgment might be overturned, *e.g.*, because of the cost and the risk involved or the time such an appeal would take because it would be completely against the legal code of conduct. Anyway, it can not be excluded that single lawyers may do so.

3.7 Differences to First Instance

The big difference between the first and the second level consists in that part of the trial concerning the judicial inquiry. In the first instance witnesses or experts

are employed more often than in higher instances. In about 80% of the cases, in fact the appeal judge uses the evidence which already has been introduced in the first instance.

4 Third instance: *Ricorso per Cassazione*

The peculiarity of *Ricorso per Cassazione* is that the Corte di Cassazione renders a judgment, but it does not resolve the case.

To conclude the case another sentence by another judge (*giudice di rinvio*) is required. The reason is that the *Corte di Cassazione* is a judge of "*leggittimità*", *i.e.*, the court has to check if the judge of the first or the second instance was mistaken when applying the law. The *Corte di Cassazione* cannot decide on the merits of the case.

The proceeding in front of the *Corte di Cassazione* consists of two phases, the "*iudicium rescindens*" (the real proceeding in court) and "*iudicium rescissorium*" (the proceeding of adjournment). An appeal (*ricorso per Cassazione*) may be lodged only for the following reasons:

1. contradiction to other judgments;
2. when the rules of jurisdiction were not respected;
3. when the rules of law have been infringed upon or there has been a false application of the law.

The appeal in Cassation starts with the serving of the summons. Only lawyers who are written in a special register may appear at the *Corte di Cassazione*.

The appellant (*ricorrente*) has to make his domicile in Rome, because the Court is located in Rome.

The appeal (*ricorso*) must be served on the opponent not later than 60 days from the day in which the judgment was notified to the party or not later than one year and 46 days if the sentence has not been served.

The appellee can propose his appeal within 40 days of the notification; if there are more than one appellee, within 40 days of the last notification.

The President of Court decides the day of the trial of the case.

The lawyers of the parties have to deposit their files until five days before the hearing.

The hearing is public. The President of the Court starts to speak first, then the lawyer of the appellant, further the lawyer of the appellee and finally the attorney general (*Pubblico Ministero*), who decides if the appeal is accepted or not.

If the court accepts the appeal the case is sent back to the first or second judge who rendered the judgment that was reversed by the court. Usually the case is assigned to a judge or better to a section of the court different from that of the original sentence. Accordingly, the trial starts again and has to be treated with all its necessary steps.

This new trial has to start not later than 1 year after the day in which the sentence was deposited in the chancellery.

As mentioned above, only 25% of the sentences of Court of Appeal are appealed to the *Corte di Cassazione*. Only 10% of these cases are reversed by the Court.

Interestingly, concerning the reform of proceeding, after the reform came into force, the judges used to fix the date for the last hearing on a very early date. In the meanwhile this has changed and now the judges fix the day of the last hearing usually to a very late date because the new hearings overlapped the old ones.

The responsible clerk of the court in Venice states that he presumes that in 2 or 3 years the old proceedings will be terminated and therefore there will be no further back-up, so the new proceedings will respect the short time as it was provided by the legislator.

Anyway, the sentence in Court of Appeal is deposited on time, *i.e.*, from the day of the last hearing to the day in which the judgment is deposited 60 days must not and, practically, do not pass.

5 International and Foreign Law

5.1 The Application of Foreign Law in Practice

Foreign law is frequently applied especially in cases that deal with family law, child custody, alimony and child support.

International conventions are often applied when corporate or maritime law is treated. In these cases legal service abroad does nearly always apply.

In most of the other cases of law, usually both lawyers and judges have little notion of foreign law. The European directive regarding consumer rights, *e.g.*, has no practical importance in Venetian civil litigation.

If international law has to be applied in second instance, in about 40% of the cases experts and witnesses are employed to find or interpret such law.

5.2 The Reform of the International Private Law

Since the recent c.p.c. came into force (1942), the Italian International Private Law ("*diritto internazionale privato*", *d.p.i.*), was contained in the preliminary and general provisions of the code ("*disposizioni sulla legge in generale*"). These provisions provide all ruling on the conflicts of law that arise when the parties of different jurisdictions commit a civil law interaction.

The basic principle was and still is that in a contractual relationship the parties are free to choose the applicable law and that conflict provisions apply only when such a choice is not made or when it is not valid.

Substantial modifications to the provisions in the civil code have now been introduced by the Act of Parliament no. 218/95.

Until AoP 218/95 came into force, the foreign law to be applied was regarded to as a *res facti*, *i.e.*, the party that was interested in applying the foreign law by the court, had the burden to proof its contents.

The peculiar aspect of the matter was that, if the proof was not given, then conclusive presumption took place that the contents of the foreign applicable law were alike the corresponding ones of Italian law.

In the general practice, effective proof of the foreign applicable law was seldom given, so that Italian law often applied. An exception was given only in specialised branches and particularly in the International Transport and Shipping Law field, where foreign law has always been of common use in virtue of the very peculiar rules on conflict of laws provided for, especially by the navigation code (1942).

Also treaties and conventions executed or ratified by Italy have always been applied regularly, even more so in Shipping Law matters, where a substantial body of case law on international conventions has developed since the twenties. Furthermore, it may be said that Conventions on Collisions of Vessels (Brussels 1910), Transport by Air (Warsaw 1929 and further Protocols), Bill of Lading

(Brussels 1924 and Protocols), Maritime Liens and Privileges (Brussels 1926), Arrest of Seagoing Vessels (Brussels 1952), and C.M.R. (Genova 1956) are part of Italian legal system and case law in all respect.

The above related principles on application of foreign law have now been substantially amended by the above quoted AoP 218/95. The main purpose of this Act of Parliament was to facilitate the application of foreign law and to introduce the generally adopted rules of International Law into the Italian legal practice.

The first main effect of Act is that foreign law is not to be considered as a *res facti* anymore and that its contents do not have to be introduced as a proof any more. The ascertainment of the foreign applicable law has now become a task of the judge, who is bound to carry it out with the co-operation of the parties, *i.e.*, that the ascertainment is open to the contribution of the other party. Furthermore, the judge may ask the assistance of experts, where necessary.

The second main effect of the Act is that foreign decisions, irrespective of the country or jurisdiction by which they have been rendered, may now be enforced in Italy under the rules of the Brussels Convention of 1968, notwithstanding that the Convention itself provides to be only applicable for judgments rendered by courts of the states that have ratified the Convention.

As the Act of Parliament 218/95 has been put in force very recently, there is not yet any significant decision which has been passed about it.

Nonetheless, the act may be regarded as an important step towards the integration of the Italian Legal system into the EU.

III. Appellate Proceedings in Austria (Winfried Schwarz)⁵¹

1 Introduction

The following analysis deals with appellate proceedings in civil litigations instituted upon appeals lodged against judgments ruling on cases on their merits. Decisions of courts others than judgments are decrees, mostly ruling on procedural issues (adjournment of a hearing, determination of fees of witnesses and experts, order to submit documents etc.) or on preliminary injunctions. Many of these decrees can be appealed against by a remedy called *Rekurs*, to which rules different from the ones applicable to the *Berufung* apply. This type of *Rekurs* is not further discussed here.

Different courts are competent to try cases in the first instance, depending on the dispute value and the type of legal questions involved. Thus a litigation may start in a District Court (*Bezirksgericht*), the District for Commercial matters in Vienna (*Bezirksgericht für Handelssachen*), a Regional Court (*Landesgericht*), the Commercial Court of Vienna (*Handelsgericht*) or the Labour Court (*Arbeits- und Sozialgericht*) of Vienna. As features of the appellate proceedings features are similar, not depending on the court, in which the litigation commenced, all these courts are referred to as "court of first instance". It should be mentioned that there is not a specific court called "court of first instance". The appeal lies with Regional Courts (if the litigation commenced in a District Court), the Commercial Court (if the litigation commenced at the District Court for Commercial Matters) or the Court of Appeals (*Oberlandesgericht*) (if the litigation commenced at a Regional Court, the Commercial Court or the Labour Court). As the proceedings on appeals are similar, all these courts are referred to as "the appellate court".

The appellate courts can either rule by judgment (*Urteil*), being a decision on the merits of the case or by decree. Against these judgments, a second appeals lies with the Supreme Court (*Oberster Gerichtshof*). It depends on the dispute value of the case and the legal questions involved, whether this second appeal (*Revision*) is admissible. The appellate court has to rule on the admissibility of the second appeal in its decision on the first appeal. Thus, if the appellate court

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holds that the second appeal is admissible an "ordinary second appeal" (*ordentliche Revision*) can be filed against its judgment. In case the appellate court holds that no such ordinary second appeal is admissible, nevertheless an extraordinary second appeal (*außerordentliche Revision*) may be filed. By this remedy the appellant tries to convince the Supreme Court that the appellate court erroneously did not rule in favour of the admissibility of the ordinary second appeal and argues on the merits of the case.

If the appellate court does not rule on the merits of a case but refers the proceedings back to the court of first instance, the court does not rule by judgment (*Urteil*) but by decree (*Beschluß*). An appeal, called *Rekurs*, against this decree is admissible in certain situations and also lies with the Supreme Court. It has to be regarded as a type of second appeal, as it usually challenges the application of the law as done by the appellate court.

This analysis deals with first appeals (*Berufung*) and second appeals being *ordentliche Revision*, *außerordentliche Revision* or *Rekurs* against a decree of the appellate court.

2 Appellate Proceeding (first appeal)

2.1 Service

The decision of the court of first instance is usually served on the parties by mail. The service is done by officials of the post, who try to hand in the documents personally to the addressee and to obtain the signature of the person the judgment is served on or of an employee of a law firm. If the document is handed in this way, the day of delivery is relevant for the calculation of the deadline to lodge an appeal. In case nobody is present at the time, another service will be tried the following day and a notice will be left in the letter box. This notice informs the addressee that the post tried to serve a document but could not do so as nobody was present. The addressee has the possibility to collect the document on the following day at the local post office. In this case the deadline to file an appeal will be calculated beginning with the first day the addressee has the possibility to collect the document.

If the parties are represented by attorneys or, as it might be the case in labour litigation by trade unions or in landlord and tenant litigation by associations representing landlords or tenants, the judgment of the court of first instance is served on these representatives.

2.2 Deadlines

An appeal has to be filed with the court, which rendered the judgment within four weeks after service, calculated as described above. The deadline is met, if the writ is posted on the last day of this period. As these periods are strictly applied and thus, a delay of one day means to lose the right to appeal, it is customary to send the writs by registered mail in order to be able to prove the date of sending. Alternatively, the writ can be handed in at the court personally at the latest on the last day of this four weeks period. In both cases, the court certifies the date of filing the writ with a rubber stamp on a copy of the first page of it.

It happens very rarely, but sometimes in petty-litigations at the District Courts, that the judge delivers the judgment orally in a hearing with both parties present or represented. In this case the parties who want to lodge an appeal have to notify so to the court within one week after delivery of the oral judgment. Having done so, the court serves a written judgment on the parties as well, which will be the subject matter of the appeal.

The deadline of four weeks can neither be extended upon motions by the parties, nor by the court in its own discretion.

We observe that the writ, in most cases is mailed or handed in to the court in the last days of the above mentioned period of four weeks.

2.3 Decision to File an Appeal

After service of the judgment of the first instance on an attorney, he usually sends a copy of the decision with his comments on the chances of an appeal to the client. Besides the costs of the appellate procedure, the reasoning focuses for the chances of arguing that the court of first instance applied the law in question erroneously, and however, less important, to questions of fact.

It is customary that the lawyers give an estimation of the chances and the costs and point out possible risks, but leave the economic decision to the clients. For the decisions to be taken see Point 4.a).

2.4 Preparing and Filing

In most cases no additional information from the client is needed and requested and the appeal is prepared only on basis of the content of the file. Sometimes the

lawyers send drafts of the writs to their clients before the appeal is filed and ask for their approval. Some clients expect that they are asked for their approval (*e.g.* tax accountants, advisers, in-house councils) others do not (*e.g.* private individuals). In most cases the arguments of the appeal focus on application of substantial and procedural law and are hardly understandable for laymen. Therefore, in most cases the clients are not in a position to make any valuable suggestions.

The writ has to state the grounds for the appeal and to contain a motion to the appellate court. Usually the appeals are based on both mistakes in finding of facts and wrong application of law. However, usually is more likely that rather the legal arguments convince the appellate court to quash a decision, while the arguments concerning the findings of facts are seldom successful.

The arguments concerning mistakes in finding of facts usually refer to the minutes of the hearings and the submitted documents and try to establish contradictions in the testimonies of the witnesses or in the documents submitted in the first instance. Additional evidence is commonly not submitted and generally not admissible. Thus the arguments on evidence suggest that the court misinterpreted the evidence, *e.g.* by establishing facts upon the testimony of an incredible witness. Another ground for appeal connected with evidence is the argument that the court established facts without having any reason to do so as conclusive evidence leading to this facts does not exist. These arguments suggest that the court assumed facts which the witnesses did not mentioned or which documents do not prove. As the appellate courts do not re-examine witnesses usually but read through the submitted evidence, this argument has a good chance if the court of first instance deals with its reasoning on the facts too superficially. On the other hand, there is hardly any chance to have a judgment quashed if a witness did not tell the truth but the court followed his testimony stating that his personal impression was credible.

Usually a clear distinction between the wrong application of procedural law and the wrong application of substantial law is made. It is common practice to argue both ways and to point out possible mistakes in detail.

As for arguments on wrong application of law at least the common textbooks and a few precedents are quoted but in many cases reference to doctrine is made in detail.

The appellant has to file at least two copies, one of which is for the court and one for the appellee. In case there are more than two parties, the appellant has to file an additional copy per additional party.

When filing the appeal the court fees for the appellate procedure have to be paid. This is either done by stamps, affixed to one of the copies of the writ, by remitting the money and affixing the remittance slip to the copy or by entitling the court to debit the bank account of the law firm accordingly.

2.5 Formal and Substantial Content of the Writ of Appeal

The appeal has to state against which judgment the appeal is lodged and has to indicate the competent appellate court. The appeal further has to contain a statement to which extent the judgment of the court of first instance is appealed against: *e.g.*, if the plaintiff moved for a compensation of 100 units and was awarded 80 only, the judgment of the first instance has to contain a part awarding 80 and a part rejecting 20. The appeal normally would be filed only against the part of the judgment rejecting 20, but not against the judgment as whole.

The writ has to contain a motion to quash the decision as a whole or in part, and to either replace it by a judgment more favourable to the appellant or to order the court of first instance to re-hear the case in order to complete its procedure, if the appellate court finds it necessary to do so.

The latter might be the case, if the appellate court holds that the court of first instance did not investigate and establish certain facts which are relevant, as it, due to erroneous application of law, it did not consider them relevant. These motions are important insofar, as the appellate court, in general, cannot amend the judgment of the first instance in a way the appellant did not move for.

The writ usually also contains a summary of the costs of the appellate procedure and the motion to order the appellee to reimburse these costs.

2.6 Activity of the Court of First Instance

If the judge of the court of first instance receives an appeal, he has to check whether the appeal was filed before elapse of the deadline. If this is the case, he sends a copy of the writ to the appellee, who is entitled to file an answer to the appeal within a period of four weeks. If the appellee does not file any answer to the appeal, he only misses the possibility to put arguments against the arguments of the appellant, but is not deemed to consent with those arguments.

In most cases answers to the appeals are filed. However, in certain situations, where it does not make sense at all to incur additional costs, as the appeal most probably will be successful, no such writs are filed. In this case, in order to speed up matters, it is possible to waive the right to appeal and to ask the court not to wait for an answer to the appeal but transfer the file to the appellate court as soon as possible. This is *e.g.* the case, if an appeal was filed against a judgment by default and it is established that this judgment by default was delivered erroneously, as no default occurred *e.g.* as the complaint was never served on the defendant due to a mistake of the postman.

In case the deadline was not met, the appeal is rejected by the court of first instance.

If the judge of the court of first instance rejects the appeal for missing of the deadline, an appeal against this decision can be lodged. This appeal, being the *Rekurs* type of remedy, lies with the appellate court directly, without giving the opponent a possibility to make his comments.

It is further possible to move for a restitution in case of missing a deadline. This is a remedy applicable to most of the deadlines defined in the procedural code, and not a special feature of appeal proceedings. Such restitutions are granted if it is established that the person who missed the deadline did so due to unforeseeable and insurmountable obstacles. In general, the courts are reluctant to grant such restitutions and often hold that the applicant did not act with due care and diligence. However, it appears that most of the successful motions for such restitutions are based on the submission that the secretary of the attorney, which is - allegedly - a well trained and reliable employee - once made a little mistake in handling the writ, which was due to an unexpected high work load.

In case a motion for restitution is filed, it has to be contained in the same writ as the appeal.

Having sent the appeal to the appellee, the courts waits for approximately five weeks whether an answer to the appeal is received from the appellee. Whether it is received or not, the court sends the complete file, including the writs of appeal and the answers to the appeal, to the appellate court. Due to the periods of time granted to the parties to file the writs and the time necessary for the handling of it by the mail and the court, it takes approximately three months from serving the decision on the parties to sending the file to the appellate court. The appellant also receives a copy of the answer to the appeal.

It is also possible that both parties lodge an appeal, *e.g.* if the complaint is rejected partly only. In this case the appeals of both parties are handled in the way as it is described above. As the deadlines apply for both parties in the same way, and as the writs are commonly filed during the last day of the period of four weeks, in practice there is hardly a possibility to wait for the other party to act first.

2.7 Proceedings at the Appellate Court

A panel consisting of three judges of the appellate court rules on the appeal. If they find grounds for rejecting the appeal for formal reasons, *e.g.* again for missing the deadline, they can do so without a hearing.

In most cases, until now, a hearing of the appeal is set upon motions of the parties, if the appeal is to be decided on its merits. However, the importance of this hearing varies considerably between different appellate courts. In the courts of Vienna these hearings usually last for ten or fifteen minutes only and the judges ask the attorneys whether they want make any additional comments or further elaborate points which they did not already address in writing. Usually, these hearings are used by the attorneys to either highlight their main argument in a few sentences or to make some emotional statements on the case referring to common sense. Sometimes, but very rarely, the legal arguments are discussed with the judges. In some of the appellate courts in the provinces, the attorneys are expected to deliver a speech on the grounds of appeal.

Although possible in theory, it very rarely happens that witnesses or experts are heard in hearings on the appeal.

In fact, in most of the appellate proceedings these hearings prove completely useless and the decision of the appellate court is based on the writs only. Nevertheless, the hearing is a common practice as the attorneys are able to bill fees for attending such hearings.

Recently, the Attorney's Fee Act was amended, granting the lawyers a lump sum fee for the appellate proceedings whether a hearing took place or not. It remains to be seen whether this amendment will reduce the number of useless hearings.

In practice at least three months elapse from the date the appellate court has received the file and the date of the hearing.

2.8 Decision of the Appellate Court

Within the panel of three judges, one is appointed to handle the file and to draft the decision. After the decision is drafted, it is discussed with the other judges. Once they agree, the decision is adopted and laid down finally in writing. The parties are neither informed on the internal discussions of the judges nor are there any dissenting opinions contained in the decision served on the parties.

There is no time frame obliging the court to render its decision within certain period of time after having received the file.

There is the theoretical possibility to file a motion for setting a deadline to the appellate court to render its decision. Such motion has to be filed with the appellate court and contains a complaint that the appellate court did not render its decision in due time and a motion addressed to the court superior to it in hierarchy to set a deadline. However, this remedy is used seldom, as the procedure for setting the deadline itself is time consuming and, according to the view of many lawyers, it might attract antipathy of the judges. Thus, if the appellate court does not proceed with the usual speed, the attorneys rather call the judge handling the file and ask him to speed up matters. Although this is not generally successful, it is common as it does not spoil the atmosphere.

The appellate court can either give leave to the appeal and amend the judgment of first instance or reject the appeal. In both cases the appellate court rules on the merits of the case and issues a decision in the form of a judgment (*Urteil*). Alternatively, the courts can refer the decision back to the court of first instance for re-trial and completion of proceedings, when necessary. In this case the decision handed down is a decree (*Beschluß*) in form.

In case it is established that the proceedings in the court of first instance are void, due to grave mistakes of procedural law, or others, the appellate court is obliged to quash the decision even if no motion to this effect was filed with the appeal.

The file, containing the decision and the very brief minutes of the hearing is sent back to the court of first instance. The court of first instance serves the decision on the parties.

The appellate court, when handing down a judgment or a decree, has to state, whether a second appeal is admissible. (For second appeals see Point 3).

3 Second Appeals

3.1 Admissibility of Second Appeals

A second appeal to the Supreme Court (*Revision*) is admissible, if the judgment of the appellate court depends on the resolution of a question of substantial or procedural law which has a substantial significance for the unity or the development of law or for the predictability of court decisions. In case the dispute value of the litigation does not exceed 3,600 ECU, no second appeal is admissible at all.

If the appellate court, having regard to these rules, states that the second appeal is admissible, an "ordinary second appeal" (*ordentliche Revision*) can be filed.

In case the appellate court did not hold that the second appeal is admissible, an extraordinary second appeal (*außerordentliche Revision*), can be filed.

3.2 The Contents of the Second Appeal

In general the same rules apply for the second appeal, as for the first appeal.

The arguments focus on wrong application of law by the appellate court.

In practice, the legal arguments are elaborated in more detail and with more care than it is true for first appeals.

The deadline for filing is again four weeks after service of the decision of the appellate court and also has to be filed with the court of first instance.

3.3 Proceedings at the Court of First Instance

The court of first instance has to check whether the writ was filed before expiry of the four weeks deadline and, in case it is delayed, or other formal requirements are not fulfilled, it has to reject it.

In case an ordinary second appeal is filed, a copy thereof is sent to the appellee, who is entitled to file an answer to this second appeal within a deadline of four weeks. The proceedings are similar as for the first appeal.

After expiry of these four weeks, the court of first instance, having received an answer to the second appeal or not, sends the file to the appellate court, which sends the file to the Supreme Court.

In case an extraordinary second appeal is filed with the court of first instance, the court has to send the file directly to the Supreme Court. In this case, it does not give the appellee a possibility to file an answer to the appeal, as this is done by the Supreme Court eventually.

3.4 Procedure at the Supreme Court

In general, the Supreme Court decides on appeals without any hearing. In theory, it is possible to set a hearing, if the Supreme Court considers this necessary in individual cases. In practice, this is hardly ever done.

If the second appeal is an extraordinary one, the Supreme Court, if it is not rejecting it for formal reasons immediately, sends a copy to the appellee, who is entitled to file an answer to the extraordinary appeal within four weeks.

The Supreme Court can decide on the merits of the case or refer the case back to the court of first instance, if the proceedings are incomplete.

Having adopted a decision, the Supreme Court sends back the file to the appellate court, which again sends it back to the court of first instance. The court of first instance serves the decision on the parties. This usually takes several weeks.

3.5 Further Appeals, Reference to the ECG

There is no remedy to challenge the decision of the Supreme Court for the application of substantial law violating the Austrian constitution or the European convention on Human Rights (ECHR) or Community Law.

It is only the appellate courts and the Supreme Court themselves, who can make an application for setting aside legislation for violation of the constitution or the ECHR. The parties of the litigation only have the possibility to make suggestions and try to convince the court to do so.

The same is true for reference procedures according to article 177 EC-treaty, which also may initiated by the courts of first instance.

4 Decision to Appeal

4.1 Considerations to Lodge an Appeal

In Austria it is not common practice to file an appeal in any case. The chances are rather assessed on a case to case basis, the client is informed about risk and chances, and takes the economic decision to appeal or not.

The costs of appellate procedures are highly predictable, as they consist in the attorney's fees set by the Lawyer's Tariff Act (*Rechtsanwaltsgebührengesetz, RATG*) and a court fee determined by the Court Fees Act (*Gerichtsgebührengesetz*). Thus it is regarded as good practice to inform the client about the costs he has to pay if the appellate procedure is not successful.

It can be observed that the judgments of the Regional Courts and the Commercial Court are more likely to be appealed against than the judgments of the District Courts. The reason for this is simply that the higher the dispute values are, the less significant are the costs for the appellate procedure in relation to the dispute value. The dispute value of the appeal is not necessarily the dispute value of the litigation in the first instance. The dispute value of the appeal is only the amount, to which extent the appellant moves for an amendment of the judgment.

In the following calculation of the overall costs of the appellate procedure consists in the court fees the appellant has to pay and lawyers fees (exclusive VAT) for the respective writ (appeal or answer to the appeal) and the attendance of the hearing. As the successful party will be reimbursed its costs from the party losing the appellate procedure and has to pay its own attorney, these costs represent the risk taken, if an appeal is filed.

| dispute value | costs of appellate procedure | percentage of Dispute value |
|---------------|------------------------------|-----------------------------|
| 1,000 | 668 | 66.80% |
| 10,000 | 1,812 | 18.12% |
| 50,000 | 5,111.23 | 10.22% |
| 200,000 | 8,931.15 | 4.46% |

As the proceedings on first appeals usually do not take more than a maximum of ten months, there is no general tactics to use it to delay payment, as normally the costs of the appellate procedure exceed by far the advantages of delaying payment. However, if it is likely that the appellate court orders the court of first

instance to re-try the case or complete its procedure, the appeal might cause a delay of a year or more.

If chances are very slim, appeals are not usually filed. This is especially the case if the judgment could be turned over on grounds of finding of facts only. As the appellate courts are very reluctant to do so, it usually does not make sense to file an appeal on these grounds only. Although the lawyers prefer to file appeals in doubtful cases as they will earn their fees for doing so, it is not common practice to file appeals for this reason only, if it is very unlikely that the appeal will be successful.

In general, there are no situations where lawyers refuse to file appeals although they think that the appeal would be successful. However, if the dispute value is rather low and thus the economic risk of the appeal is excessive, parties sometimes prefer not to file an appeal unless the lawyer advises them that he thinks that the appeal most likely to be successful.

4.2 Strategic Decisions

Strategic decisions are mostly taken either before or during the proceedings at the court of first instance. Once the parties decide to try the case, it hardly happened that settlements are entered into after the decision of the court of first instance.

In case the appellate court or the Supreme Court refer the case back to the first instance in order to complete the proceedings, the final result often will be predictable for the parties.

In this case it is likely that the enter into a settlement during the re-opened proceedings at the court of first instance, as they know the interpretation of the law the Supreme Court will apply to the case.

4.3 Statistics

We were provided with the following statistical information by the Landesgericht für Zivilrechtssachen Wien (Regional court of Vienna), Appellate Division:

Remedies decided upon in 1997 by the Regional Court of Vienna

| <u>Remedy</u> | <u>Total</u> | <u>affirmed</u> | <u>amended</u> | <u>quashed</u> | <u>others</u> * |
|-----------------|--------------|-----------------|----------------|----------------|-----------------|
| <i>Berufung</i> | 2,654 | 1,707 | 471 | 411 | 219 |
| <i>Rekurs</i> | 8,381 | 4,072 | 1,969 | 1,676 | 878 |
| Total ** | 10,954 | 5,579 | 2,440 | 2,087 | 10,097 |

We were further provided with the following statistical information by the Österreichisches Statistisches Zentralamt (Austrian Central Statistics Office):

Remedies decided upon in Austria in 1996 by all Regional Courts, Commercial Court

| <u>Total</u> | <u>affirmed</u> | <u>amended</u> | <u>quashed</u> | <u>others</u> | <u>success rate</u> |
|--------------|-----------------|----------------|----------------|---------------|---------------------|
| 31,084 | 16,519 | 7,151 | 4,459 | 3,366 | 37.4% |

Remedies decided upon in Austria in 1996 by the Court of Appeals (Oberlandesgerichte)

| <u>Total</u> | <u>affirmed</u> | <u>amended</u> | <u>quashed</u> | <u>others</u> | <u>success rate</u> |
|--------------|-----------------|----------------|----------------|---------------|---------------------|
| 9,619 | 4,888 | 1,978 | 1,634 | 845 | 37.6% |

Remedies decided upon in Austria in 1996 by the Supreme Court

| <u>Total</u> | <u>affirmed</u> | <u>amended</u> | <u>quashed</u> | <u>others</u> | <u>success rate</u> |
|--------------|-----------------|----------------|----------------|---------------|---------------------|
| 2,029 | 994 | 514 | 520 | 47 | 51.0% |

* These figures represent settlements and waivers becoming effective after the appellate court has received the file.

** This figure represents the number of files the appellate court received. As in several cases both *Berufung* and *Rekurs* were lodged by different parties, this figure is not necessarily the total of the figures "*Berufung*" and "*Rekurs*".

5 Foreign Law

In theory, courts have to apply foreign law, in cases the Private International Law Statute (*Gesetz über das internationale Privatrecht, IPRG*) an act containing the rules of conflict, provides so, without a motion of the parties to do so. In practice, the courts of first instance hardly apply foreign law unless the parties refer to it or the appellate court raises the issue. Until recently the United Nations Convention on the Sale of Goods, also published in the Austrian Federal Gazette, seems not to be commonly applied without the parties asking for it; however, in the last years things seem to change.

If the courts have to decide whether Austrian or foreign law applies, as the attorneys or the appellate court raises this issue, they seem to resolve this question in many cases where it is doubtful as to the application of Austrian law.

In case foreign law is actually applied, the court has to determine its content by its own or with the help of the Ministry of Justice. The parties are asked to assist the court, but failure to do so will not affect their rights. The ministry provides the court with official expert opinions, while private expert witnesses are practically never heard. The judges usually ask the councils to assist in determining foreign law by submitting the relevant statutes and textbooks.

In many cases the courts establish that the foreign law, they have to apply, is not substantially different from Austrian, and then do not distinguish any more, but go on and rule as if Austrian law would apply.

As the application of German law is concerned, the courts, in most cases feel that they can apply German law without consulting the Ministry, as the courts are at least equipped with standard text books on German civil and commercial law.

In general, the appellate courts and the Supreme Court deal with the question of application of foreign law in a more professional way. This is also due to the fact that the libraries they are equipped with, contain the relevant material.

According to our experience, the courts are extremely reluctant to disapply Austrian law for the supremacy of EC law and rather tend to make reference to the European Court of Justice according to article 177 EC-Treaty. Many judges of courts of first instance do not seem to be prepared even to do so and inform the attorneys that they will apply Austrian law as it stands and invite the attorneys to appeal against their decisions in order to find out what the appellate court will do.

However, the Commercial Court and the Supreme Court make use of Art 177 EC-Treaty quite frequently.

6 Differences

The proceedings in the appellate courts, in most cases, consists of paper work only and the hearings, if any, are comparably useless. The judges, who usually neither heard the witnesses nor the experts, rely on the documents they have on file only. Thus they seem to be more objective and more devoted to a clear and correct legal reasoning.

It can be observed, that the judges of the courts of first instance, in many cases seem to try to convince the parties to enter into a settlement agreement, as this will reduce the work load of the judge. This is hardly ever done in appellate proceedings.

It should be mentioned as well, that - due to misguided university policy - the studies of law in Austrian universities do not necessarily include a basic education of community law. Thus many judges and attorneys lack the necessary knowledge to identify problems of community law and to act accordingly. In general, the education and the professionalism of the judges of the Commercial Court of Vienna is more adequate.

7 Access to Appeals

It is frequently argued that the reduction of the possibility to lodge appeals would make the court system more efficient. This argument is often based on the observation that the courts have to deal with a work load increasing from year to year. In my view, this argument has to be rejected as the increasing work load of the courts obviously shows that the society is in need of this service. Instead of reducing the access to appeals, the proceedings should be made more efficient, and the courts shall be provided with sufficient personal and equipment. *E.g.*, are the IT-systems of the Austrian courts are underdeveloped.

In general, I feel that not only the parties of a case have an interest in a possibility to appeal, but there is also a general interest as the precedents of the appellate courts and especially of the Supreme Court are an important guideline to the application of law.

IV. Clients, Lawyers and Appeals in France (Ulrike Brandt-Mongin)⁵²

1 Motivations for Appeal

First of all I would like to determine what could be the reasons for lodging an appeal. The following considerations may appear to be of an anecdotal and trivial character and therefore not necessarily fit for being mentioned in a scientific study. However, in my opinion they are in practice the main reason for the overwhelming number of procedures that have covered the courts here in France during the last years. The number of appellate proceedings has increased equally.

For good reasons in the last years plans for a legal reform have been initiated by the ministry of justice, which are considered as being quite urgent and which will probably be realized in the near future. The objective of the reform is to limit the access to courts while creating an instance for mediation, sometimes with the assistance of psychologists, in order to try to reconcile the parties and to reduce the charge of work for the courts.

1.1 The Personality of the Client as a Reason to Appeal

The following reflexions are not carried out for general amusement, but, as any lawyer can confirm, because the human component of this profession is a very important if not a vital one.

I would personally distinguish the following potentially difficult clients, who may be not always welcome, into four categories, including both French and foreign clients:

1.1.1 The Eternal Loser

The *eternal loser* some day has been grasped by the mills of justice and, since that day, tries desperately to have his rights or that what he supposes to be his rights, recognized.

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Usually, he would be entitled to judicial assistance fees, even when he is a foreigner, since these have to be allowed for foreign parties under the same conditions as to French parties.

Since he has already being ruined for several times because of a long series of defeats, he would meet the financial conditions and his lawyer should, as a responsible and helpful counsel, help him by completing application forms.

However, because of an insufficient knowledge about his rights and because of an irresistible tendency to leave his destiny to the hands of someone else, *i.e.*, his lawyer, he often will agree to pay any provisions of fees without any discussion and without delay, which of course attracts many lawyers. Therefore, often there are no legal reasons for his proceeding which will be carried pitiless through all instances.

1.1.2 The professionally Assisted Person

In the case of the *professionally assisted client* the overburden of work in French courts results directly of the existence of judicial assistance fees. Because of a long-term experience in administrative application this type of client often has more legal knowledge in special areas, as, *e.g.*, renting of flats, than many lawyers and therefore is quite an uncomfortable client.

Even if he does not meet exactly the conditions for obtaining judicial assistance, he has learnt to formulate his situation on the application forms in such a convincing manner that he gets it anyway, as an exceptional favour.

I do not think that my impression of the overwhelming number of such proceeding is mainly subjective. According to statistics the quote-part of parties with judicial assistance fees has been of about 5% ten years ago while today they represent almost 25%.

This phenomenon gets enforced by the fact that the rule according to which the fees and costs exposed by the "winning" party have to be charged on the "losing" party is not systematically applied. For clients who have to pay themselves, the rule has certainly a intimidating effect and would be an incentive to weight carefully the chances of success.

Concerning the beneficiary of judicial assistance fees, they know that the court would take into consideration their personal situation and make use of its faculty to reduce the reimbursements to be paid to the other party. While such rule

should reintroduce some sort of social justice or equity in most cases, it is often considered as a free entrance to appellate proceedings, even if the motivation would be evidently insufficient under legal considerations.

1.1.3 Prosecution Complex

It may be the big city, the poverty that lately has largely increased because of unemployment, or today's attitudes and trends: whatever the reason may be, any lawyer in Paris finds himself quite frequently in the situation to have to help and assist psychologically disturbed people. This applies more in criminal than in civil proceedings, but even civil matters this problem does occur.

There are many different forms of the persecution complex. Some examples of clients I have personally met: those being convinced that "the politicians" in cooperation with "the secret services" would try to exterminate them, by the use of "gases" being vaporized in their favourite bistros, by secret doors opening suddenly in the metro and leading to places where torture would take place, by nuclear clouds produced for their own personal "use" etc.

A German female client (of only about fifty years) told me that she had worked during the Nazi regime for Doctor Mengele at Auschwitz and now was persecuted by the Mossad.

Furthermore, there are those clients frightened by sects, the mafia, right now: hooligans, priests, etc., and who are convinced that one or more of their relatives and/or neighbors are secretly linked to such groups.

Some of these sick people are quite wealthy (even if they don't have a salary or other constant revenue) and therefore capable to pay one or more lawyers sometimes for a couple of years.

1.1.4 Urge of Vengeance

In most cases the lawyer would be confronted with the **urge of vengeance**, *e.g.*, in divorce matters in which emotions, often restrained over the years, would lead to the pitiless exhaustion of all chicaneries of proceedings and instances (I would think that appeal is made in about 30 to 40% of divorce cases); one has to keep in mind that in France divorce still can be based on fault and in fact is in about 33% of divorce cases.

In addition to this there are important differences between, *e.g.*, the German and French law concerning the amount of alimony or compensation to be paid to the ex-wife (or sometimes ex-husband) with the result that in many cases there is an intense struggle on the question of competence of German or French courts and law applicable.

1.2 Appeal based on a mistaken Appreciation of Facts

The Court of Appeal has to judge both the correct application and interpretation of legal norms and the correct appreciation of the situation between the parties which led to the litigation.

An appeal of course is necessary if it is found that during the first instance any important document has not been served or could not be served (first instance one of the parties has not respected the so-called "*clôture*", *i.e.*, the end of the preparation of the actual hearing) or if the court has not taken into consideration the documents that have been served or has given a wrong interpretation.

This may occur mainly at the courts trying *référé*-cases because many of these courts are completely overcharged. There are courts in the suburbs of Paris where 30 to 40 matters are fixed for the same day, sometimes four to five times per week.

At these courts, the hearings start at 5 o'clock p.m. and end at about 9 o'clock p.m. Computers only have been introduced in 1993 or 1994. The courts are often located in old, damaged buildings without convenient offices or rooms for archives. They work with a heroic staff that often is completely snowed under work.

In addition to this, there is no obligation for the parties to be assisted by a lawyer at the country court, the commercial court or the *conseil des prud'hommes* so that they may discuss their case themselves.

According to the rule that "the proceeding is oral", the decisive moment in the proceeding are the oral pleadings of the lawyer or of the parties and on the other hand all documents can be served up to the moment of the pleading, sometimes even afterwards, if the judge asks for further information or authorizes further information.

Since the decision are taken weeks or months later, the judge, of course, has some difficulties to remember exactly the case.

For that reason, a general custom has been developed according to which the lawyer prepares a file for the court explaining the case and helping for better understanding.

Because they are overloaded with work, however, many lawyers, especially those who treat many "unimportant" matters and often plead two or more matters before one, two, sometimes three different courts on a single afternoon, would only prepare those files rapidly and not very diligently.

Pleadings at French courts often are very long and complicated, even though one has to admit that often the pleaders have natural oral talent and verve.

Under these conditions, many judges are solely reduced to rely on their impressions during the pleadings and their handwritten notes, rather than on the careful study of the party's files; with the corresponding results. Accordingly, this may be one of the most pertinent reasons for parties to appeal.

1.3 Appeal based on a mistaken Interpretation of the Legal Situation

Misinterpretation of legal norms is the classic and most evident reason for appeal. I do not think, however, that it is the most frequent one.

Linked to that is the fact that the court simply forgot to answer a legal argument.

1.4 Legal Frontier-Cases

Finally there are quite often controversial interpretations of a legal rule or other legal norms in jurisdiction.

Our firm, for instance, has often intervened in cases of transsexuals in order to have identity documents and civil registry changed. In these matters, the Parisian *Tribunal de Grande Instance* refused almost systematically those modifications while the Court of Appeal admitted them, so that the client had to be informed right from the start that he would have to undergo two instances.

2 Proceedings at the Court of Appeal

In civil proceedings, one has to distinguish fundamentally between

- the "real" appeal proceeding during which a decision of the first instance court may be retried before the appellate court;

- the "opposition" which allows a party that has not been heard or represented during the first instance to have the matter retried before the same court;
- the "tierce opposition" which allows a third party that has not been invited to and/or not been informed of the first instance proceeding, to have the points which directly would be of concern to her and which might conflict with her own interests, be retried.
- the appeal before the Supreme Court.

This chapter only concerns the first and the last case.

2.1 Appeal at the Court of Appeal

2.1.1 Allotted Time to make Appeal

The most important delays for appeal at the appellate court are:

- two weeks after a référé-decision and decisions in all proceedings being started solely by a written request and not by serving of the writ by the bailiff;
- one month for all "regular" proceedings.

One has to keep in mind that for all deliveries within the ancient colonies still attached to France (DOM-TOM) this delay would be prolonged by one month, for all deliveries in foreign countries by two months.

The delay starts, except for specially excluded cases, with the day of delivery.

A special problem occurs because of the way deliveries of decisions are carried out in France. As a rule they have to be made by way of the bailiff who would either hand the decision personally to the addressee who would sign a receipt, or to someone authorized (husband, wife, concierge) who also has to sign a receipt, or he would leave the document at the town hall. In the last case he has, in addition to this, to leave a message in the mail-box indicating that and where he left the documents and send him another copy by mail.

However, it happens quite frequently that the notice and the copy do not reach the addressee nonetheless, who therefore gets not informed of the decision and the delivery and finds himself out-of-date to make appeal.

Concerning deliveries to foreign countries the problem is less important since they are done by way of the public prosecution services of both countries implied and at least would reach the addressee by way of a registered letter.

2.1.2 Competence of the Court of Appeal

During the appeal proceeding the entire case is retried which means that legal problems and arguments as well as the initial situation between the parties which has been at the origin of the litigation (*effet dévotatif*) are tried again.

This also means that the parties are entitled to introduce new documents and new arguments without limitations.

The competence of the appellate court is limited, however, by the sort of proceeding chosen during the first instance.

If, *e.g.*, a decision has been taken within the frame of a *référé* proceeding, which only is possible if the initial situation is relatively simple and the proceeding can be conducted rapidly and if it is found during the appeal proceedings that the situation in fact was not as simple as that but should have been heard during a normal proceeding, the matter has to be sent back to the first instance court which would then have to conduct a normal procedure.

Then one has to distinguish between the so-called general appeal ("*appel général*"), the appeal in view of quashing the first instance judgment, the appeal for indivisible litigations and the limited appeal on the other hand.

In the latter, the appealing party accepts one or more of the decisions taken in the judgment or the order, but criticizes one or more other decisions (*e.g.*, in divorce matters: maintaining of the motivation of divorce, support, custody etc, but appeal against compensation for the other party).

2.1.3 The Importance of the First Instance Decision for the Appeal

As a principle, the appeal interrupts the execution of the first instance decision for the duration of the appeal, with the result that, for instance, debts can not be recovered by enforcement of the judgment.

However, this rule is very often circumvented because it is, *e.g.*, inapplicable to *référé*-orders or because it has been decided by the first judge that his decision would be provisionally enforceable.

In this case the winning party would enforce; if it would then lose the appeal it would have to reconstitute the initial situation and therefore repay the amount of money it had recovered.

Because of the length of the appeal proceedings (depending on the sort of litigation and the appellate court concerned, they take between at least 9 months and sometimes even 5 years) this system is very risky and unpredictable. To my opinion the loser party's lawyer should therefore start to think of making an additional appeal against the provisional enforcement which would be heard by the president of the *Tribunal de Grande Instance*.

It has further to be noted that the *effet dévolutif* expressly does not include, but exclude that the parties introduce new demands ("*prétentions*") during the appeal proceeding, if they do not respond to the demands of the other party. *E.g.*, the party which did not claim damages in the first instance, would not be entitled to do so during appeal.

However, the Court of Appeal may and usually does tolerate such a *prétention nouvelle*, if the other party does not protest.

2.1.4 Distribution of Roles at the Court of Appeal

As it was already explained above, it is necessary that the parties use the help of special lawyer at the appellate court, called "*avoué*", with the exception of social matters.

The function of the *avoué* mainly consists in supervising the exchange of writs between the parties and to assure the correspondence with the court. He intervenes during the *mise en état*. This is a procedural hearing which generally takes place 4 or 5 times in preparation for the main audition. This hearing permits to one of the judges, specially designated for the case, to verify if all writs and documents have been exchanged between the parties, if a party has claimed judicial assistance fees, if there are problems for delivery of documents, etc.

The writs themselves are written by the lawyers, usually. During the years a special way of presenting the writs, of formulating certain demands, of quoting etc has emerged at the appellate courts (as at the Supreme Court) which often makes it necessary that the *avoué* would correct and verify the writs of the lawyer. He normally would do this without being asked to and the writs are served in the name of the *avoué* anyway.

Even during the main hearing, it is not necessarily the lawyer who pleads, but he may ask the *avoué* to do so in his place.

2.1.5 Exchange of Writs

Appeal is lodged by way of a declaration ("*déclaration d'appel*") which has to be signed by the *avoué* and introduced at the appellate court.

The court then will inform the other party of the appeal and ask it to designate an *avoué* itself.

If the appellant finds that the other party has not named an *avoué* within 2 months, it would have a writs of summon to be delivered by the bailiff.

If thereafter there is still no reaction within 2 weeks, the appellant may have the proceeding go on and eventually gain a judgment without the hearing of the other party.

After the *déclaration d'appel* the appellant has to introduce a writ motivating the appeal within 4 months, without regard to the question whether it is a French or a foreign party. After this delay the appeal would be null and void.

Surprisingly, this often happens in divorce cases and might be dangerous for foreign clients: At the moment when the parties receive the first instance decision, their relationship often still is so tense that they immediately ask the lawyer to make appeal. Some months later they may have somehow accepted the situation and may have started a new life, so that they may forget to give their new address to their lawyer or do not answer demands to take position on projects of writs.

The consequences may be unagreeable:

- on the one hand, the appeal can not be simply withdrawn ("*désistement*") but the other party has to accept it. That is logical because it has already had to pay its own *avoué* and most of the time its own lawyer. Therefore, one has to negotiate the conditions of withdrawal. Without any contact with the client the lawyer, however, is not entitled to do so and therefore the proceeding continues.
- On the other hand the opponent party may claim damages for an dilatory or improper appeal ("*appel dilatoire ou abusif*").

- Finally, the Court of Appeal may inflict a penalty motivated by an "misuse of proceeding".

2.1.6 The Preparation of the Main Hearing

After the introduction of the *déclaration d'apel* the president of the Court of Appeal designates the competent chamber. The president of this chamber then would charge one of the judges with the *mise en état*.

At about one month after the declaration of appeal he indicates to the *avoué(s)* the planning of the *mise en état*, i.e., fix days for

- the introduction of the writ to be served by the appellant (four months, as mentioned above);
- the introduction of the writ in response of the opponent party;
- the *clôture*, i.e. the end of exchanges of writs;
- the hearing.

If it is found, during the proceeding, that the matter is complicated and the exchange of more writs would be necessary, the *clôture* may be refixed without great difficulty.

A party, however, which demands that the *clôture* be delayed for personal reasons (the client does not answer to his lawyer's letters, overload of work of the lawyer or of the *avoué*, etc), the demand would have to be motivated quite precisely.

The dates are systematically delayed if the appellee has claimed judicial assistance fees and its lawyer has not yet been designated.

The *avoués* meet the judge at these occasions. Routine-discussions rarely take more than 5 minutes. But if one has to plead for a delay or for other incidents of the procedure ("*incidents de la procédure*" as for instance preemption, inadmissibility of certain documents, inadmissibility of certain arguments, acceptance or not of a *désistement*) the debate may take more than an hour.

2.1.7 Preemption of the Appeal Proceeding

It may happen that an appeal proceeding takes several years notwithstanding the *mise en état*.

I might give an example: the appellate court had decided that a psychological examination had to be made of the defendant. But since the defendant did not like the idea, she simply did not go and meet the psychologist. The opponent party apparently had also not paid its *avoué* and lawyer with the result that the matter had not been treated in any way for more than two years.

So, in this case the preemption which is two years, had been achieved ("*péremption d'instance*") and the appeal was declared null and void.

The first instance decision therefore became definitely enforceable, even though the reason for the delay was essentially due to the fault of the appellee.

In some very urgent cases and under the condition that the interests of one of the parties might be directly endangered, it is possible to call on the president of the court d'appel or, by the use of a *référé*, on the judge charged with the *mise en état* in order to have an immediate date fixed for the audition. The parties would have to plead to this point.

2.1.8 Strategic Considerations Concerning the Appeal

a. The Decision to make Appeal or not

Most of the time it is not a question of strategy to decide whether or not an appeal shall be lodged. It rather happens that the deficiencies of the first instance decision forces one party to do so or the client is one of the sort which is incapable to accept loosing the case.

But even in these cases the question has to be raised.

The fees for the *avoué* are of some importance and have to be paid in advance.

The lawyer would also ask for a provision of at least 1,200 to 1,500 ECU.

As outlined above, these fees would be refunded by the opponent party in the case of winning but this does not change the fact that they have to be paid in the beginning and that there is always a certain risk that the court does not allow the total amount to be repaid, or that they cannot be recovered.

Further, there are certain proceedings for which it is known that they only can be won in the second instance so that the client of course is prepared to advance costs right from the beginning.

Sometimes an appeal might be opportune simply in order to delay immediate enforcement of the first instance decision. This would especially be the case when the client meets financial difficulties and hopes to be able to clear up the situation within a couple of months, but would be forced, in case of enforcement of the decision, to declare himself bankrupt. As mentioned above, the risk would be that he might be condemned to pay damages and a penalty.

In this case it is important to try to find any plausible legal argument for appeal.

I think that in a certain way the Court of Appeal of Paris unduly corroborates such dilatory tactics because it does not systematically apply the rule according to which the appellant party has to indicate its name, profession, address, etc on the declaration of appeal and if it does not, that appeal would be null and void

Of course, a debtor who has been condemned in the first instance usually prefers not to indicate his real address, especially if the judgment is already enforceable.

The Court of Appeal of Paris nevertheless accepts declarations of appeal knowing the indicated address is wrong and only allows damages on these grounds if the opponent party is able to proof the exact amount of the damages that have occurred because of this mistake, which practically is quite difficult to do.

In those cases, where the decision to lodge an appeal or not has to be weighted carefully, the following parameters might be of importance:

- to which extend the position of the parties with regard to the jurisdiction of the appellate court seems solid or fragile;
- did the appellate court involved have an different opinion from the recent decisions of the Supreme Court;
- how long do most proceedings take before the appellate court concerned.

At some appellate courts it may take up to five years before the decision is taken. Here, it should be considered if the client has the financial capacity and the necessary patience to bear such a situation.

Some institutional clients as, for instance, insurance companies, banks, etc, often have a multitude of similar cases for which it might be necessary to obtain a sort of example and to get a final decision on a specific issue.

A good example would be a question that has been of some importance in my practice some years ago. The question was, to what extent and under what conditions certain German contractual clauses could be accepted by French courts.

b. Lawyers on Appeal

Personally I do not know any lawyer who would refuse an appeal because he feels embarrassed. If the legal position is difficult, he would explain this to the client and try to make clear that the risk is his.

If the whole affair and the psychological reasons for appeal that could not be hidden are of the quite hysterical or ridiculous sort, the lawyer would motivate his explanations in a very factual manner and always find a way to make clear to the judges that there is a certain personal distance between his argumentation and his own opinions. Except for some very few judges, they easily get the message and will not make the lawyer "pay" for it on another occasion.

If the client seems to be quite unbearable and the personal contact begins to be more than unagreeable, the lawyer will try to make him understand that he might be better off by changing.

If one has to think that the client is not inclined to pay the fees, the lawyer would only introduce the declaration of appeal or the writs once the client has met his demands.

On the other hand, success in the lawyer's profession depends largely on the good or bad reputation.

A good lawyer would therefore not accept to defend in a matter which is a very special and difficult one and that he does not know to handle in a professional manner. It is, for instance, very dangerous, because of the special procedure and the need of technological knowledge, to accept to intervene in matters of patent law.

It also happens that a lawyer with rather conservative clients would refuse to defend for instance groups cooperating with terrorists. One is rapidly stamped.

Even at the Court of Appeal of Paris, where 13,000 lawyers are admitted, a lawyer who specializes on a certain matter or on certain clients (or who might be of special incompetence) is quickly recognized.

Our office, for instance, quite often treats cases of changing sex for transsexual persons because we simply had to succeed a deceased colleague. Very quickly we had to start to explain to clients, colleagues and judges that this did not mean that we were specialized on homosexual and transvestite matters or the like.

Some colleagues have a solid "bad" reputation, because they defend special political groups or lobbies. These lawyers would in certain cases not refuse to defend a matter but would rather have it pleaded by another colleague in his own name in order to "hide" their intervention considering that chances for success might be better.

It also happens, especially at small Courts of Appeal, that the position of the court and sometimes the personal opinion of judges are well known, so that it might be opportune to have a "foreign" colleague defend the case.

Last but not least it happens that the Courts of Appeal have a different position on certain issues. The Court of Appeal of Paris and the Court of Appeal of Versailles for instance opposed each other some years ago on several questions in family matters.

Therefore, sometimes it became necessary for a colleague from Versailles who won several cases and got his name published in this relation, to avoid defending in similar cases in his own name at the Parisian Court of Appeal where he would likely have lost both the case and, accordingly, his good name.

Even if it would be recommendable not to lodge an appeal because of the factual situation, some lawyers apparently try to push to have the litigation followed on appeal. I do not think that this would be by reason of fees, but rather out of considerations of strategy to make themselves known.

In fact French lawyers do publish a lot and often comment decisions they have obtained. At least, as far as decisions of the Courts of Appeals are concerned.

It therefore might be of interest to a lawyer, if he is trying to receive a reputation in a certain matter, to persuade the client to follow up on appeal as it simply might be useful for the discussion of a litigious point of law.

The rules of the lawyer's chamber do not allow lawyers to base their fees on the success of the intervention but there is no rule when and to what extent the lawyer has to ask for fees.

So it might happen that the lawyer does not ask for any fees until the judgment or sentence has been taken and only requests payment if he has won, which of course would make the decision easier for the client.

2.1.9 International Law

The application of foreign legal norms is rare in French litigation practice. First of all the international private law generally leads, if the competence of the French courts is recognized to the application of the French law as being the law of the domicile or the nationality of the parties.

Besides this, one has to recognize that quite often as well the lawyers as the judges do not have any special knowledge on international private law, they are not educated to handle these rules and therefore simply forget or exclude the possibility of application of international treaties collision norms or foreign law. However, this does not apply to some very specialized first instance sections of the *Tribunal de Grande Instance*, especially as regards the chambers that treat with patent-law or copyright law.

When foreign law is applied, the courts systematically ask the parties to bring a certified statement of a lawyer or magistrate of the concerned country. If these statements are contradictory, the court would decide on an expertise. I have had no personal experience of this type so far.

The examinations of the decisions that have been published show that foreign law mainly has been applied in inheritance matters and commercial matters. It is also evident that the quality of the decisions on appeal under these problems is much better than on the first instance level. This may be explained by the fact that the decisions first of all are never taken by a sole judge as it often happens in the first instance, or by non-professional judges as at the *conseil des prud'hommes* or at the Commercial Courts, because the judges have a better training and because they simply have more time to write their decision. Besides this, the further career of a judge at the Court of Appeal depends even more than in the first instances of the solidity of the decisions.

Private international law and international treaties are more frequently applied in terms of international jurisdiction of French courts. I think, however, that the

judges often enter into this kind of consideration simply in order to exclude their own competence and therefore the potential application of foreign law.

This for instance happens in cases of divorce where the (German) wife and mother simply takes the children home to Germany without informing her husband. If French law is applicable, custody for the children lies in the hand of both parents and leaving the family's home together with the children may be considered a sufficient reason for divorce. Despite this, the Parisian judges for family matters do exclude their own competence quite systematically motivating their decision by pointing on the new home (which often has not even been changed officially) of the mother who now has the physical custody over the children. They do so even knowing that in this case, and if the father is responsible enough not to return the children by force, the Luxembourg treaty of 25 May 1980 concerning abduction of children is entirely thwarted.

2.2 Cassation at the Supreme Court

2.2.1 General information

Reasons for a "*pourvoi en cassation*", *i.e.*, an appeal to the Supreme Court, are of course based on legal and not on strategic considerations.

Annually there are at about 60,000 of such appeals.

The declaration is introduced by a lawyer at the Supreme Court.

If there have been no indications concerning the arguments ("*moyens de cassation*") and documents, the appellant has to communicate them within a delay of three months.

These documents are served to the appellee by the Supreme Courts office by registered mail.

Within a delay of two months he has to answer the writ or, if the declaration of the appellant has not yet been motivated, within three months.

All appeals are first submitted to a prior control of a specialized section of the Supreme Court which verifies if in fact there might be a mistaken interpretation of law by the Court of Appeal. If not, the appeal would be refused at this stage.

The president of the Supreme Court then would designate a judge ("*juge rapporteur*") who would prepare the file and give his own oral explanation of it during the audition.

Normally there are no pleadings at the Supreme Court if the lawyers have not requested to plead. The court might also authorize the parties themselves to give some explanations.

A member of the attorney general's office also assists at the hearing and may intervene. The Supreme Court may be seized directly by other courts asking for a preliminary ruling concerning a special problem they have to solve.

2.2.2 The lawyers at the Supreme Court

Appeals to the Supreme Court only can be made by specialized law firms admitted at the *Cour de Cassation* and the *Conseil d'Etat* (Supreme Court for administrative matters). Today there are 72 such admissions for law firms ("*charges*").

A young lawyer, however, who has succeeded to pass exams to admission to the Supreme Courts, can not create his own office and start working. First he has either to buy such a *charge* (which is very expensive) or work as an employee in a law firm admitted to the court, being paid a contractual fee for every file he has prepared. Today there are at about 380 such lawyers.

The proceeding at the Supreme Court is exclusively in writing and not oral; it is only exceptionally that pleadings are heard.

There is no obligation for the appellee to be represented by any lawyer. Fees for lawyers within a Supreme Court proceeding are of about 1,800 ECU for an appeal, and about the same for prior consultations that often are required. In addition, court fees arise.

Because of the costs and the risks involved almost half of the appeals introduced are not followed up by the parties.

2.2.3 Duration of the Proceedings

The duration of the proceedings at the three chambers of the Supreme Court charged with civil matters (there is one more chamber for penal and one chamber for social matters) is two to three years.

2.2.4 Consequences of Appeal

It has to be pointed out that the appeal at the Supreme Court expressively has not an suspending effect, *i.e.*, the decision of the Court of Appeals can be enforced immediately.

Quite often, however, one meets some difficulties in having the bailiff accept to do so. In case therefore that the winning party in the appeal proceeding, which would be the appellee at the Supreme Court, has not yet been able to enforce the appellate decision, it has the possibility to introduce a special demand in order to force the appellant to prove to the Supreme Court that he in fact has fulfilled the appellate decision. If he does not, the appeal at the Supreme Court would be null and void.

If the Supreme Court reverses the appellate decision, the matter has to be retried by another appellate court which is not bound by the Supreme Courts decision. If this court does not follow the Supreme Court and confirms the decision of the first Court of Appeal, the matter is brought before the Supreme Court again. The court then retries the case, this time the chamber is composed according to special rules and with more members, and additional lawyer fees may occur.

It is only this second decision of the Supreme Court that would be binding for the third Court of Appeal which would have to judge as the final instance.

Because of this quite long and complicated procedure, there may occur differences in the jurisprudence of the Court of Appeals and the Supreme Court.

This happened in the matter of medical responsibility of hospitals for patients that were infected during their stay in hospital because of insufficient hygiene or transfusion of spoiled blood. In these cases, the Court of Appeal follows a doctrine according to which one has to distinguish between the obligation to reach a certain result ("*obligation de résultat*") for having absolute hygiene respected in hospitals, and an obligation to try to achieve the best result ("*obligation de moyens*") during an operation.

However, the Supreme Court still keeps to a simple presumption of insufficient treatment that can be refuted by the hospital by proof of certain actions of prevention.

V. Appellate Proceedings in a Common Law Environment (Miriam Bartlett)⁵³

1 Description of a standard appellate proceeding through all different stages and levels of appeal.

My area of expertise is the defence of Professional Negligence claims and as there are often many tactical and policy considerations to take into account when deciding to appeal such claims, I have decided to use this type of case as the basis for my in-depth study. In this scenario I assume that I am acting for a Defendant, a professional man accused of negligence, who has lost his case at first instance. The professional man has indemnity insurance cover and his insurers have conduct of the defence of the action on his behalf. The insurers in this scenario instruct me to act on their behalf and also on behalf of the Defendant professional man.

Let us assume the Defendant, a lawyer, was found to have made a negligent mis-statement in a document relied on by a foreign bank Plaintiff, who had asked for information on a borrower. The basis of the defence was that the statement made was correct as far as the Defendant was aware and that the Plaintiff bank had not actually relied on the Defendant's statement when deciding to advance funds to the borrower concerned. The Defendant professional also raised arguments of contributory negligence against the Plaintiff bank. He argued the Plaintiff bank had failed to comply with its own procedures for checking the borrower's credentials before advancing money. It transpired the borrower did not repay the loan as he never had sufficient funds to do so and should not have been accepted as a good risk by the bank. The Plaintiff bank, having lost the money it advanced to the borrower, has now turned against the Defendant professional in an attempt to lay the blame for the advance at his door and so recover the amount of the advance from him.

The principle of negligent mis-statement and reliance on negligent mis-statement leading to economic loss is a relatively complex area of English law and is one where courts of first instance are sometimes tempted to extend the scope of liability. The appellate courts tend to be far more strict in the application of those complex principles and so an appeal in such a case is one which can be

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recommended to a client for several important strategic, legal and financial reasons. In addition, in my area of expertise, the litigation on behalf of the Defendant professional man is funded by his professional indemnity insurers. The insurers will have many considerations pressing on them when deciding whether or not to take a case on to an appeal, not least the need to be seen to support the insured professional to the full extent of the legal remedies available to him. Other factors include finance (the cost of the further litigation and the risk that not all costs would be recovered even if successful on appeal); the need to protect the reputation of the professional concerned; the importance to the public of the point of law to be considered; the concomitant publicity; and finally the possibility of new law being created and the risk that the new law may not be favourable to the professional concerned and therefore will add to the risks facing such professionals and by extension will add to the cost of insuring such professionals for their insurers.

1.1 The Defendant appeals to the Court of Appeal

The court of first instance finds the Defendant guilty of negligent mis-statement to the Plaintiff bank and awards substantial damages to the Plaintiff bank and costs. Judgment is given by the trial judge in a written judgment which is read out in court. At the request of the Plaintiff bank, the judge makes the discretionary decision to treat his judgment as if it had been read in open court. It therefore becomes a matter of public record, which is of concern to the Defendant professional man as his livelihood and reputation will suffer. He also remains convinced he did nothing wrong, that the Plaintiff bank is treating him as a scapegoat, that the Plaintiff bank did not in fact rely on his statement when lending money to the Borrower and finally that the Plaintiff bank was itself negligent in failing to check the borrower's credentials before releasing the money. He wishes to appeal the decision.

Once judgment has been handed down by the trial judge of the first instance court and the Defendant has become aware of the decision against him, the normal course of events is as follows. The Defendant's solicitor will obtain from the court transcriber's office a typed copy of the judgment which was read out in open court. Almost all court proceedings are taped and when a judge hands down his judgment by reading it aloud in court, that is certainly taped and any party to the action (and indeed any other person who wishes) can obtain an official transcript of the judgment for a fee. Once the tape has been typed up by the court transcribers it is passed to the judge who checks it to ensure that it reflects what he said and it is then released to the party who commissioned the transcript.

The Defendant's solicitor will then advise the insurance company of the decision and will pass on the Defendant's desire to lodge an appeal. The Defendant's solicitor should give his own initial views as to whether or not the judgment discloses any valid ground for an appeal. In order to appeal against a judgment, the appellant must show that the judge made a mistake as to the interpretation of the law or a point of principle or made a very fundamental mistake as to a question of fact or acted unreasonably when exercising his discretion or made a fundamental mistake in his decision on quantum. It is most unusual for the appellate court to overturn a finding of fact because the appellate court is conscious it has not had the benefit of seeing the witnesses or hearing all the factual evidence. The appellant cannot raise points of fact or law which he did not raise in the original action with the sole exception that he can mention new evidence which has come to light since the original trial.

There is a 28 day time limit within which to lodge an appeal or to seek leave to lodge an appeal. The time limits are strict and a very good reason is needed to persuade the court to grant an extension of that time limit for example sudden unavailability of the barrister (usually a Queen's Counsel, *i.e.*, a very senior barrister) who is preparing the Notice of Appeal. Any application for an extension of time where leave to appeal has already been granted is made by summons supported by an affidavit sworn by the solicitor with conduct of the case explaining why more time is needed. If the 28 day time limit has not yet expired the application is made to the lower court. If the time limit has expired the application is made to the Court of Appeal itself. Where leave to appeal is required, the court automatically assumes more time will be needed for lodging the notice of appeal and a seven day extension is automatically granted which runs from the date leave is formally granted.

In my scenario, the solicitor would convene a meeting with the insurance company, the Defendant professional and the senior and junior barristers who would by now be handling all the advocacy in my experience. If a senior barrister (Queen's Counsel or QC) has not already been appointed for the trial of first instance, one would now be appointed in almost every case unless the junior barrister was very experienced. At the meeting the barristers would give their opinion on whether there were legal grounds on which to base an appeal. It is extremely unlikely that in a case such as this the judge is likely to have made some error in regard to the evidence admitted in the trial and so in my experience the grounds for appeal would be solely based on a point of law.

In this scenario I shall assume that the first instance trial judge tried to create an extension of the law of negligent mis-statement and so the advice given by the Defendant's legal advisors is that there are good grounds for an appeal. The legal advisors point out, however, that the point of law is one which will attract a great deal of interest not just amongst legal professionals and their indemnity insurers but also amongst all other persons involved in giving advice in relation to the making of loans. At this stage many factors come to be considered, some of them conflicting. The Defendant professional man wishes to clear his reputation and has been told there are good grounds for appealing the decision against him so he wishes to proceed. He is funded by his insurers and therefore he has no financial constrictions upon him. There are no financial limits on an appeal.

The insurance company client has far more considerations to bear in mind. Firstly, it has an obligation to the Defendant professional man to see that he is provided with access to all reasonable legal remedies. The barristers have advised that there are good grounds for an appeal and if the insurance company does not intend to accept that advice then it must have very good reasons. Such reasons will include whether or not there is a risk that new law might be created which would be even harsher for professionals providing advice to banking institutions than the existing law. This is more a public policy issue and one which the insurer is in a far better position to consider than either the legal advisors or the Defendant professional himself. The insurer has a far better understanding of the factors which will weigh on its decision in general market insurance terms. The Defendant professional will be concerned to protect his reputation but he will be aware that if the case proceeds to the Court of Appeal and new law is made or if the Court of Appeal judges give very careful consideration of the existing law in judgments which are found to be of general use then this is a case which will be quoted frequently as giving a useful exposition of the law on this area and every time it is quoted the professional man's name will be in the case title. He may not want that degree of publicity associated with his business.

In this scenario I shall assume that the decision is taken to appeal to the Court of Appeal and that leave is granted and Notice of Appeal is duly lodged within the 28 day time limit and is served by the Defendant's solicitor on the Plaintiff bank's solicitors.

In this scenario I shall also assume that the Plaintiff bank decides to cross appeal within 21 days of receiving the Defendant's Notice of Appeal. I shall assume that the grounds for the cross appeal by the Plaintiff bank are that they intend to

appeal against certain findings by the trial judge that they had indeed been partly negligent in their assessment of the borrower's credentials. The trial judge eventually held that the Plaintiff bank's own negligence was not the true cause of the Plaintiff's loss. That said, the Plaintiff bank still objected to the trial judge's criticisms of it and therefore filed a cross-appeal. The cross-appeal will be lodged with the court within 21 days of receipt of the Notice of Appeal from the Defendant. The cross-appeal will also be served on the Defendant's solicitors. The Defendant has a right to reply to that cross-appeal and indeed the Plaintiff bank has the right to respond to the Defendant's Notice of Appeal.

Procedurally, the next step will be that the court will confirm receipt of the notice of appeal and the notice of cross-appeal. The papers will be processed by the court office and a date will be given for the hearing of the appeal. The hearing is unlikely to be much earlier than 6 months away. The court will provide details of the deadlines by which it expects to receive the "bundles" and the "skeleton arguments" of both parties. The bundles are the documents relevant to the dispute to which the court will refer during the trial and the skeletons are an outline of the arguments which will be put by the barristers for both parties. The Court of Appeal is very strict about receiving the skeleton arguments of the barristers within the available time limits. The three Court of Appeal judges will read the skeleton arguments carefully in almost every case.

The hearing itself proceeds far more quickly than the trial of first instance. There is no need for the barristers to tell the court all the background detail and there is no testimony from witnesses. In fact, it is often the case that the Court of Appeal judges make it clear to the barristers as soon as the case opens that they have read the skeleton arguments, are aware of the issues to be determined and simply have their own questions they wish to raise and they do so in a much more interventionist way than the trial judge would do. The trial judge sits back, listens to what is told to him, only asking questions where he feels a gap has been left or some point requires clarification. Court of Appeal judges have already fully appraised themselves of the facts and they wish to have more of a discussion on the particular point of law which is being appealed. If they feel the barrister does not put his point adequately he will be quizzed until they feel they have understood the point he is trying to make. They will often give indications as to the way they are thinking and this will give the barrister time to come up with a more detailed argument or to take instructions from his client as to whether the client still wishes to proceed given the way the Court of Appeal is thinking.

In the scenario I have envisaged, the appeal hearing is unlikely to take more than 2 to 3 days. There would be very detailed consideration of the way in which the trial judge analysed the law in relation to negligent misrepresentation. The cases (*i.e.* other legal decisions and precedents) the barristers referred to at the trial of first instance and the way they were considered would be looked at very critically and in great detail by the Court of Appeal. Other relevant cases would also be looked at and might be read in some detail and there could be a great deal of argument between the barristers as to the emphasis to be given to particular points and there will almost certainly be questions from the bench (*i.e.* from the judges) as to whether or not they agree or disagree with either barristers' interpretation of the law. The Court of Appeal judges are of a very high calibre and have the intellectual capacity to consider the complexities of the case law as this is indeed their function.

In the scenario I have envisaged time would also be given at this stage to considering the Plaintiff bank's cross-appeal on the findings of contributory negligence against it. The Court of Appeal will not prejudge the issue but if it is having doubts about the first instance decision and is thinking of overturning it, the judges might heavily suggest to the Plaintiff bank's barrister that the Plaintiff waits until the court has given its judgment on the issues of whether the Defendant was negligent and, if he was, whether the Plaintiff bank actually relied on the Defendant's negligent statement, before the Plaintiff decides whether or not it wants to put arguments to the court about the findings of contributory negligence.

A sensible barrister reading the signs correctly would take the hint from the bench. At that stage therefore the Plaintiff bank might like to think whether or not it wants to take up the court's time in trying to persuade the Court of Appeal it was not contributorily negligent until it knows whether the first instance decision on liability is going to stand or fall. If the court decides there was no negligence or if the court decides the negligent statement was not relied on by the Plaintiff, the issue of contributory negligence falls by the wayside and time need not be spent on it in argument.

At the hearing itself in my scenario all the advocacy is done by the senior barristers, the Queens Counsel. The junior barrister sits behind the Queens Counsel taking notes and liaises with the solicitor and the client who sit behind him. The solicitor, client or junior barrister can pass notes to the QC if they feel he should elaborate on some issue or has missed some issue or if they are able to provide assistance with some question the bench may have asked the QC.

In the scenario I have envisaged, the hearing would take approximately 2 days. At the end of the second day the Court of Appeal judges would give an indication when they would be able to provide their judgment. It could well be the next morning or it might be a week or so later.

In the scenario I envisage, the Court of Appeal did indeed over-turn the first instance trial judge's finding and ruled that he had wrongly interpreted various complex cases on negligent mis-statement and that the Defendant professional man had not been guilty of negligent mis-statement within the correct legal definition. At that point they would make a finding in favour of the Defendant and award him his costs of the first instance trial and of the appeal. The Plaintiff bank might decide to cut its losses and save its costs and end the proceedings there or it might wish, on a point of principle, to find out whether the Court of Appeal agreed or disagreed with the trial judge's findings on contributory negligence, as it were to clear its own name. The Court of Appeal might well feel that the Plaintiff bank had not in fact been negligent in its consideration of the borrower's credit-worthiness and might decide that the trial judge had erred in law in making findings of contributory negligence. If, for example, the trial judge had decided that it was contributorily negligent of the bank not to carry out certain specific checks even though in law there is no obligation upon a bank to carry out those checks then the Court of Appeal could over-turn such a finding as a question of law but it would rarely overturn a finding of fact of the trial judge.

1.2 Decision to appeal to House of Lords

In the scenario I envisage, the Plaintiff bank is extremely displeased at the Court of Appeal's decision and as soon as the Court of Appeal judges have handed down their judgment they ask their QC to stand up there and then ask the Court of Appeal whether they may have leave to appeal to the House of Lords. The Court of Appeal can make an instant decision to grant or refuse leave to appeal then and there. In this instance, the Court of Appeal refuses leave to appeal to the House of Lords. However, the Plaintiff bank can nevertheless make a formal application to the House of Lords for leave to lodge an appeal.⁵⁴

In determining whether to allow an appeal the House of Lords considers the general public importance of the case, the likelihood of success and the degree of

⁵⁴ The mechanics of applying to the House of Lords to seek leave to appeal a Court of Appeal decision have already been stated in this study, in the country report.

dissension amongst the Court of Appeal judges eg if the case was decided on a majority of 3 to 2 and the two dissenting judges delivered robust speeches then an appeal of the case is very likely to be allowed.

Once again, there are strict time limits which must be observed. A written Petition for Leave to Appeal has to be presented to the House of Lords within one month of the Court of Appeal's Judgment. There are strict provisions as to how to deal with such an appeal if one misses the time limit. There are strict rules as to exactly what documents have to be submitted to the House of Lords so that they can review the Court of Appeal's decision and decide whether this is a case which is indeed worthy of being appealed, given that the Court of Appeal was of the view that it was not a case which should be appealed.

Appealing to the House of Lords is more likely to be used as a tactical ploy than an appeal to the Court of Appeal. Appeals to the House of Lords attract far more publicity and are far more expensive in terms of barristers' fees than trials at first instance or appeals to the Court of Appeal. In a scenario such as I envisage, the parties would certainly want Queen's Counsel to conduct the advocacy for them as the legal precedents and statute law to be considered are relatively complex and the House of Lords Judges will have an extremely detailed and intelligent grasp of those areas of law. It is not however compulsory to have a Queen's Counsel in the House of Lords.

The Plaintiff Bank in my scenario can gain time by lodging its petition for leave to appeal. If it changes its mind and decides not to try to appeal to the House of Lords it can withdraw its papers at any point up until the House of Lords' Court Office has made a decision on whether or not this case is worthy of being appealed. This could take several months during which time the Plaintiff Bank has the tactical advantage of holding the threat of expensive and very public proceedings over the Defendant professional man and his insurance company. If the House of Lords were to overturn the Court of Appeal and to restore the decision of the first instance trial Judge then there would be no further redress for the Defendant and the decision would almost certainly be reported in the major broad sheet newspapers and all interested legal journals and would also be printed in the reports of cases. The publicity would be widespread.

Once again, the work done by the legal advisers is very similar. They will meet and consider the typed transcript of the Court of Appeal Judgment. They will put forward their views as to whether or not the House of Lords is, in this scenario, likely to allow the Plaintiff bank to appeal a decision. They will also think one jump ahead and on the assumption that an appeal is allowed, they will try to

work out the likelihood of the House of Lords restoring the decision of the first instance trial Judge. The considerations to be born in mind by the Defendant and his insurance company and indeed by the Plaintiff bank are the same as before only they are now heightened by the added publicity and added financial cost at stake and by the fact that the House of Lords is the final court of reckoning in the United Kingdom.

In my scenario, leave to appeal to the House of Lords is indeed granted. The Plaintiff bank files a Petition setting out its reasons for wishing to appeal. It also submits a Statement of Facts and Issues Involved which should be prepared in conjunction with the Defendant so that one agreed Statement of Facts and Issues is submitted. A very short appendix of the documents used in evidence and (where relevant) recordings of the proceedings of the Court of Appeal are also submitted. The appendix contains those original documents which have to be looked at by the court, if any, in order to make sense of the case. In our scenario one would wish the court to look at the actual document the Defendant professional submitted to the Bank which gave rise to the allegations of negligence. One would also perhaps wish the court to look at certain other documents prepared by the Bank in relation to the loan. The appendix will also contain the transcript of the Judgments of the first instance trial Judge and the Court of Appeal. It will also contain copies of the relevant legislative provisions. Once again, the House of Lords will provide a date for the hearing of the appeal. In a case such as this, the appeal might be heard within 4 to 8 months. It would depend how many matters were being appealed to the House of Lords at any one time as there is a limited number of Lords Justice who can hear the cases.

Once a date has been given, detailed procedures come into play for the submission again of skeleton arguments to the House of Lords. If the Plaintiff bank were to decide several months before the House of Lords' hearing date that it no longer wished to proceed with its appeal, it would have to make a formal application to withdraw its Petition. It is possible the House of Lords would decide it should not be allowed to withdraw its application. The point of law might be one which the House of Lords considers should indeed be dealt with by the House of Lords. To that extent, an appeal to the House of Lords can be a double-edged sword. It is entirely possible that a very similar case might also be pending appeal to the House of Lords and the House of Lords would want both cases to be heard together so that a comprehensive study of the relevant law could be made as it applied to both types of scenario so that a useful exposition of the law could be handed down. The parties would have no say in the way in

which the case was heard or if it were to be joined with another case in this manner.

The hearing itself might take longer than the Court of Appeal hearing. The study of the law might be even more detailed and, if our case were to have been linked with another similar case, then it is entirely likely the matter might take 5 to 6 days to be heard.

The hearing itself is less formal than one might imagine. The Lords Justice wear lounge suits rather than the ceremonial robes of the Court of Appeal Judges. The hearing is conducted in one of the courts within the Houses of Parliament at Westminster and these are usually oak panelled rooms where the parties sit at benches at long wooden tables facing the open end of a horseshoe-shaped table at which the Lords Justice all sit. The tables are all on the same level, unlike the lower courts where the judges sit at a raised bench, head height above the rest of the court.

The Lords Justice will certainly have read all the relevant papers before the hearing and will be fully aware of the facts. They rarely let the barristers put their cases without interruption and they often outline right at the start the issues they think need to be focused upon. Assuming the barristers and their clients agree then their Lordships might allow the barristers to begin argument on the complex issues of law straight away, interrupting where they feel matters need to be expanded on or clarified or where they disagree and need to be convinced otherwise. The interruptions come from all five judges and it can be harrowing for the barristers to deal with such a bombardment, which is one of the reasons why they charge much higher fees for appearances at the House of Lords. The same court timetable is adhered to namely hearings will usually be between 10.30am and 4.30pm with one hour for lunch.

Once the legal debate has been concluded, their Lordships will go away and write up their judgments which will be delivered at a later date, often a much, much later date. One can wait almost 12 months for a judgment in some cases although it is more usual for judgments to be written within 3 months or so. As before, the judgments are written out in full. They are made available to the parties to the litigation at 10am on the morning judgment is to be handed down. All parties then go to the House of Lords Chamber itself at 2pm that day and in a very short ceremony lasting no more than 15 minutes, the Lords Justice simply state that judgment has been granted in favour of whichever party and they each say "Aye" or "Nay" to show whether they agreed with or dissented from the majority decision.

In my scenario, the Defendant lawyer wins. The House of Lords refuses to overturn the decision of the Court of Appeal which is upheld. The most usual costs order is that the Plaintiff bank has to pay the Defendant's costs which will be subjected to a process known as "taxation_ if they cannot be agreed by the parties. If the Plaintiff bank cannot accept the detailed account of the amount of the Defendant's legal advisors' fees once presented to them, they can pass that fee note to the court where a specialist in dealing with costs will scrutinise the fees very carefully and decide whether or not they are fair and will adjust the figures down if he does not think they are fair or correct. The costs incur interest from the date the draft bill is lodged with the court to be taxed, alternatively they become payable straight away if the Plaintiff bank agrees the level of the costs.

2 Decisions to Appeal

Decisions to appeal are not taken lightly in the UK. As I have already explained, one has to be able to show good grounds for appealing *i.e.* there must be some clear point of law which you feel the original court misinterpreted or misapplied or some gross mistake as to the facts and evidence admitted before the court. The courts are becoming more careful about allowing matters to be appealed. It is becoming a more frequent practice for a Judge to refuse leave to appeal and to make any would-be applicant apply for leave to appeal thus having to put down on paper the reasons why he thinks he might stand a chance of appealing.

This practice is slowly becoming more common amongst trial judges of the first instance courts. It has always been something which the Court of Appeal judges have never been afraid to do in order to stop a flood of useless cases going up to the House of Lords. Judges in the courts of first instance were wary of being seen to block the path to justice but people are becoming more and more litigious in the United Kingdom. The availability of Legal Aid to assist financially disadvantaged parties bring cases to court is becoming much more restricted so parties are having to fund their own litigation or be their own advocates (litigants in person).

A litigant in person is a layman trying to make his way around the complex procedure and law of the courts with as much help as the court procedure can provide him. The court offices bend over backwards to be helpful and trial judges try to be equally helpful. This can in fact cause more trouble. The trial judge might allow the litigant in person leave to appeal a useless case in circumstances where the trial judge would never have allowed a legally represented party leave to appeal because he thought there was not a good enough case. The legally

represented party would then have had to file a formal application for leave to appeal whereas the litigant in person can simply get on with his appeal and will drag his opponent into an appeal which will be dismissed almost immediately because it has no good grounds.

Use of the appeal process as a tactical weapon is limited in the United Kingdom. In the scenario I discussed above, I showed how appeals to the Court of Appeal and House of Lords could indeed be a tactical weapon as regards the difficulties in raising finance to take those steps and as regards the extra publicity which comes with those steps. Because one generally has to show reasonable grounds for the appeal, it is not common practice in this country to file an appeal in virtually every case as a matter of course. This is a tactic which a litigant in person might try to use but the courts are gradually becoming wise to this as I mentioned above and are trying to prevent this abuse of the process.

Whether or not a lawyer would use an appeal as a delaying tactic is more difficult to say. It is true that filing an appeal does technically delay time for payment. In the scenario I used above, the Defendant professional man should have been paying damages to the Plaintiff bank from the day the trial judge gave his judgment and interest would have been accruing on that sum from that day. However, once the appeal was lodged, the Defendant professional man was under no obligation to pay those sums pending the appeal. When the Defendant lost at the Court of Appeal, he became due to pay the damages awarded by the trial judge of first instance together with interest from the date of the first instance judgment. He did not save any money at the end of the day by lodging the appeal. Interest continued to run right from day one of judgment in the first instance trial. To the extent that he bought more time to pay his debts, it is true that it was a useful tactic but he also incurred further legal fees.

Delay in payment is therefore a possible tactic but unless it is simply to secure a delay of a few weeks then it does not make sense to delay whilst incurring the procedural costs of the appeal and whilst interest continues to run on the original judgment debt. A lawyer who advised his client to appeal where chances of success were extremely slim simply in order to raise more fees for himself would be acting unprofessionally and could be disciplined by the relevant supervisory bodies if it was quite clearly the tactic he was employing.

It is possible that a lawyer might advise his client not to appeal even though he had good grounds and reasonable prospects of succeeding because his client might not be able to afford the next steps in the litigation, or the increased barristers' fees and, were he to lose, might not be able to afford the extra interest

which would have accrued on the judgment debt. Cost is therefore a very relevant factor. As for risk, this is something which must be weighed by the client in conjunction with all other factors which are preying on him including damage to his reputation and issues such as whether or not he wishes to be a party to creating new law which might (or might not!) be of benefit to a wider class of people (this would be the kind of consideration the insurance company would have to bear in mind in my scenario given above). Deciding not to appeal simply because of the time delay is unlikely to be a factor unless there is some external reason why time should be critical, for example market forces might be operating on your client which will overwhelm him unless he can get rid of this litigation quickly. In such a scenario he would get rid of the claim more quickly by settling with the other side to stop them appealing the decision.

I know of no instance or example where a lawyer would advise his client not to appeal a good arguable case simply because it was not customary to do so or he would be despised by colleagues or judges.

How often do parties appeal on each level?

Very roughly, about one in thirteen cases are appealed from the courts of first instance to the Court of Appeal and approximately one in ten Court of Appeal cases are appealed to the House of Lords.

The usual outcome of appellate proceedings is for about one fifth of the cases to proceed to a full hearing. Most of the others either settle before trial or a very small percentage may be struck out of the court process for procedural irregularities. Because an appellant in the UK has to show good grounds for an appeal and has to put forward some legal basis for his appeal, the matter more often proceeds to a full hearing of those issues. It is not the case in the UK that everybody always appeals simply as a tactic and that this is a ploy used in an attempt to cut down the damages awarded by the first instance trial judge.

A party who has just been awarded judgment by a trial judge but who is threatened with an appeal is unlikely to try to get rid of the appeal by settling for anything less than the judgment figure in settlement unless he can see that his opponent is in fact prepared to proceed all the way to an appeal and unless he is advised by his barrister that his case is likely to be overturned on appeal.

There are no threshold values limiting whether or not a case may be appealed in the UK. That said, if the amount being argued over is for example less than £5,000 then it simply does not make economic sense to pursue an appeal as the

minimum costs of an appeal to the Court of Appeal would be at the very least £5,000. However, if the client wishes to fight the point of principle and can show that on the legal issues at stake he has a good case, he is entitled to pursue the matter. If he wins then he will be awarded his costs unless of course his opponent is a legally aided person in which case whilst that legally aided person will be ordered to pay the other side's costs, the court will say the legally aided person does not have to pay those costs yet. The court leaves it open as to when the legally aided person will have to pay the opponent's costs and provides that the opponent has to come back to the court and seek leave to enforce these costs if for example he were to learn at some time in the future that the legally assisted person had won the national lottery and was no longer impecunious and could in fact now afford to pay the costs.

In circumstances where the client wishes to appeal the lawyer should assist his client to sit down and carefully calculate the costs involved and the likelihood of success and the likelihood of actually recovering the costs spent from the opponent. If the lawyer's own client is impecunious the lawyer has a duty to advise the client of the availability of legal aid within strict financial limits. If the lawyer himself does not provide his services under the Legal Aid scheme then he must recommend the client goes to a new solicitor/barrister who will provide assistance under the Legal Aid scheme.

3 Foreign Law and the application of foreign, international or treaty law in the courts

The application of foreign, international or treaty law in the UK courts is relatively common. Whilst it is more common for parties to choose English law as the relevant jurisdiction for various international contracts, it is nevertheless the case that foreign, international and treaty law is frequently applied. In those circumstances, and where the amounts at stake are substantial, as is usually the case, expert witnesses are almost always employed in order to find and interpret such law.

In the larger law firms there will be specialist lawyers who will have a good understanding of international law and may indeed have dual qualifications in other foreign laws and will be au fait with various of the relevant treaties. They may nevertheless wish to appoint an expert from that field to assist the court in the interpretation of the relevant law. In the smaller law firms, they are most unlikely to have any such specialist knowledge and will certainly have to appoint an expert witness.

Application of foreign, international or treaty law is no different in appellate proceedings on the various levels. However, where a case involving application of a particular treaty is proceeding to the Court of Appeal or House of Lords one might decide to appoint a senior specialist barrister with knowledge of that particular treaty to represent one in that litigation and to that extent one might need less assistance from one's expert. However, the barrister is unable to present evidence to the court and if he is asking the court to accept evidence of a particular treaty then he must either provide that treaty in such a form as can be understood without assistance from an expert or he must provide the expert to assist the court.

In the United Kingdom, it would be more common for cases involving questions of international or foreign law to be dealt with in the Commercial Court where the barristers presenting the cases and the judges hearing the cases are far more likely to have specialist knowledge of international and foreign law and various treaties. To that extent, I would not agree that these issues would be dealt with in a more professional way at the higher appellate level. They would be dealt with professionally at every level.

4 Main differences between first and higher instance proceedings

As I hope has been made apparent by the scenario discussed above, the main differences between first and higher instance proceedings are as follows. In the higher courts:

More specialist, highly qualified barristers become involved;

The judges also become more experienced and more highly qualified;

The issues become narrowed down and are focused on much more closely and are argued in more detail;

There is more intervention from the judges as to points which they want clarified in the appellate courts; the atmosphere becomes more of a legal debate on the legal issues rather than the more dramatic presentation of a story to a trial judge where all the witnesses are sitting there ready to play out their roles; there is more of a feel of "theatre" about the Court of first instance.

Matters become more clinical and intellectual as cases proceed through the appellate courts. That said, matters can be more relaxed in the appellate court as

there is less emotion involved and the judges tend not to be dealing with a court full of members of the public, witnesses and antagonistic parties.

I suspect what is more unique to the United Kingdom is the age of some of the institutions involved, the ceremony which is still visible in the robes worn by judges and in particular the appellate judges. It must be most unusual that the highest court in the land sits in the Houses of Parliament. The decisions of judges are of great weight in the growth of law in the United Kingdom by the process of precedent law.

5 Access to appeals

As I have already explained, access to appeals is not limited in the UK by threshold values save where economic pressures may force a particular litigant to abandon a case even if he thinks he has a good chance of winning. I can appreciate the argument that limiting the availability of appeals may contribute to the efficiency of legal proceedings and to reducing costs in relation to litigation. However, those limits ought to be based on legal merit, not on the financial values of the case involved. If there were an intermediate system for assessing the merits of appeals as there is in circumstances where leave to appeal must be sought, this would weed out useless appeals. I can quite believe that judges change their attitude if there is no appeal available against their decisions. I have sat in courts where the judge has prepared a very carefully worded judgment simply because all through trial the various parties have, through their barristers, made it quite clear to the judge that he is almost certain to be appealed whatever he decides because there is so much at stake for each of them and that as a result they will have to be convinced that his judgment is water tight before they will let it stand.

In my opinion it would create bad law to have threshold limits barring appeals. Decisions would stand from the first instance courts which are bad decisions and yet which have never been appealed simply because the party involved was prevented by the threshold limit. Other judges of first instance would look at those decisions and might feel bound to make the same decision. Whilst a judge of first instance is not bound by decisions of another judge at first instance, he does come under a certain amount of pressure to try and produce consistent law and so he will certainly have some regard to those other decisions. Where a decision is bad in law it should be capable of being appealed, and should not be subject to any threshold limits.

It is my belief that it is equally in the interest of my clients to have no threshold limit. I would hope that my clients would be sufficiently sensible to make reasoned decisions as to whether they can afford litigation so long as they have my help assessing the merits of their litigation and the prospect of them being successful. It is for them to decide whether they can afford the process. They should not have their access to justice barred by an arbitrary decision that because the threshold value of the appeal is below a certain limit, they may not take the matter further. This is an attitude too "paternalistic" for a court to adopt in my opinion.

Part D: Conclusions

I. Access to Justice in Europe - A Single Market for Litigants? (Hanno von Freyhold)⁵⁵

1 Preliminary Assumptions

The chapters on the cost and duration of civil proceedings in the Single Market clearly show that the costs which the parties have to pay in obtaining justice are high and that the duration is long. Appellate proceedings add to the costs and make the proceedings longer.

There should be no doubt that justice should be as efficient and inexpensive as possible. In his extensive report on the English legal system, Lord Woolf⁵⁶ has phrased the principles on which a civil justice system should be based. According to Lord Woolf, such a "system should:

- be *just* in the results it delivers;
- be *fair* in the way it treats litigants;
- offer appropriate procedures at a reasonable *cost*;
- deal with cases with reasonable *speed*;
- be *understandable* to those who use it;
- be *responsive* to those who use it;
- provide as much *certainty* as the nature of particular cases allows; and
- be *effective*: adequately resourced and organised."

⁵⁵ staff author; with a contribution by Nabil Rifai.

⁵⁶ *Access to Justice - Final Report to the Lord Chancellor on the civil justice system in England and Wales* (London: HMSO 1996); see also the extensive discussion and the references in: Vial, Enzo: *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr - Eine rechtssoziologische Untersuchung* - (Diss. - Baden-Baden: Nomos, forthcoming 1998).

Apart from reasons of public policy, about every European citizen who would be interviewed would agree to this statement. Art. 6 para 1 of the European Convention on Human Rights also provides the right to efficient civil justice. The European Court of Human Rights has held more than once member states responsible for breach of Art. 6 para 1 of the European Convention on Human Rights.⁵⁷ The demand for efficient justice is thus constitutionally imposed on all member states and the EU as well. The European Union itself has rightly proclaimed its aim to develop and maintain the Union as an "area of freedom, justice and security."

The macro-economic study by Wagner in *Cost of Judicial Barriers for Consumers in the Single Market*⁵⁸ has further shown that, legal security is a major factor in economic growth and the absence of legal security leads to economic slow-down. Within the context of cross-border legal interactions and proceedings, it is estimated that the current lack of legal security creates annual losses for the economies of the EU in excess of 100 billion ECU. Accordingly, there should be a strong incentive by all member states and by the EU itself, to improve the situation.

The main part of the study, the country reports, focuses on the cost and duration of appellate proceedings with values of 50,000 ECU and 200,000 ECU, respectively. These values were part of the study outline, as set by the Commission, but they are also well reasoned for. As mentioned before, the previous study on the *Cost of Judicial Barriers for Consumers in the Single Market*⁵⁹ has shown that,

- a) for dispute values of 2,000 ECU, not even a cross-border first instance dispute is worth to pursue and that in most member states a dispute value of

57 *E.g.*, Judgment of 1 July 1997 - Nr. 48/1996/667/853 (Pammel ./ Deutschland), EuGRZ 1997, 310, with many references to prior decisions.

58 Wagner, Helmut: "Macro-Economic Analysis of the Cost of Judicial Barriers for Consumers in the Single Market", in: von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

59 von Freyhold, Hanno, Vial, Enzo: "Report on the Cost of Judicial Proceedings in the European Union" in: *ibid.*

50,000 ECU might be a reasonable value to pursue a cross-border dispute,⁶⁰ and

- b) there do exist a number of cross-border transactions by consumers within the EU that reach 50,000 ECU which may cause conflicts and disputes to occur.⁶¹ Specifically, real estate, including holiday resorts and homes, building work by contractors from other member states, bank loans related thereto and life insurance contracts are areas which may involve such amounts in consumer transactions. Information received by a cross-border consumer information centre, a model project funded by the Commission, indicated that these types of transactions increasingly cause the need of assistance by these centres.⁶²

Furthermore, in some member states, threshold values exist for access to appellate courts. In order to achieve comparable results from all member states it was considered to be useful to select values that would exceed these threshold values for all member states.

As has been shown, *supra*, the percentage of legal fees in relation to the value is degressive with increasing values. Therefore, as opposed to the value of 2,000 ECU in the previous study, it does become more economically viable to pursue a claim in court. Nevertheless, the total amounts will become very high. Bearing the potential of having to pay both side's legal fees in mind, there is rarely a consumer who can afford this type of litigation.

Where justice is too expensive, it is not viable to pursue it. The individual concerned would not pursue his claim thus abandoning his rights. Taking into account that, despite a scaling of costs in some member states, legal costs in all member states soon exceed the value of the claim for all amounts of claim below 2,000 ECU⁶³, consumers are effectively barred from seeking redress for their

⁶⁰ *Ibid.* p. 114.

⁶¹ Gessner, Volkmar "Consumers in the Single Market - A Legal Sociological Approach -", in: *ibid.* p. 13.

⁶² *Deutsch-Französische Informations- und Beratungsstelle für Verbraucher*, EURO-Info, Jahresbericht 1993/94, p. 4 and 11.

⁶³ von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

most common problems. They can therefore be described as *no shotters* in the context of cross-border litigation.⁶⁴

Also, only if a judgment can be obtained and enforced within reasonable time there is a reasonable threat to the other party that this avenue could be taken as a step to obtain one's rights.

The cost and duration of a legal proceeding thus are decisive factors whether this is a potential step one of the actors would take if a dispute arises. Provided that the material results of a proceeding can also be projected to a reasonable extent (which are but other words for legal security), the threat of a potential court proceeding creates the *shadow of the law*⁶⁵ which guides all other actors in their expectations and thus, in their acts.⁶⁶ This is not true only in the event a dispute actually arises, in which case the potential result of a legal proceeding guides settlement negotiations. It is also true even for the initial behaviour that could give reasons for a dispute. For some economic actors it is the possible enforcement of legal rights by the other actor that induces them to adhere to their contractual obligations in the first place.

Where, as discussed, consumer problems are potentially barred from judicial resolution, sellers and service providers for consumers may take advantage of the situation to the detriment of the consumers. Particularly in the most problematic area of cross-border transactions, where other methods of social or competitive control would also fail, there is a potential risk for the consumer. This risk is statistically quite low, since most sellers and service providers for consumer products do not focus exclusively on the cross-border market, do not distinguish in their products between the customers and are possibly subject to far stronger legal and social control (reputation) by their domestic customers than by the once in a while foreign consumer. Yet, psychologically, people have proven to be averse to losses twice as much as they are interested in gains and to be

⁶⁴ Vial, Enzo: *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr - Eine rechtssoziologische Untersuchung* - (Diss. - Baden-Baden: Nomos, forthcoming 1998).

⁶⁵ Galanter, Marc: "The Radiating Effects of Courts" in: Keith O. Boyum, Lynn Mather (eds): *Empirical Theories about Courts*, (New York & London: Longman 1983), p. 117-142.

⁶⁶ Luhmann, Niklas: *Legitimation durch Verfahren* (Neuwied: Luchterhand, 1978).

particularly risk avoiding.⁶⁷ Therefore, as long as there is even a slightly potentially higher risk of losses in terms of poor quality or not being able to exchange or repair the same, consumers will refrain completely from taking advantage of the opportunities of the Single Market.

Further, consumers, *i.e.*, the public at large, will feel betrayed by the EU and its institutions for not caring for their welfare. Such betrayal will be felt by consumers each time they notice an opportunity and refrain from using it for fear of potential losses. Then, only the most aggressive and suggestive sellers or service providers will probably succeed in cross-border consumer sales - also the companies most likely to be "black sheep". And again the consumers will feel betrayed.

The dispute values that form the backbone of this study and the cost and durations that are incurred when these disputes are brought to court should lead to an additional incentive to improve the situation. At these levels of dispute values increasingly small and medium sized enterprises (SMEs) and the craft sector may have similar problems as consumers. In legal sociological terms, both can be termed *one shotters*⁶⁸ when it comes to cross-border disputes as opposed to multiple players who have the experience and means to deal with these situations in a more efficient and calculated way. For both consumers and SMEs, the cost and durations described in the country reports can easily mean ruin. As a consequence not only will consumers refrain from taking advantage of the Single Market, but also SMEs. The macro-economic costs of legal insecurity within the Single Market mentioned above can be multiplied.

Estimated spendings on the entire judicial system do not exceed 1% of overall government spendings in any member state. In light of the importance of a functioning legal system for both the states and for its citizens (more) spending cuts in this area does not seem very opportune. If priorities were to be assigned by the citizens one can well imagine various other budget items which would not survive if a decision were to be made between justice and those other budget items.

⁶⁷ See, Sunstein, Cass R.: "Behavioural Analysis of Law", 64: *Univ. of Chicago Law Review*, 1997, p. 1175 *et seq.*

⁶⁸ Galanter, Marc: Why the "haves" come out ahead: Speculations on the Limits of Legal Change, *Law & Society Review*, 1974, p. 96 *et seq.*

Yet, in times in which government resources are short demands for reduction of costs for litigants by raising government spendings and for more staff in the judicial system are not likely to be fulfilled either.

In most member states,⁶⁹ there are complaints about the current litigation rates which are at an all times high and always seem to be rising in these member states⁷⁰, about the work overload of the legal system and about back logs. This may be seen as a problem, but it also means that both the demand for justice has risen and access to justice has improved for major parts of the population previously barred from the courts, which is not necessarily a bad development. It can be at least be reasonably predicted that litigation rates, or at least the demand for litigated dispute resolution, may further rise in the long run.⁷¹

Many of these complaints, it should also be noted, take little account of the economic situation. There is strong scientific evidence that litigation rates are connected to the general economy. In times of growth and a striving economy, litigation rates fall. All parties, particularly commercial actors, are more willing and can afford to compromise. If their potential opponent is another business actor, a second contract which allows both to make more revenue can be concluded. If the potential opponent is a consumer, the seller may give in even in cases of doubt for the benefit of the "good will". And consumers can likely cover a loss incurred.

In the opposite, in times of slow down, fewer businesses and individuals can afford to loose any value. Businesses may depend on every sale to avoid bankruptcy, cannot make additional contracts and consumers have less spare money to loose. Thus, the current positive economic situation in Denmark may also be a reason for decreasing litigation rates there.

In the context of increasing litigation rates, if any, it should be noted again that in most member states the legal system funds itself through court fees to a

⁶⁹ With the notable exception of Denmark, *supra*.

⁷⁰ Although available statistical evidence, *e.g.*, from Germany and England and Wales, is rather inconclusive.

⁷¹ For an extensive discussion of the topic, see, Friedmann, Lawrence: *Total Justice*, New York (Sage) 1985.

significant degree.⁷² This shows that the citizens are not only demanding the service by the legal institutions but are also willing to pay for it. As long as the fees are not creating a barrier to justice, this can be seen as a positive aspect and increased litigation rates would be positive, too. In fact, no private service provider would complain about additional fee-paying customers. Thus, improvements to the efficiency and quality, *i.e.*, to the *service* legal institutions provide, need not necessarily be costly for the government budget if its *customers*, the citizens, believe that their court fees are well spent. Any government spending for the courts, as may be necessary under the legal system of a member state, could then need to be seen as being the subsidy for the few proceedings that do not finance themselves and should be borne in the interest of justice, the economy, constitutional and human right demands, legal security and the rule of law, in other words: public policy in general.

Unfortunately, a subsidy in particular of lower value cases through lower court fees, funded, in part, by the government budgets and, in another part, by fees from higher value cases, finds its ultimate restriction with the lawyer fees. After all, cases with lower values also require lawyer time spent which needs to be paid for one way or the other. All European lawyers have reported that they do take account of the value when charging their fees, either voluntarily or by regulation, and that they do generally "subsidize" smaller values by charging less than for higher values. It is also generally part of the ethical rules of the legal profession to take care of the needs of lower income clients. Some member states have fee scaling regulations that even impose such scaling. Nevertheless, one has to be careful not to make the lawyer fees too low, lest the quality of the service might suffer.

Legal aid schemes solve part of the problem for those who are very needy. However, the extensive chapter on the practice of the Strassbourg legal aid convention shows that not all member states have ratified the convention and that there are extreme problems in the application of this convention. Therefore, it may be concluded that cross-border disputes are not sufficiently covered by legal aid. Further, as with most welfare items, legal aid creates a middle class gap of people who are not considered needy but can still not afford the outrageous legal fees involved in a dispute and cannot afford to wait for years until their dispute is resolved, an issue which is not covered by legal aid anyway.

⁷² In Germany, there is a cost recovery of the entire civil and criminal court system of approx. 80% (Source: Schmitt-Michalowitz, Sylvia: "Dreistufiger Gerichtsaufbau", *DRiZ* 1994, 474).

Private insurances are a possible solution for the middle class gap, but there are problems as to the coverage since these insurances may only cover some types of disputes or only a portion of the costs and also since most people do not have such insurance. Also, it can not be satisfactory to treat litigation costs as a risk similar to accidents, fire, flood or storms for which insurance has to be bought to be financially protected from the peril. Court litigation is a service and not a peril and should, for very good reasons shown, be provided to the citizens at a reasonable price and time. Finally, legal cost insurance also cannot help with protracted proceedings during which the parties do not get their money.

Finally, the more costs litigation adds to the value in dispute and the longer it takes, the higher is the risk that the judgment debtor will ultimately not be able or willing to pay the claim and fees awarded against him. If the total amount is high enough, the incentive is also big enough and it is not very difficult for both individuals and most smaller companies to avoid payment through the hiding of assets or, in the case of a company, bankruptcy or dissolution. Thus, even when the claimant has had reasonable expectations to win the case and to be able to recover his claim and his cost, this may change over the several years of litigation that may ensue.

The in depth report on the Italian proceedings gives an extreme example of a case in which appeal was taken because of the legal fees only. Interestingly, in some jurisdictions, such as Germany, it is specifically not possible to appeal on the cost only. Therefore, at a point in the proceeding where the costs have become more important than the claim itself, the only possibility to challenge the decision on the costs involves a challenge to the claim itself, which adds additional costs and an unnecessary procedure on issues not exactly in dispute. It is argued by the proponents of this rule that the dispute about the costs should not take longer and more instances than the dispute about the issues. Yet, where the costs, as has been seen, may reach a level of high proportion of the claim or even exceed its value, this argument loses much of its attraction.

2 Legal culture in Europe

There is a strong common tradition in legal structure among the member states, a common confession to the constitutional, moral and human rights principles behind the justice system and a common economy. As a result, and the reports clearly show it, there are many similarities and common traits in the legal systems and proceedings among the member states. Obviously, the civil laws and

procedures are so similar that they allow for mutual recognition of judgments under the Brussels Convention without much conflict or even doubt.

Yet, there do exist significant differences which are of an even greater weight as the legal system and the legal culture of every country is one of the most deeply rooted features of each society. Few measures of improvement are applicable to and would have the same effect in all member states.

It is quite interesting to observe the similarities between the measures to improve the civil proceeding taken by Italy, which have been described in the study on the *Cost of Judicial Barriers for Consumers in the Single Market*⁷³ and the current reforms undertaken in Denmark which are described in the in depth report, above. An important difference that can be observed between the two reform projects is that the Danish reform commission involved all practitioners, including lawyers, at an early stage while the Italian reform was introduced against the legal profession. This may be one of the possible reasons why the reform has partly failed.

A standardized or same legal system within the EU is unthinkable for the near future. As the most striking example, there is a common denominator that civil proceedings are in the hands of litigants to a large degree. All systems concede that the plaintiff decides whether a case is brought to court and that the parties may settle in or out of court at any time thus putting an end to any legal proceeding.

As a result the parties can usually agree, to some extent, to adjournments during the proceeding if they want to. There are many good reasons for a continuation.⁷⁴ E.g., the parties may wish to have more time for settlement discussions. Or, there may be some other dealings or a second contract between the parties the outcome of which they may want to await without losing the option of continuing the legal process if this second dealing goes sour as well or does not fulfil the expectation of providing a solution for the first conflict. So far, joint requests for adjournment should be and are accepted by most member states' courts. Even if

⁷³ Vial, Enzo: "The Practice of International Civil Procedure in Italy" in: von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

⁷⁴ See, *Court of Appeal (Civil Division) Review* (London: Court Service Publications, 1997) ("Bowman Report").

such an adjournment leads to a statistical prolongation of a proceeding, there would be nothing bad about it.

Yet, as has been learned in the report on Italy in the previous study on *Cost of Judicial Barriers for Consumers in the Single Market*,⁷⁵ there is a tradition of almost ethical quality among Italian attorneys that "two requests by a colleague should never be denied: a cigarette or an adjournment." Such a tradition, if exploited, would lead to results not compatible with the aim of an efficient legal system.

A possible solution for Italy might be a stronger participation of the parties themselves in the proceeding. The law might impose an obligation on the Italian court by asking the parties to explore whether the adjournment is really their wish and deny the application if the court feels that at least one of the parties would not be served well by the prolongation. To date, the parties themselves are rarely present in person in Italian civil proceedings and it would not be wise to call them as long as the practice of holding up to 15 hearings during one proceeding continues. Other legal systems (*e.g.*, Ireland) regularly require that both parties be present in all hearings. In others, this is at the discretion of the court. At the same time, particularly in the context of cross-border proceedings, this may also create an undue burden in terms of travel expenses and loss of time. As a result, there are many possible improvements that would serve good for some member states and not for others.

Certain specific differences in material law create additional insecurity and legal barriers for consumers. As an example, the previous study on the *Cost of Judicial Barriers for Consumers in the Single Market*⁷⁶ has mentioned extreme differences in statutes of limitations as a specific problem for cross-border transactions and the enforcement of consumer rights. It has been criticized that in some countries, the statutes of limitations for claims of defects of goods are far too short for European Consumers to pursue their rights within a cross-border context. The proposed draft regulation that would require all member states to have a minimum statute of limitation for defects on consumer goods of two years is an extremely good example of a European law that is necessary, may improve

⁷⁵ Vial, Enzo: "The Practice of International Civil Procedure in Italy" in: von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

⁷⁶ von Freyhold, Hanno, Vial, Enzo: "Report on the Cost of Judicial Proceedings in the European Union" in: *ibid.*

the living conditions of the European citizen, that can potentially work in all member states, does not infringe unduly on the competences of the member states and is compatible with all legal systems in terms of the legal procedural harmonization which it embodies.

Despite the obvious necessity and potential good that may come out of European laws which would force the member states to improve the situation in some areas for the benefit of the European citizens, it is clear that there are few areas in which a global solution would be the best. The aforementioned differences as well as the complexity of legal systems and its traditions are a strong argument against many measures. The principle of subsidiarity is also useful in this situation and implies that the EU needs to carefully weigh each potential measure and its effect in different member states.

Nevertheless, it should be beyond doubt that measures for the improvement of the functioning of the common market and measures for the improvement of the living conditions of the European citizens and for consumers in particular are clearly within the purview of the European Institutions under the Treaty, as is civil judicial cooperation in general, art. 73M. Notwithstanding the principle of subsidiarity, the EU institutions therefore have the clear authority to regulate certain aspects of civil court procedures as described in this study, where the member states themselves fail.

It can be observed that all member states, for good reasons, strive to improve the efficiency of the legal system. There are always discussions to change certain features of the civil process in order to lower the costs for both the parties and the budget and to reduce duration and the work- (over-) load of the judicial system. It is striking how many different and even completely opposite suggestions for changes are made in various jurisdiction for this same aim.

In the long run, one can expect that, but for some few member states and some specific items,

- there is not going to be a major change raising or lowering budget spendings on the legal system,
- there is not going to be a common European legal system,
- there is not going to be a complete change of any of the member states' legal systems, but

- there need to and are going to be minor changes on specific areas, pursuant to internal discussions within the member states as well as those "imposed" from the EU.

It is these specific changes and the role that the European Institutions may play which are the subject of the following considerations.

3 Consequences of Increased Litigation

Despite the inconclusive evidence as regards litigation rates mentioned before, it is still interesting to ask for possible reasons and consequences of rising number of appellate proceedings, as this is true at least in some member states.

As seen above, at least some authors of the in depth reports complain about the work load their country's courts have to cope with. The French report for example mentions an absolute overload of most first instance courts. This can be interpreted on the one hand as a kind of criticism to the organisation of the courts in the country which seems not to be adequate to fulfil its purpose. On the other hand it might also be addressed at the French people as a reproach for litigating too many things which are not worth it.

The latter opinion can also be found in the UK report where it says: "Judges in the courts of first instance were wary of being seen to block the path to justice but people are becoming more and more litigious in the United Kingdom." Although this sentence refers to the higher and not the first instances it appears that, people in the U.K. have the increasing tendency to attempt to pursue their interests by the way of justice. Interestingly, the statistical data provided in the *Bowman Report*⁷⁷ does not necessarily support this impression.

However, if such a tendency becomes too weighty it will have the immediate consequence that the courts will be confronted with too much work. As there are always limited possibilities to expand the capacity of a once created court structure the increasing work can only partly be compensated.

The increasing work of the courts leads to the fact that every single court and its staff and especially the judges are exposed to a pressure of time. The duration of the trials becomes longer as the efficiency of the courts will be reduced.

⁷⁷ *Court of Appeal (Civil Division) Review* (London: Court Service Publications, 1997) ("Bowman Report").

When having to decide more cases per day, the judges might be tempted or forced to treat the individual cases more superficially because there is not enough time. Thus the judgments may lack of thoroughness and probably many cases will be decided falsely.

The question arises whether there is then a need to change the general attitude towards litigation in general and towards appeals specifically. The treatment of the appeal as a legal institution differs in the EU member states. In Italy, for example, until the legal reform of 1990 an appeal was "quite common without regard to the actual chance of the particular case,...". In Greece, we have been told, appeals are taken in about 90 per cent of the dispute and are almost considered to be a necessary part of any proceeding. It is argued that, the reasons for this are the comparatively low costs for an appeal, the court fees are in the range of 40 ECU and the lawyer fees are insubstantial. Therefore it does make sense to use the appellate proceeding as a second try on the same issue.

In contrast to this in the UK it does not seem to be usual to appeal without having good arguments for it. Costs may play a role, but costs for appeals are comparatively high in both jurisdictions.

Additional costs may deter people from litigating or appealing cases that are not worth it. This may be a factor in so called neighbour dispute which are a horror to most lawyers and to the judges at the same time. But these litigants, who are often as emotionally charged as a divorcing couple make up only a small proportion of all disputes and can never be deterred even by extremely high costs from litigating or appealed. This is probably true for all the feared nuisance litigators.

The majority of disputes, however, are brought to court for well founded reasons. A large number of disputes, as all national statistics show, concern traffic accidents. There may be special tribunals created for these types of disputes, but they have to be solved in some type of adjudicated procedure which will weigh the evidence and the degree of fault in order to assess the damages and compensation for suffering that one side can demand from the other.

Many other disputes are of a contractual nature. Consumers may complain about a car, a building or other work and businesses have to litigate against one another for similar reasons. As outlined above, it is particularly important that these disputes gain access to court.

Does it then make any sense in these cases to appeal "blindly" against first instance decisions? What might be the reasons for Italy's lawyers to do so? To appeal means to open oneself a second chance to win a case. Although the possibility of winning might be quite little, it will always be greater than when not appealing. Yet the disadvantage of having to pay more fees in the end appears as the stronger argument.

It casts doubt to the function of second instances. If in fact the higher instances are supposed to be institutions to review errors of first instance or decide questions on law which seem to be of a certain importance, a frequent appeal might prompt the lower court judges to be more superficial knowing that their word will not be final in any event.

At the same time, the important aspect of the new interpretation of law or even the creation of new law is diluted if appellate courts have to deal with everyday issues too often, that could and should have been resolved in trial court. Therefore the difference between the first and the second instance should be the importance of the case and also the awareness that a case was once probably falsely decided and needs to be considered very carefully. If differences between first and appellate instance are diluted, the second instance, as a result, would only be the "second part" of the first instance.

On the other hand, if appellate proceedings are used only for tactics of delaying the payment there must exist some special reasons for it because the costs will increase significantly and become an essential part of the dispute value. Some reports give indications that in these countries delay tactics are a serious issue to bear in mind.

This may not be true, however, when the duration of the appellate proceeding gives the appellant additional time to avoid payment at a time at which he is not fluent. The aforementioned possibilities to hide assets or avoid payment after a judgment which took too many years to obtain might partly a role. In addition, it might be interesting to investigate whether the interest awarded for the time during which the claim is before the Italian courts may be too low in relation to inflation rate or in relation to profits the debtor may make with the monies during that time.

In contrast, in other member states the delaying effect of appealing is not denied but is deemed to be unusual. Possibly there are different relations between the court and lawyer fees, the usual dispute values, the duration and the interest that is awarded on the claim.

This seems to be confirmed in the UK report where in the opposite, "a lawyer might advise his client not to appeal even though he had good grounds and reasonable prospects of succeeding because his client might not be able to afford next steps in the litigation,...". Obviously those fees are quite high - at least for some people in that country who want to litigate.

Especially in the UK, but also in other member states, there is an additional issue to consider when appealing. In a system that is based on case law appealing a judgment always contains the possibility of new law being created which may not be in the interest of the appellant. Although the French law is not based on case law, the special report about France confirms this point as being important, as well.

Furthermore the France and also the UK report include the issue that appealing to a higher or probably the highest instance might focus public attention on the party. When losing the case this might result in bad reputation and in jurisdictions in which the parties' names become the name of the case the name of the party from then on can appear in a precedent for a long time.

What effect does this aspect have? Surely it would reduce appeals especially in cases where the chance to succeed seems to be quite slim. Yet it attracts parties or their lawyers who have good reasons to appeal and want to earn good reputation for it. So the effect of public attention seems to be quite similar to the one of binding precedents.

Albeit, there is not only a positive issue as far as case law and reputation aspects are concerned. Of course, those parties who are quite sure that an appeal would make or not make sense will be strengthened in their decision. Nevertheless, there are also parties who assume a fifty-fifty chance. For those, the decision to appeal becomes even harder because there are more consequences to bear in mind.

Yet, especially these cases are important because judgments of binding instances are particularly important for those questions which are not easy to answer and consequently lead to a fifty-fifty chance.

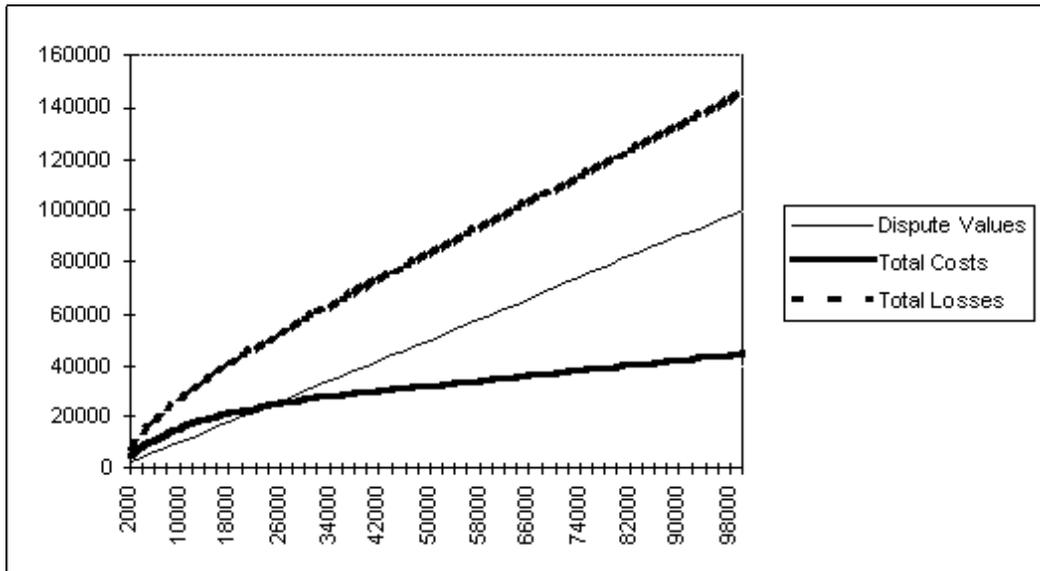
In theory it is possible that a lawyer suggests to lodge an appeal although the chances of success are extremely slim only for raising more fees. It can be seen in the Italian in depth study that also in practice "... there are these kinds of lawyers and for sure they are known by the court; ... ". Obviously, there is a limit to such activities, since the reputation will suffer with the number of cases which

a lawyer loses in both instances and when having to explain fees exceeding the value of a case to the client. There has been scientific evidence that any lawyer billing on an hourly basis tends to spend slightly more time on a case than is necessarily good for the client. Yet, the necessity in private practice to justify the fees to the client warrants against excessive legal fees. Notwithstanding, the French report emphasises that it does also happen there to make a useless appeal for becoming known in the branch.

An increase of cases on all levels will cause in every country the same problems. As shown above, except, of course, for a protracted duration, one essential problem might be more false judgments. Though, there are many different aspects which have to be considered when concluding the effects on the number of appeals.

As mentioned before, the likelihood that cases with high values are brought to court and are appealed is higher, than for lower values. Two factors play a role here: with increasing values, the case and the question of whether the party wins or loses, gain importance for the parties. At the same time, even though the fees may be much higher, their relation to the dispute value is often better. There is a better relation in terms of the amounts invested to the amounts that can be gained (or lost). Yet, in most member states, even at a dispute value of 50,000 ECU, the aggregate total legal fees of a three instance proceeding are far more than half of the value. Thus, each party is basically at risk to lose 75,000 ECU for potentially winning 50,000 ECU. The chances to win against the risks were better if the parties would invest on a roulette table!

This can be shown by the following chart: ⁷⁸



The first curve in the chart shows the total costs that a party who loses a case has to pay in legal fees for the respective values in ECU, if a case were disputed through three instances and the ECJ. The straight line are the values at dispute, which, of course, crosses the chart at an angle of 45 degrees as it is self referential. The second curve (dotted) shows the total of fees and the value, which the losing party "loses" in the dispute. If the total losses are seen as the "wager" and the value as the possible "win", the parties might want to consider the argument about the roulette table.

4 Specific Solutions

In addition to all other difficulties that have been mentioned and which make global solutions difficult, every judge, lawyer or other professional observer of legal proceedings will tell that every dispute is different in its problems, needs and parties. Any change in procedure may be better for one case and worse for another. At the same time, there is the principle of equality to be observed and it is problematic to design procedures for individual cases only.

⁷⁸ The chart is used for explanatory purposes only. It is therefore based on estimated figures and not on a specific country or average. Taking specifically into account the value based threshold restrictions in some of the member states, the fact that not all cases are appealed and very few are disputed to the ECJ and, further, that each case has too many individual aspects that will influence the number of instances as well as the level of fees, any reference to a "European average" would be unscientific.

There is one common aspect at least, about which there is little doubt. All times in which a case file stands still without work done on it is against the interest of justice and at least one party to the proceeding. In practice, files are moved and/or have to wait for a long time within court administrations for simple administrative tasks to be performed, judgments to be typed, *etc.* Therefore, all member states need to cut these times to a minimum. More efficiency in the non-judicial aspects of court administrations is strongly demanded. It is proposed that all member states investigate these delays and their reasons and adopt measures for improvement. Even if such measures need additional funds, then they cannot be avoided. At the same time, additional costs may be avoided through more efficient management.

While a more efficient, less costly legal proceeding may lead to higher litigation rates as more people might use court litigation to resolve their conflicts, the opposite can also be true. Through the workings of the *shadow of the law*, knowledge that a breach of contract or other offense can be easily brought to justice, the result of which can be foreseen (legal security!) could also lead to a reduction of conflicts giving rise to disputes or to more settlements in an earlier stage.

This study deals mostly with the appellate systems in the member states of the European Union. It thus complements the study on the *Cost of Judicial Barriers for Consumers in the Single Market*⁷⁹ which dealt with typical cross-border first instance proceedings brought to court by consumers. That study also covered the process of recognition of foreign judgments under the Brussels / Lugano Conventions and the subsequent enforcement procedure.

Usually, when an appeal has been filed, the procedure has already been nationalized to such a degree into the framework of an individual legal system that it is difficult to "spot" cross-border cases or, the cross-border aspect of an individual case. Other studies have shown that, at this point in any procedure the foreign parties have to a large degree adapted themselves and their expectations

79

von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

to the procedure before them and that their behaviour differs little from the behaviour of domestic litigants.⁸⁰

The problem of costs is dealt with further below. As to the duration of appeals it is striking that, in most member states there exist very strict and short periods within which appellant and appellee have to give notice of appeal, file their briefs and be ready for hearing. It can also be observed that on the basis of these rules, there are extreme differences in the time that the appeals process actually takes and these differences even exist within individual member states between different appellate courts. Therefore, it is a valid conclusion that, as regards the appellate proceedings, it is not the procedural codes or the parties that cause extended durations of time, but the courts themselves. In other words, in many member states there is a considerable inefficiency and back log in the court calendar which is the main reason for delay. As mentioned before, this is a reason not warranted by the cases and thus, not acceptable in terms of access to justice.

This might lead to the question, if perhaps litigation rates as such have increased to an unprecedented degree and may have caused the back log. Surprisingly, however, available statistics show that the number of appeals does not necessarily coincide with the number of cases of first instance. In England and Wales, for example, there has been over the last 10 years a substantial increase in the number of applications (mostly for leave to appeal and similar applications), while the number of appeals set down has remained largely constant. During the same period, the number of first instance claims decreased. As a result, the percentage of first instance cases which were taken to appeal increased.⁸¹ Thus, apparently, there are many other factors involved in rising appellate numbers, if any, than the mere overall increase of litigation.

The study on the Court of Appeals in England and Wales also clearly shows that, while the number of appeals remained almost constant, the duration increased significantly. In addition, the number of cases on the so called "short warned list", which are considered to be less complex and follow a fast track procedure,

80 von Freyhold/Gessner/Olgiati: "The Role of Courts in Global Legal Interactions", in: Volkmar Gessner (ed.): *Foreign Courts - Civil Litigation in Foreign Legal Cultures*, (Aldershot: Dartmouth, 1996), p. 269-281, 275.

81 *Court of Appeal (Civil Division) Review* (London: Court Service Publications, 1997) ("Bowman Report").

was reduced thus further increasing the average durations.⁸² A very significant increase of the number of justices in the Court of Appeals over the same period did not make much difference (unless, of course, the situation might have been even worse if that had not happened).

As mentioned before, the legal system in each member state is very different. Nevertheless, the English example may be generalised in that the reason for long durations have to be sought in the courts' mode of operation itself.

Even the view on the European Court of Justice confirms this point: in a case file described above, it took the ECJ court administration more than two months from the date the request for a preliminary ruling by the national court was received at the ECJ to forward the decision to the parties and the other institutions that are to be heard. After the receipt by the ECJ of the statements from the parties, the Commission and a number of member states, a hearing took place about 8 months later. Then, it took the Attorney General 6 months and thereafter the court another 4 months, respectively, to issue their opinions.

Whereas it might be argued that, a good and valuable and thought through appellate decision takes its time, the time lost in the forwarding of the case shows clearly that, purely administrative reasons make up most of the delay, and not legal work. Further, none of the lawyers from any of the member states which has different durations in different courts on the same level has mentioned any difference in quality between these courts. It can therefore be concluded that most of the time the case is simply not processed which would not be an acceptable reason.

4.1 Threshold Value Restrictions

Many member states have or are planning to introduce or raise threshold values allowing or barring appeals. Threshold amounts are the easiest way to control the access to higher instances. Higher threshold amounts will produce a lower number of appeals. It is obvious that the quality that can be obtained in first instance proceedings within European legal systems is statistically quite excellent. Even where allowed, in most jurisdictions only a small number of

82 *Ibid.*

cases are appealed⁸³ and statistically only a fraction of appeals are successful if brought to judgment.

In light of the costs that rise with every instance and the duration, restrictions based on value are also sensible. It obviously does not make sense to promote litigation that costs far more than the value at stake. In some jurisdictions, appeals are often used by defendants simply to delay their clear obligation to pay. In others, appeals have become so common that the assigned roles of appellate courts - of correcting unjust decision, upholding legal standards, creating new law or interpretations and keeping common standards among the many first instance courts - become obsolete. And finally, threshold values do serve to protect the losing party from excessive fees that bear no sensible relation to the value at stake.

The question is, however, whether this method to reduce the number of appellate cases is acceptable on the background of access to justice.

Unfortunately, restriction of access to appeals by threshold values does not equally affect all. In practice, threshold values are directed at a specific group of legal customers, *i.e.*, the consumers. Matters which matter to them may thus be systematically excluded from judicial review and from the development of precedents.

It may be argued that, most legal subject matters in theory can occur in different settings so that there will be an opportunity to form precedents in higher value cases on the same questions of law. If this were so, the systematic exclusion of the special needs and the social situation of consumers may be even more dangerous if the higher courts form their precedents on a different basis of facts. After all, particularly in civil law systems where precedents serve the purpose of creating abstract legal rules, it may be particularly important for the judges to have a scenario before them in which they have "normal" parties rather than parties who have more financial capacity and are thus in a different situation. This may become important when, for example, social policy issues come into play in contract law. In order to notice and make precedent law on the rights of the weaker party in a contractual relationship, it is useful if the court has a weak party before it. This is probably what is meant in the U.K. report, *supra*, with the statement that "threshold limits would create bad law."

83 See, country reports, *supra*, for rules and exceptions.

In fact, all practitioners we have interviewed to this topic all over Europe also disagree. In addition to the arguments of justice, some have raised the issue that first instance courts change their attitude once they feel to be above review. Our study is based on a very small sample but this objection has been noticed by other empirical studies as well. In other words, judges may become "arrogant" and this danger is even more likely when their case load, as is the case in all first instance courts in Europe, is pressing them to have the dispute resolved one way or the other as soon as possible. This danger is particularly relevant in jurisdictions where the first instance is a single justice court.

Accordingly, Ms. Bartlett emphasises that "... limits ought to be based on legal merit, not on the financial values of the case involved." This argument is in line with the Council of Europe which, in its recommendation of 07 February 1995 states that in principle it should be possible for any decision of a lower court to be reviewed by a higher court but, "in order to ensure that only appropriate matters are considered by the second court, states should consider ... requiring leave to appeal".⁸⁴

Instead of introducing raising the threshold amounts it would be therefore more adequate to install, maintain or expand the role of institutions which will assess the merits of the case and decide whether to give leave to appeal or not. By the way, it is also not fair for the legal system to parties with weak cases to allow matters to drag on and incur costs which the parties will ultimately have to pay - to the court and to both lawyers.

The only potential problem with such a proceeding might be that, it possibly only creates an additional level of review, adding both costs and duration to an already protracted procedure. The possible solution to avoid this disadvantage might involve two measures: as the first, the proceeding for leave to appeal should be an *ex parte* proceeding. The appellant alone would have to file his arguments why the lower instance should be reviewed. Only when the appellate court is convinced that, there are valid points raised by the appellant need the appellee become involved.

As to second and higher appeals, requests for preliminary rulings by lower courts, without participation of the parties, should become the rule and party appeals the exception.

84

Council of Europe, Recommendation No. R (95) 5 of 07.02.1995, Chapter I, Article 3.

The higher the instance, the stronger are the public vs. the private purposes of appeals.

There is a private and a public purpose of appeals in civil cases. The private purpose is to correct an error, unfairness or wrong exercise of discretion which has led to an unjust result. The public purpose is to ensure public confidence in the administration of justice and ... to clarify and develop the law, practice and procedure and to help maintain the standards of first instance courts ...⁸⁵

Therefore, the parties should not have to spend legal fees for the highest instances of the member state and should also be free of court fees.

Hopefully, an abandonment of all or most appeals as of right and of value based criteria for a system of leave to appeal for the second and preliminary rulings instead of the third and higher instances, would reduce the overall workload of the appellate levels to a sufficient degree as to speed up proceedings. If administrative times are also cut down to a minimum, time frames for appeals might return to an acceptable level in all member states.

We would like to note an exception: as to the ECJ it does serve an important extra purpose that the parties, specifically, their lawyers, participate in proceedings for a preliminary ruling. Through these proceedings, lawyers in all member states become more accustomed to European law and the Court has the opportunity, each time, to receive additional views from the member state where the dispute takes place. Therefore, the participation of the parties and their lawyers in proceedings before the ECJ is in the interest of European integration.

Nevertheless, it should be considered to find methods to equalize the fees that lawyers from the various member states can charge for proceedings before the ECJ. The current disparity between these fees is an unpleasant situation.

4.2 Cost ruling and Cost Shifting

The issue about fees has to be seen in connection with the cost rules. In theory, all procedural norms and standards are oriented at aiding the party which is presumed to be weaker.

⁸⁵ *Court of Appeal (Civil Division) Review* (London: Court Service Publications, 1997) ("Bowman Report"), p. 25.

Under European legal concepts and standards this is usually presumed to be the defendant. The plaintiff makes the selection as to when litigation commences and selects the issues. Therefore, the defendant should at least be given the right of forum at his place of residence or business and should be afforded the time necessary to be heard and defend himself.

This is quite different to the American concept under which it is assumed that if the defendant is a company transacting business at and deriving income from the place where the plaintiff resides, this is considered to provide sufficient contact to that jurisdiction to invoke long-arm-statutes providing for jurisdiction at the plaintiff's residence.

In real cases, of course, either or both may be true and it is quite unclear, which party needs more protection by the system. As opposed to procedurally oriented reforms, such as threshold values, which appear to treat all parties equally but in fact discriminate against certain groups of society, an actor oriented approach is needed. An extremely good example of this "new" approach are the jurisdictional rules favouring the consumer in the proposed draft revision of the Brussels Convention,⁸⁶ although it might be said that these rules do not go far enough.

In addition, in the U.S., the plaintiff is held to be the party aggrieved by the defendant, which is the reason to seek redress from the courts. Therefore, court fees are particularly low and there is no cost shifting against the plaintiff in the event he loses the case. This "American rule" is supposed to enhance access to courts for the plaintiffs who need not consider the additional risks of the other side's legal fees. In fact, as seen in the main chapter on the country reports, *supra*, particularly the cost shifting rules, as they exist in most member states, double the risk for each individual party.

There is an additional argument in that cost shifting, again, works differently for different types of parties. Business actors who are "multiple players" in court proceedings can make a general litigation strategy. In theory, if after a sufficiently large number of litigations, *e.g.*, 25 cases, the company has gained just 1 ECU more in judgments than it has spent on legal fees, then the litigation strategy was correct. In effect, this would lead to a decision to risk litigation when winning chances are between 60% or 70%.

⁸⁶ See, Article 13, Commission Communication to the Council and the European Parliament: *Towards greater efficiency in obtaining and enforcing judgments in the European Union*. Proposal for a Council Act establishing the Convention on Jurisdiction and Enforcement ... in Civil and Commercial Matters (COM (97) 609 final).

For a consumer, who is a typical *one shotter*, the cost shifting rule makes litigation so risky that he must be very sure to win, probably over 95%, before he or she takes this avenue as he cannot recover in other cases. Therefore, cost shifting does serve as a barrier for consumers to courts.

On the other hand, the rationale for this (European) rule is well founded. Cost shifting protects defendants in a dispute from being wrongly sued and from having to incur costs without good reason. At the same time, cost shifting ensures that the plaintiff, if he succeeds, is "made whole". There would be no justice if the plaintiff winning a case could not also recover his legal fees as he might, as shown above, have to spend even more on the proceeding than the value of the claim.

The proponents of the "American rule" argue that, the plaintiff usually has the possibility to sue on a contingency fee basis. The problem is, that this does not work for low values, which lawyers would simply not take on.

It is further argued that, when damages are awarded, the juries usually take account of the legal fees in their awards to ensure that the winning plaintiff is "made whole". This, again, creates a problem with regard to plain contract cases in which the issue should be the sales price or the merchandise, and not damages. In these cases, without damages for particularly malicious behaviour of the defendant, the plaintiff cannot recover his legal fees even if he wins on the issues.

The same is true, of course, for the defendant, who should not have to pay anything, if he is right.

At least it appears that American parties to contract litigation tend to settle very early in the proceeding, earlier than European parties. As both parties have their own legal fees to loose the longer the proceeding takes, the incentive to settle is stronger. Yet, it also appears that this may not be in the interest of justice which courts are for. Parties should have better reasons to settle than being forced to.

Not surprisingly, the American legal system has invented the term "nuisance value settlements": a defendant may agree to pay a sum to the plaintiff which is somewhat lower than the legal fees he would have to pay for winning the case. Obviously, a system where parties have to consider such payments is flawed.

Accordingly, there seems to be no compelling reason to abandon the "European" rule of cost shifting, as it is practiced in most member states in one way or the other. The possible barriers to access to justice in some cases are compensated by

additional cases, which gain access to the courts and by the overall "justice" the rule awards to both parties.

However, on appeal there is an additional issue to be considered. If the appellant wins, the appellee then has to pay the costs of the entire proceedings, which are quite significant, although he won on first instance. Since the appeal could only have been successful if the lower court made some error, it should be seriously considered if the costs of successful appeals should not be paid by the state. The party that loses in the end would still have to pay the costs for the first instance, but not those of the appeal. In order not to discourage settlements, it may be given to the discretion of the court.

Also, the courts may have or exercise a wider discretion to award costs differently than the outcome of the proceeding, or even impose sanctions in form of lawyer fees to the other side or additional court fees, if the court has the impression that a party has protracted the proceeding or caused unnecessary costs or delays. This might be a potential solution for those jurisdictions, in which appeals have become a general practice to delay payment.

4.3 Simplified or Summary Procedures

Most member states have a simplified or summary procedure for simple money claims. Unfortunately, experience has shown that these procedures are statistically used mainly by companies against individuals for the enforcement of money claims, i.e., by sellers and service providers for their purchase price or fees. It has therefore become an instrument against the consumers, not for them.⁸⁷ Under these circumstances, the consumer may profit only from the fact that, the legal fees imposed upon him in addition to the plaintiff's claim are lower.

As a matter of constellation, consumer claims often concern either the quality of a product or service or the non-delivery of a service. Exactly for these types of claims simplified or summary proceedings are usually not useful as they would often require evidence as to the defect of the goods and as the claim for fulfilling a contract is not necessarily a monetary claim. Accordingly, these claims are excluded from simplified procedures in most member states. It is therefore not

⁸⁷ Vial, Enzo: *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr - Eine rechtssoziologische Untersuchung* - (Diss. - Baden-Baden: Nomos, forthcoming 1998), with many references.

proposed here, to expand the possibilities of such procedures as they cannot be a real solution to the problems at hand.

5 Alternatives

5.1 Diversity Jurisdiction

To some extent, the U.S. with its many different states with different laws and jurisdictions has been used as example for suggestions for the European Union. The deep distrust which existed at the founding of the U.S. against the courts of other States has led to the creation of a independent federal court system having jurisdiction on matters of federal law and in diversity cases. The latter are defined as cases in which the parties on one side of a litigation have their residence in / are citizens of another State within the U.S. For practical reasons and to avoid costly federal court litigation there is threshold value of currently U.S. \$ 100,000 for federal jurisdiction in diversity cases. There are some prospects in this concept which could be considered in the European context.⁸⁸

Yet, there are many arguments against such an institution. It needs compelling reasons to create an additional expensive court structure. As to "federal law", the European Court of Human Rights, the European Court of Justice and particularly, the Court of First Instance already serve this purpose to the extent necessary by the current state of integration. This system may grow or change as will be necessary in the future, but it is far from being similar to the American federal court system and any currently discussed options are of a different nature and far beyond the scope of this study.

As to the diversity jurisdiction, even in the U.S. there are discussion for abandoning it. Its high threshold value, which has been raised several times to reduce the case load, serves as barrier to most cases and the rules are quite strict anyway. The distrust and the lack of quality that existed in the judicial system of the U.S. States when it was created, is no longer present and does not exist within Europe. Many different additional factors, such as modern transport and communication as well as the press and public opinion further assist in

⁸⁸ Stürner, Rolf: Der Europäische Zivilprozeß -Einheit oder Vielfalt?, in: Grunsky, Wolfgang / Stürner, Rolf / Walter, Gerhard / Wolf, Manfred (eds.): *Wege zu einem europäischen Zivilprozeßrecht - Tübinger Symposium zum 80. Geburtstag von Fritz Baur* (Mohr: Tübingen 1992), p. 3.

maintaining knowledge and quality and therefore trust in other member states' legal institutions.

Therefore, it cannot be recommended to introduce a costly parallel "federal" court structure in Europe.

5.2 ADR

Another solution proposed is alternative dispute resolution (ADR). Traditionally, ADR is divided into arbitration and mediation. It may further be divided into voluntary ADR and compulsory ADR.

Arbitration has for some time now been a specific opt-out instrument in business, particularly in international business and with respect to the assumed rationality of economic actors, probably for good reasons. Yet, it does not seem to be viable for the state to give up legal control to private institutions. It is a historic achievement and a foundation of modern democracy that the state provides the rule of law. Also, unless additional "appeal" possibilities are provided against arbitration awards, which could then make the proceeding even longer and more costly, there are only few safeguards that arbitration procedures uphold those rules which are destined to protect the weaker parties in society, such as consumers. Public policy thus warrants that, unless parties voluntarily wish otherwise, the state does not withdraw itself from such an important aspect of itself. Furthermore, why should not the state attempt to provide a judicial system just as efficient as arbitration purports to be?

In detail, it has been argued for arbitration that it may be faster and cheaper, that it allows for simpler procedural rules as opposed to the complex court rules, that the arbitrators can be better if they are experts in the field of business involved, thus avoiding costly expert testimony, and that it allows for a multinationality of arbitrators and language which give the "foreign" party more confidence in the neutrality of the court.

Except for some arbitration institutions connected to (trade) organisations, arbitration is generally entirely funded by the parties themselves, which includes the arbitrators, the rooms and the administration. There is no obvious reason, why then a (partly) state sponsored court system should be more expensive for the litigants, if the state court system tries to improve.

If procedural rules are too complicated, this may be necessary to protect the weaker parties. In business, the actors are presumably of more equal strength

than a consumer facing a seller. Where the procedural rules do not serve this purpose, they could and should be changed.

As to expert judges, the Commercial Court in London or the commercial chambers at the German *Landgerichte* may serve as good examples that courts need not necessarily lack factual competence. Also, this may be a good argument for business disputes but hardly convincing for consumer disputes. The only practically possible expert judges in areas that concern consumer disputes would need to come from the sellers' or service providers' sphere and may thus not be entirely independent if not by direct employment than at least by socialization. This aspect has been a considerable point of discussion with regard to certain branch oriented ombudsmen.⁸⁹

The multinationality of arbitrators as opposed to the single-nationality of courts is in fact an important and viable aspect in cross-border disputes. No one should dispute the quality and neutrality of judges throughout Europe. It is in fact very high and the member states make every possible attempt to have a high standard of judicature, even if the means employed are quite different. As an example, Germany and France attempt to employ the *crème* of every year of absolvents of legal education while the U.K. attempts at employing experienced practitioners, with similar results. At least for the higher court levels, all legal practitioners interviewed within this study agree on the quality and neutrality of their judges as well as their European counterparts. Furthermore, within interviews made in connection with the project on Global Legal Interactions,⁹⁰ there have not been any complaints or statistical evidence as regards prejudice against foreign parties to civil proceedings.⁹¹

Nevertheless, there have been both statements as well as statistical evidence for a lack of knowledge as well as sensitivity for the international character of disputes and in the application of foreign law and international conventions.⁹² In light of

⁸⁹ See, e.g., *Green Paper on Access to Justice* of 16 November 1993, COM(93) 576 final.

⁹⁰ A project funded by the Volkswagen Foundation and conducted at the Centre for European Law and Policy (ZERP) at the University of Bremen, publications include, *inter alia*, Volkmar Gessner (ed.): *Foreign Courts - Civil Litigation in Foreign Legal Cultures*, (Aldershot: Dartmouth, 1996).

⁹¹ von Freyhold/Gessner/Olgiati: "The Role of Courts in Global Legal Interactions", in: Volkmar Gessner (ed.): *Foreign Courts - Civil Litigation in Foreign Legal Cultures*, (Aldershot: Dartmouth, 1996), p. 269-281, 278.

⁹² *Ibid.* p. 279.

the hopefully ever increasing importance of the Single Market, measures should be taken to increase the international competence of the courts.

5.4 Education

It has always been criticized that legal education in the member states does not include enough European law, conventions and international aspects. It is therefore proposed that initiatives to improve legal education in these areas of law (e.g., Jean Monnet, ERASMUS, SOKRATES etc.) be intensified.

Yet, any improvement of legal education will take a long time until it effects the institutions. Following the current criticism it is obvious that the judicial system lags behind changes that have taken place through globalization and European integration. Accordingly, training for judges in particular areas of law is necessary. It is therefore proposed that the EU takes initiative to provide training for judges in Europe for European law and for the application of foreign (i.e. other member states') law.

Arbitration panels often provide for multinational members. This is an interesting aspect to be considered. It is therefore proposed to test a judge exchange programme on the District Court level. As an example, at every court on the District Court level in each member state, most of which are organised as chambers anyway, a special chamber could be formed which includes one justice from another member state sent to that court by his home country. This chamber would then have exclusive jurisdiction for all standard civil and commercial matters (at least initially with the exception of family matters) in which one of the parties resides or has its place of business in another country.⁹³ That concept corresponds with the exchange of interested young practitioners on the level of lawyers, where it is already becoming common to pass a year of internship in a foreign law firm.

Even if the suggested concept would not provide the foreign litigants with a justice from their own country, a foreign judge within the chamber would add to the sensitivity for their needs and create additional trust. The day to day cooperation would increase the number and quality of the application of

⁹³ An extensive discussion of this topic can be found in: Vial, Enzo: *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr - Eine rechtssoziologische Untersuchung* - (Diss. - Baden-Baden: Nomos, forthcoming 1998).

European, foreign and convention law and would lower the individual psychological burden of a number of European judges to deal with foreign law and with foreign languages.

Furthermore, such cooperation between judges would most likely lead to a better understanding of each other and each other's legal system and further the concept of European integration. Each and every participant of the programme would also have the opportunity to learn from the other colleagues of both positive and negative aspects of ones own and the others' legal system. In the long run, an approximation of the legal systems may be a result, both faster and more efficiently than any measures imposed from green tables. The direct, indirect and multiplicatory effect of such an exchange of justices on European integration may be overwhelming.

As a possible model to be discussed, the EU may require such chambers to be formed or for the procedural codes to allow for foreign judges in such chambers, finance the necessary language courses for the judges and probably the additional moving expenses but leave it to the individual member states and its judges to fill this system with life.

5.3 Mediation

When two parties have a civil dispute in most cases settlement negotiations take place at several occasions before and during the proceeding. This process has been named litigotiation.⁹⁴ Throughout Europe, settlements during court proceedings are one of the most important means for the resolution of disputes. Most procedural rules encourage settlement of disputes in one or the other way and many disputes are in fact settled before judgment.

Litigotiation is a process about information. At the beginning, each side has limited information about the facts, the law, the third party (the court's) evaluation of the facts and the law and what the other side of the dispute knows about the facts, the law etc. and about the first sides' assessment of these issue. Along the process, at each step of the proceeding, both parties gain additional information. Facts are found out through investigation, witnesses, experts, the

⁹⁴ Galanter, Marc: "Worlds of Deals: Using Negotiation to Teach about Legal Process", *34 Journal of Legal Education* 268-276, 269.

other sides' input. Legal information can be bought at lawyers.⁹⁵ Usually, each step of additional information will cost time and money and finally, when the court has rendered its judgment, all information including the information about how the third party has ultimately assessed the dispute, has been obtained, all expenses and the maximum time has been spent.

As long as the two sides' information about the dispute differs too much, settlement is difficult. The more information becomes available *to both parties*, the more likely a settlement becomes. It is interesting to note that procedures in which at a certain point the costs and the duration for any additional information is not very high, settlement is not encouraged as much as where considerable additional funds and time has to be expended.

As an example, in Germany immediately after hearing one witness and after discussion of the case between the parties with the court, all statutory lawyer fees have been earned and the additional court fees for more witnesses or a judgment are not significantly higher than the additional lawyer fees for a settlement. Also, at this point a judgment can be expected within a very short period of time. If not in the same hour, usually within two to three weeks. The only remaining incentive for a settlement is the potential remaining risk as to the assessment of the case by the court.

In the opposite, in member states where due to hourly billing of lawyers each additional step causes additional expenses and where, as in Italy, each additional hearing or the period waiting for a judgment after completion of the trial causes extreme losses of time, the incentives to the parties to cut the proceeding short by settlement are stronger and more cases are settled.

Under circumstances of equal and sufficient information about the facts and the law, the costs, time and risk avoidance are important factors favouring settlement. On the other side, on the basis of equal information about the facts and the law, a major obstacle may be that the parties can still differ in their assessment of the case. Psychologically, many parties tend to be overly optimistic in their assessment of chances, diminishing settlement opportunities.

As opposed to arbitration, mediation is the attempt to find amicable resolutions to disputes. Unfortunately, judges are rarely trained in the special techniques of

⁹⁵ Plett, Konstanze: *Settlement on Litigation Road*, unpublished LLM thesis, Univ. of Madison, WI, 1988, copy on file with the authors.

mediation and are also not necessarily appropriately equipped. Under the constraints of the civil procedures, it may be difficult to find the creative win-win solution which is often the key for successful mediation. Therefore, this task should be assigned to persons especially trained.

Pursuant to some models that have been tested, it may make sense to have a prescreening for all first instance claims brought to court and suggest to the parties whether a court proceeding, a technical expertise or mediation are the most appropriate means for the resolution of the dispute. Either upon filing of the complaint or after receipt of the answer the prescreening could take place. For this purpose, it should be required from the parties to provide a short statement of facts. In order to serve constitutional constraints in some member states, the imposed standards of such statement of facts need not be too high and could be given orally to a court registrar. Nevertheless it helps both the parties and the prescreening staff with the assessment of the case. After all, as mentioned, litigotiation is all about information.

One disadvantage of such a proceeding is that it may be too much bound to the constraints of court administration as well as to the procedural rules. As an example, before the defendant can participate it would be necessary to have the entire set of papers to be served. If the defendant resides abroad this would include costly translations as well as transmission through the Hague Convention mechanisms etc. As has been shown in the previous study on the *Cost of Judicial Barriers for Consumers in the Single Market*⁹⁶, such procedural steps may easily take several months and cost several hundred ECU.

In the alternative, a mediation institution which is located at the court but operating independently may allow for easier procedural handling. As an example, the notice to the defendant may be sent by registered mail and a translation may not be necessary for all or some of the papers. After all, mediation is and should be voluntary.

Under all these aspects, it is absolutely necessary and therefore proposed that, the running of statutes of limitations be discontinued and that proceedings in parallel courts in other jurisdictions be barred during mediation to the same extent as is provided for full court proceedings under the Brussels Convention.

⁹⁶ von Freyhold/Gessner/Vial/Wagner (eds.): *Cost of Judicial Barriers for Consumers in the Single Market*, A report for the European Commission, Brussels 1995.

Additionally, an incentive system should be provided. In order for the plaintiff (or, better: *claimant*) to consider mediation as a possible means to solve the dispute, the fees paid to the mediation board should be lower than the court fees and should be counted towards the same so that no additional costs arise.

For the mediators, a "no deal no fee" rule may be applied. This would encourage mediators to find a solution for the parties. If the parties still have to litigate after mediation, the paid in fees are forwarded to the court. If a settlement is reached, the mediator keeps these fees.

Finally, if the defendant does not participate in the mediation at all, the mediation fees might be awarded against him regardless of the outcome of the case. Of course, as opposed to the plaintiff, this rule would not also be an incentive for good faith negotiations, but at least for participation as such.

And for both parties, the additional costs of the court proceeding should the party loose in the end, might be an incentive to try mediation.

It is therefore proposed to encourage or even prescribe mediation schemes on a Europe wide basis. In order to provide better knowledge about the existence of the institutions to both local and foreign parties, mediation institutions should be created at every first instance court (multi-door-courthouses).

II. Results and Proposals

1 Summary of Results

1. The average cost a consumer has to invest when he initiates a law suit against a seller or service provider from another EU member state which covers higher instances is, for a value of 50,000 ECU, about 15,000 ECU for a proceeding that covers the first instance proceeding and one appeal to a higher level. If all available instances are used, including a constitutional court, where available and a request for a preliminary ruling at the ECJ, the average total costs for such a proceeding would amount to 37,000 ECU, including VAT of up to 25% on the lawyers fees. Furthermore, the personal risk each party has to take does also cover the expenses of the opposite party, that usually have to be paid by the losing party at least to a large extent. These fees would amount to at least 70% more than the costs already incurred, so that an average total amount that may be risked by the consumer who tries to enforce his right within the Single Market is in excess 60,000 ECU. If the amount in dispute is 200,000 ECU the respective average costs would amount to 28,000 ECU for two instances, 52,000 ECU for the entire use of the legal system, and a risk in the range of 90,000 ECU.
2. Obviously, the share of the cost, compared with the total value in dispute, declines with the increasing value in dispute. Nevertheless, in many cases this amount would be high enough to ruin the private actor who is condemned to pay it. Accordingly, at least a consumer who is not absolutely sure to win the case would refrain from an appeal. This does not protect him, however, from appeals taken by the other side.
3. The previous study on the *Cost of Judicial Barriers for Consumers in the Single Market* led to the result that in small claims the total costs the losing party has to pay, may easily superate the value in dispute. It is an important result of the present analysis of appeal proceedings that this outcome is confirmed even for disputes up to a value of more than 50,000 ECU.
4. The duration of cross border appeal proceedings within the Single Market amounts to an average of at least 30 months for a proceeding that covers two instances and approximately 110 months, *i.e.*, almost 9 years, for a full litigation that passes three instances plus preliminary rulings before the ECJ and the national Constitutional Court, and the subsequent enforcement proceeding.

It must be noted, that all values are based on a realistical minimum and that, due to all the complications and obstacles that may occur in an international law suit, in practice the cost and duration may rather be higher than lower.

5. The interviews and reports from public offices and lawyers of the member states again confirm the conclusion drawn by the the previous study two years ago: notwithstanding all the similarities of the national legal systems, still no common "European" legal culture can be observed. On the contrary, the execution of international procedural conventions, which should be the backbone of the "European Single Litigation Market", is hindered by organizational problems and by delays attributed to language problems, bureaucracy or to the high workload of the national public authorities.
6. Reports provided by lawyers from different member states point out that traditions of the national procedural practice, local reputation of the lawyer and use of tactical means still seem to be important factors within the civil litigation and certainly do not facilitate the "internationalization" of proceedings. Suing a foreigner still means dealing with two different legal systems and, often enough, with different languages and with diverse legal cultures.

2 Proposals

1. Experience has shown, that typical consumer claims as they are related to quality or delivery issues cannot be resolved in simplified procedures. This is even more true in the context of the complexities of cross-border disputes. As a result, simplified procedures are rather used against consumers by sellers and providers as a simplified method of debt collection. It is therefore not proposed to expand the possibilities of simplified procedures for money claims.
2. It has been discussed that, a European diversity court system could solve some of the problems of European integration. However, U.S. American experience with diversity jurisdiction in the federal court system shows that this concept is outdated and too costly. It is therefore not proposed to introduce a European diversity court system.
3. Consumer policy is government responsibility and so is the provision of effective dispute resolution for consumers. Only the state can ultimately assure principles of access to justice, equal opportunities and fair process.

It is therefore not proposed to exchange court litigation by arbitration outside of the pure business environment.

4. Threshold barriers to appellate review unduly exclude a specific group of society and their legal needs and in practice work against consumer interests. It is therefore not proposed to introduce or expand threshold values as a barrier to appellate review. Rather, these barriers should fall and should be replaced by a system of applications for leave to appeal. If these applications are handled *ex parte*, without participation of the other side, undue costs can be avoided in cases where leave is denied.
5. However, it is recommended to encourage the introduction of methods by which lower courts may on their own motion ask higher courts for an advisory opinion. In order to reduce costs and durations, these cases should be handled on a specific fast track, possibly even without participation of the parties involved in the lower court. For reasons of European integration, however, this proposal should not apply to the ECJ.
6. Some delays in civil legal proceedings arise from the nature of an individual case, are necessary to protect the weaker party or are otherwise unavoidable in the interest of justice. Others delays arise simply from court work overload or administrative shortcomings. The latter in fact create a major part of the long durations observed in this study, which is unacceptable. It is therefore proposed that all member states investigate administrative delays in court proceedings and their reasons and adopt measures for improvement. It is further proposed that, the European Commission calls for the reporting of such measures in order to eventually adopt respective programmes and initiatives.
7. It is proposed that the current system of cross-border legal aid be improved significantly. It is further proposed that with regard to the use of international conventions, standard forms be developed that would allow parties, courts and central authorities a simplified use of these proceedings, reduce the workload of the administration, reduce translation costs and avoid unclear references. It is proposed that, forms be designed to be possibly used for several conventions at the same time and include parts for the receiving state to return to the originating state a receipt notice, the name and telephone number of the person responsible for the further handling of the matter, for progress reports and the ultimate result.

8. It is proposed to encourage or even prescribe mediation schemes on a Europe wide basis. These mediation schemes should be somehow attached to the court structure. Information on these schemes is essential and in addition, specific incentives should be applied that encourage the parties to use these schemes. At the same time it has to be ensured that these mediation schemes must under no circumstances cause additional costs or unnecessary delay. Statutes of limitations have to be halted during the mediation procedure.
9. The administration of justice depends on the legal professionals. Thus, continuing information and education of these professionals on all legal and legal cultural aspects of cross-border proceedings, foreign and international law is essential for adequate and effective resolution of cross-border disputes, for the application of foreign, European and international law, for the harmonization of law and legal practice, and for European integration. It is therefore proposed to introduce an exchange of justices on a Europe wide basis pursuant to the model described in more detail in chapter D, 5.5.4 of this study.
10. European regulation has to ensure, as it does to a large degree, that legal aid insurance in Europe covers litigation in courts of other member states plus the cost of a lawyer in the home country of the insured, where necessary.

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