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Loïc Cadiet/Burkhard Hess/Marta Requejo Isidro (eds.)

Procedural Science at the Crossroads of Different Generations

Nomos

Max Planck Institute LUXEMBOURG for Procedural Law

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Volume 4

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Foreword

In July 2014, the first Post-doctoral Summer School in procedural law took place at the Max Planck Institute Luxembourg. Organized by the International Association of procedural Law and the Max Planck Institute, the school offered to young researchers specializing in procedural an opportunity to discuss their current research topics with fellow colleagues and law professors coming from different jurisdictions.

The idea to organize the summer school was inspired by two complementary reflections: on the one hand, modern procedural law is characterized by its opening to comparative and international perspectives. This development is triggered by the growing globalization, Europeanisation and similar developments of regional economic and judicial cooperation. Economization and constitutionalization of procedural law are equally trends which are more and more influenced by international standards. The financial crisis entailed a view on the justice systems as an important factor for the correct functioning of the economic systems. International actors as the World Bank, the IMF and the Council of Europe have become important facilitators of far reaching procedural reforms. On the other hand, the opening of procedural science also requires a new approach of research which has to be based on comparative methodology. Immediate discussion with colleagues coming from different jurisdictions is the best way to practice legal comparative research. Against this backdrop, the IAPL and the new Max Planck Institute for Procedural Law decided to support modern research in procedural law by organizing the school. This school implements the wish of the IAPL to diversify its activities towards young proceduralists.

After the announcement of the school many applications were filed to the Max Planck Institute; only a small percentage of them could be admitted. The participants of the school came from thirteen different legal and academic backgrounds like Argentina, Belgium, Bulgaria, China, France, Germany, Greece, Italy, Kyrgyzstan, Poland, Spain, Switzerland and the United Kingdom. This book collects most of the papers which were presented at the conference, Reviewed and reworked in the light of the discussions of last summer, they address many different areas of procedural law, ranging from regulatory approaches to procedural law, to compara-

tive procedural law, arbitration and ADR, as well as the Europeanisation of civil procedure. In this respect, the treatise demonstrates the current trends of scientific research in procedural law and the specific approach of an incoming generation of researchers.

The title of this book takes up another feature of the summer school. In July 2014 several generations of researches gathered in Luxembourg: *professores emeriti*, professors in the best age of their research careers and many young proceduralists. Different continents, different perspectives, different experiences and approaches came together and a stimulating scientific exchange took place. To accompany the young scholars the professors presented some major works of procedural and comparative law – each of them was asked to select a book or an author he or she considered worth to be read and discussed. Consequently, former generations of proceduralists were invited to the meeting of the different generations also. These presentations can also be found in this book.

All in all, the First post-doctoral summer school in procedural law, Luxembourg 2014, was an inspiring and exciting moment. It was organized with the help of many collaborators of the MPI to whom the editors of this book would like to express their outmost gratitude. It is our pleasure to announce that the preparations for the second IAPL/MPI Summer School in Procedural Law which shall take place in Luxembourg in summer 2016 are on their way. A call for applications will be launched in fall of this year.

Luxembourg and Paris April 2015

Loïc Cadiet/Burkhard Hess/Marta Requejo Isidro

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Inaugural Lecture

Towards a New Model of Judicial Cooperation in the European Union

Prof. Dr. Loïc Cadiet[*]

I want, first of all, to express my pleasure to be here, with you, for this post-doctoral summer school of the IAPL co-organized with the MPIL. I warmly thank its director, Prof. Burkhard Hess, for having accepted to host this first summer school. It was a very big challenge and I must straightaway pay tribute to the professionalism with which Burkhard and all his team have managed this event. I want also to thank my IAPL colleagues who have accepted to attend this summer school and to chair our sessions. Some of them come from far-away countries, particularly Prof. Oteiza who represents here the very important, generous and dynamic family of South American proceduralists. I am confident that my European colleagues, from England, Germany, and Italy, will accept to share with me this particular appreciation. The IAPL is a worldwide institution. Since it was created, more than sixty years ago, it has grown continuously thanks to the positive action of its members under eminent presidents, namely Mauro Cappelletti, Marcel Storme, Peter Gottwald, who are among us, and Federico Carpi, who is unfortunately prevented from being here. Our duty is to continue this path, in particular by attracting young proceduralists, so that the association is full of energy for the future. This summer school is a centrepiece of our project. I finally thank you, you young proceduralists, for having accepted to join this venture and helping us to achieve our goals.

Having said that, I must fulfil my own duty by introducing this summer school with an inaugural lecture. When Burkhard asked me to give an inaugural speech, my sense of duty pushed me to accept, but I had no idea about the topic to deal with. In the end I have chosen to speak about the

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evolution towards a new model of judicial cooperation in the EU, particularly focusing on its horizontal dimension[1].

Why?

Because this first summer school is partly dedicated to European procedural law.

Because this event takes place in Luxembourg, which is not only the seat of the EU Court of Justice but which is also the country of a European man who played an important role in the conception and implementation of the European system, in particular its judicial and procedural aspects: I mean Pierre Pescatore. I invite you to read his famous book, entitled *Le droit de l'intégration*[2], which contains Pierre Pescatore's lectures on building Europe.

However, unlike Pierre Pescatore, I propose to consider the evolution of the European project, not in a vertical perspective, but in its horizontal dimensions. I would argue that a new dimension of the European project is growing with horizontal techniques of direct coordination between the protagonists of the judicial system – courts, judges, prosecutors, advocates, bailiffs, policemen/women and so on. This evolution goes further and enhances what Pierre Pescatore described in the last chapter of his book as the "*émergence d'un pouvoir judiciaire européen"* on the basis of the preliminary ruling[3]. My horizontal perspective must also be distinguished from the category called "horizontal judicial dialogue" as outlined by Allan Rosas in his paper "The European Court of Justice in context: forms and patterns of judicial dialogue"[4]. My concern is not to look at what other judges are doing when they cite their judgments or exchange views and experiences about the interpretation of law. Instead, I deal with procedural duties governing dispute resolution and with coordination of

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1 This evolution is part of a more general evolution towards a model of cooperative justice: see L. Cadiet, "The Emergence of a Model of Cooperative Justice in Europe: Horizontal Dimensions", in Center for Judicial Cooperation, *EUI Distinguished Lectures,* San Domenico di Fiesole, European University Institute, 2014.

2 P. Pescatore, *Le droit de l'intégration – Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, Bruylant, 2005, pp. 73-95.

3 P. Pescatore, *op. cit.*, pp. 73-95.

4 A. Rosas, "The European Court of Justice in context: forms and patterns of judicial dialogue", *European Journal of Legal Studies,* 2007, Vol. 1, No. 2, pp. 13-14. But comp. with G. de Vergottini, *Au delà du dialogue entre les cours – Juges, droit étranger, comparaison,* Dalloz, 2013.

different foreign courts in the fulfilment of these procedural duties. The development of new forms of horizontal coordination between national courts in Europe is one expression of the rise of a more general cooperative model of dispute resolution, which can also be observed in the national judicial systems. In this sphere, the idea is that proceedings are not the property of the parties (accusatorial system), nor the property of the judge (inquisitorial system); they depend both on the parties and on the judge, and this coupling leads them to cooperate in order to reach a fair and efficient settlement of the case.

I will focus mainly on civil procedure, subject to one point: not all civil procedure is covered by EU regulations, only certain aspects are covered.[5] You know them; so I shall only briefly list them here: jurisdiction, recognition and enforcement of judgments in civil or commercial matters[6]; jurisdiction, recognition and enforcement of judgments in matrimonial and parental responsibility matters[7]; service of judicial and extrajudicial documents in civil or commercial matters[8]; cooperation between courts in the taking of evidence[9]; insolvency proceedings[10]; enforcement orders for uncontested claims[11]; orders for payment procedures[12]; small

5 That is a problem. See L. Cadiet, E. Jeuland et S. Amarani Mekki, *Droit processuel civil de l'Union européenne*, Paris, LexisNexis, 2011, n° 4. – A.-M. Leroyer et E. Jeuland (dir.), *Quelle cohérence pour l'espace judiciaire européen?* Dalloz, 2004.

6 (EC) Regulation n° 44/2001, 22 December 2000 on jurisdiction, recognition and enforcement of civil and commercial judgements, replaced by (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements.

7 (EC) Regulation n° 2201/2003, 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

8 (EC) Regulation n° 1393/2007, 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents.).

9 (EC) Regulation n° 1206/2001, 28 May 2001 on cooperation between the courts of Member States in the matter of evidence in civil and commercial cases.

10 (EC) Regulation n° 1346/2000, 29 May 2000, on insolvency proceedings, replaced by (EC) Regulation n° 2015/848, 20 May 2015, on insolvency proceedings.

11 (EC) Regulation n° 805/2004, 21 April 2004 on creation of a European enforcement order for uncontested claims.

12 (EC) Regulation n° 1896/2006, 12 December 2006 creating a European order for payment procedure.

claims procedures[13]; jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[14]; jurisdiction, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession[15], account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters[16].

Such a set of common rules regarding jurisdiction in criminal matters does not exist. The explanation for this is that criminal procedure is traditionally closely connected to State territoriality and sovereignty. However, the same phenomenon as in civil matters is emerging and growing in the criminal field. Illustrative of this evolution is the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[17] likewise the Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use

13 (EC) Regulation n° 861/2007, 11 July 2007 establishing a European small claims procedure.

14 (EU) Regulation n° 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

15 (EU) Regulation n° 650/2012, 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

16 (EU) Regulation n° 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

17 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002; amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The important thing is that Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and, of course, in accordance with the provisions of this Framework Decision.

in proceedings in criminal matters[18]. These Framework Decisions are another step after the creation of Eurojust and before the creation of a European public prosecutor's office[19].

The most interesting aspect of this evolution towards horizontal cooperation is the new forms of international cooperation between protagonists of the European Justice system.

Traditionally, with the exception of arbitration, international litigation depends on the *lex fori* because justice is a matter falling under a State's prerogatives. On this understanding, justice is one of the main attributes of State power, just like monetary matters or military matters. Of course, this does not prevent any coordination between States, but traditional coordination is limited to jurisdiction, effects of judgments, and maybe service of documents or taking of evidence[20]. Furthermore, this coordination requires a Treaty of Mutual Assistance, *traité d'entraide judiciaire*, which can be bilateral or multilateral such as The Hague Conventions for example[21]. But this mutual assistance is traditionally organized on a diplomatic basis and is approached on a State-to-State basis. Assistance is provided by the executive branch of the States and the courts have no direct powers. It was –and it partly remains – a subject for private international law, specifically the part of private international law called "conflict of jurisdictions"; this issue is not really a question for civil procedure, especially in a unitary State like France.

On the contrary, the interesting aspect of the contemporary evolution of EU law is the new forms of coordination between States' justice systems and how they have caused the questioning of the traditional lines due to a

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18 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008.

19 See I. Patrone, "Conflicts of jurisdiction and judicial cooperation instruments : Eurojust's role", *ERA Forum*, 2013, vol. 14, Issue 2, pp. 215-225. – M. Berger, « Le droit de l'Union européenne et la coopération en matière pénale », *ERA Forum*, 2013, vol. 14, Issue 2, pp. 263-275.

20 See P. Mayer, « La notion de coordination et le conflit de juridictions », in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *Les nouvelles formes de coordination des justices étatiques*, Paris, IRJS Editions, 2013, pp. 3-10.

21 V. p. ex Convention du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile (*service of documents*). – Convention du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale (*taking of evidence*). - Convention du 30 juin 2005 sur les accords d'élection de for (*choice of court agreements*).

rising osmosis between the internal and the external dimensions, the domestic and the international levels. This osmosis has already been observed in the global field of conflict of laws where the rise in power of private interests competes with the traditional primacy of State sovereignties[22]; it imposes itself more at the regional level with the development in Europe of an integrated community in favour of which the national constitutions agree a growing delegation of sovereignty from State members to the European Union. Thus appears an EU procedural law that can be presented, in a synthetic formula and from a private law point of view, as both the result of the proceduralization of private international law and of the internationalization of private procedural law. To catch a sense of this evolution, it is necessary to begin with presenting some new forms of coordination of State justices (I), before outlining some general remarks on this evolution of the notion of coordination (II).

I.

The new forms of coordination are many and they develop with regard to the action –an English word problematic for expressing the action in justice- as well as in the proceeding (*l'instance* in French). I will focus on the proceeding[23] and I will limit my presentation to giving you two spe-

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22 Starting point: Friedrich-Carl von Savigny, *Traité de droit romain*, 1849, t. VIII, esp. § 348-361. See esp. H. Muir Watt, *La fonction de la règle de conflit de lois,* thèse Paris II, 1985. Comp. B. Hess, « Nouvelles techniques de la coopération judiciaire transfrontière en Europe », *Rev. crit. DIP* 2003, pp. 215 *sq,* spec. II, 1°.

23 As to the « action », the new forms of coordination do not have much to show with classical international *lis pendens* or *exequatur* proceedings: see M.-L. Niboyet et Y.-M. Serinet, "L'action en justice: comparaison entre le contentieux international et le contentieux interne", *in* E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *Les nouvelles formes de coordination des justices étatiques*, Paris, IRJS Editions, 2013, pp. 87-114. For example, in a *Flash Airlines* case (Paris 6 March 2008, *JCP* 2008, II, 10115, note Bruneau; *D.* 2008, 1452, note Courbe; *Gaz. Pal.* 20-21 Feb. 2009, 48, obs. Niboyet) and a *West Caribbean* case (Cass. 1re civ., 7 Dec. 2011, *JCP* 2012, 241, note D'Avout; *D.* 2012, 254, note Delebecque; *Rev. crit. DIP* 2012, 138, rapp. Maitrepierre), a party asked the French courts to declare themselves incompetent to decide the cases pending before US courts, or, in a *Vivendi* case (Paris, pôle 2, ch. 2, 28 Apr. 2010, *JCP* 2010, 1191, no 25, obs. Jeuland; *Procédures* 2010, repère 7, obs. Nourissat; *D.* 2010, 2323, obs. Bollée. Also see M. Audit and M.-L. Niboyet, « L'affaire Vivendi Universal SA ou comment une

cific examples. We will look at the renewal of forms of coordination through the course of the proceeding (A) as well as the effects of (national) judgment (B).

A.

Firstly, in the course of the proceeding (*le déroulement de l'instance*), foreign national procedural rules may be applied and not just supranational ones. We may observe the progressive integration "of national procedures inside a supranational procedure," in passing "from independent national proceedings (…) to an international proceedings composed of interdependent national segments."[24] The case law of the European Court of Human Rights also follows this new way of thinking. In *Dinu c. Roumanie et France*, the court ruled that a transnational process has to be considered as a unique procedure in spite of the multiplicity of national proceedings implemented in a single case[25]. This is indeed a ***renewed*** vision of the proceedings and not a simple stacking up of technical rules justified only by their sector-based necessity. *Lex fori* is no longer the only applicable law to the proceedings. This renewed approach brings about "active facts of co-operation of a national court to the course of proceed-

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class action diligentée aux États-Unis renouvelle le droit du contentieux international en France », *Gaz. Pal.* 28-29 May 2010, 11), a claimant asked a French *juge des référés* to decide by anticipation the non-invocability of a foreign judgment that had not yet been ruled (See TGI Paris, ord. réf., 27 August 2009, *Gaz. Pal.* 28-29 May 2010, 11, obs. Audit and Niboyet. – Paris, pôle 2, ch. 2, 28 Apr. 2010, n° 10/01643, *JCP* 2010, 1191, n° 25, obs. Jeuland; *D.* 2010, obs. Bollée; *Gaz. Pal.* 28-29 mai 2010, 11, obs. Audit and Niboyet). Action becomes the vector for dialogue between foreign judges, for transnational judicial cooperation, which focuses precisely on avoiding *forum shopping* and organizing an efficient coordination of State justices.

24 L. D'Avout, "De l'entraide judiciaire internationale au contentieux civil intégré", *in* E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 117-140, spec. n° 1.

25 Ex. CEDH 4 Nov. 2008, n° 6152/02, *Dinu c. Roumanie et France*, *Procédures* 2008, nº 333, obs. Fricero; *Gaz. Pal.* 20-21 févr. 2009, 50, obs. Sinopoli (avec CEDH, 29 Apr. et 18 Dec. 2008). The new horizontal forms of cooperation are increasingly recognised by the European supranational courts which are asked to review the conformity of these forms with European fundamental rights – here an example from ECtHR jurisprudence in both administrative (*M.S.S v Belgium and Greece*), criminal (Stapleton), civil (*X v. Latvia*, Application no. 27853/09).

ings in another State"[26]. In other words, a national court delegates the implementation of certain aspects of the proceedings to a foreign but European court, including in the forms provided for by the law of the requesting court.

Two particularly clear examples can be given here, that illustrate two modes of this new co-operative procedural work.

The first one lies in EU Regulation of 2001 on the taking of evidence[27]. For example, under Art. 10 of this regulation, judges of EU countries may be directly asked by a court in another EU country to execute an order to investigate in accordance with the specific procedure provided for by the law of the requesting court (Art. 10, 3°), and representatives of the referring court may even be present when the requested court implements the measure of investigation (Art. 12, 1°). Therefore, for example, a French judge may be led to order disclosure or cross-examination at the request of an English court, perhaps in the presence of an English judge, even though these tools do not exist at all in French civil procedure.

The second example is provided by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[28]. I particularly draw your attention to Art. 15, entitled: **"**Transfer to a court better placed to hear the case". This provision states : "By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or [and of more interest] (b) **request a court of another Member State to assume jurisdiction** in accordance with paragraph 5". It is remarkable that this provision shall apply, not only, "(a) upon application from a

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26 L. D'Avout, *op. cit.,* p. 118.

27 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

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

party", but also **"(b) of the court's own motion; or (c) upon application from a court of another Member State with which the child has a particular connection**, in accordance with paragraph 3. The courts involved have the express duty to "cooperate" for the purposes of this Article.

These new forms of coordination of State justices can be observed not only in the course of the proceeding; they also impact upon the effects of judgments.

B.

The **effects of judgments** are also the object of an important change. With regard to recognition and enforcement of foreign judgments, one may say that, inside the European Union, foreign judgments are less and less foreign and more and more domestic because of the abolition of *exequatur*[29]. The foreign judgment is somehow naturalized, which expresses the trend already observed in the privatization of the coordination between State justice systems[30], privatization in the sense that the public *ex ante* control disappears to the benefit of an *ex post* control initiated by parties.

But here a question arises.

The procedure for *exequatur* was traditionally presented as a form of coordination between State justices; therefore, one may well question whether its abolition means, not a new form of coordination, but a backward movement?

In my opinion, it is not a step backward.

Rather than a step backward, the abolition of *exequatur* is simply a moving of the coordination in question. It is first the result of a homogenization of national procedural systems. Secondly, the apparent step backwards which the abolition of *exequatur* may bring is compensated for by a possible recourse against the judgment (strictly speaking an "application for refusal of enforcement") on the ground of public policy in the Member

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29 (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements, Art. 39-44, spec. Art. 39: "A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required". See S. Bollée, "Les effets des jugements étrangers", *in* E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 157-169.

30 See *supra* I, *in limine*, p. 4 and *infra* II, B.

State addressed[31]. The abolition thus represents a moving of the coordination to a later stage of the implementation of the recognition or of the enforcement.

This brings us to a point whereby certain additional general comments may be made as to these new forms of coordination.

II.

The observation of the new forms of coordination allows me to sketch three general remarks.

A.

The first one refers to the **structure of proceedings**.

What happens with these new forms of coordination between the judicial systems in different States?

I would say that they draw an "informal model for integrated international proceedings"[32] that would favour a form of relocation (*délocalisation*) of the proceedings brought before a given national court. This relocation may be managed according to two modes: either by association with a foreign court, for example in the taking of evidence; or by transmission, which can be reversed, of the case to a more appropriate foreign judge, as in family matters.

The first mode illustrates a "geographically diffused procedure, but ranked globally" under the management of a "guiding judge"*;* the second one illustrates a "geographically concentrated but turning procedure"[33]. The choice between these two formulas depends largely on the nature of the claim; it is clear that maintenance disputes are not similar to evidence issues. However, in all these hypotheses, it is a sort of what Peter

31 (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements, Art. 45-51, spec. Art. 45: "1. On the application of any interested party, the recognition of a judgment shall be refused: a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed".

32 L. D'Avout, *op. cit.,* p. 132.

33 L. D'Avout, *op. cit.,* n° 23.

Schlosser qualifies as a "joint transborder case management" of the proceedings that is performed[34], depending on an institutionalized dialogue of judges which might go, in some cases, as far as a decision ruled in cooperation by the judges of different States. This co-operation could be reinforced in the future thanks to the development of new information and communication technology which would allow the organization of joint hearings before courts located in different countries.

These occurrences merit attention; they may be of considerable pedagogical value for the judges involved, since they give them experience in foreign procedural techniques. That is to say, the utilisation of these techniques in foreign systems favours a gradual harmonization of court practices, by mutual adaptation[35]. This procedural assimilation is furthermore promoted by the institution of different co-operative networks, specifically the European Judicial Network in criminal[36], civil and commercial matters[37], and the European Judicial Training Network[38]. The transnational disputes are testing grounds for international exchanges of court practices, and thus to the integration of new procedures, and ultimately, this cultural adaptation will gradually favour the harmonization of national procedural rules themselves. This is why the EU Commission wants to strengthen the European judicial network so that communication between courts becomes a reality in day-to-day judicial life.

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34 See P. Schlosser, "Jurisdiction and international judicial and administrative co-operation", *RCDAI* 2000, t. 284, pp. 396 *sq*.

35 A similar phenomenon occurs in criminal procedure with the Joint Investigation Teams (JITS) created by the Framework Decision of 13 June 2002 on the European arrest warrant, hosted in French law by the Code of Criminal Procedure (art. 695-2 and 695-3). A Joint Investigation Team (JIT) is an investigation team set up for a fixed period, based on an agreement between two or more EU Member States and/or competent authorities, for a specific purpose. Non-EU Member States may participate in a JIT with the agreement of all other parties. The aim of a JIT is per definition to investigate specific cases, it is not possible to establish a generically competent task force for a certain type of crime, nor is it possible to set up a permanent operational team by using the JIT setup and concept.

36 https://e-justice.europa.eu/content_ejn_in_criminal_matters-22-en.do.

37 https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do.

38 http://www.ejtn.eu.

B.

The second remark is about the **patterns of coordination**.

The contemporary evolution in European law proposes a categorization of coordination mechanisms by grading them: a lower grade is illustrated by the abstention of a national court to handle the case to the benefit of a foreign court and the higher grade is the direct co-operation of foreign judges in the settlement of the same international case[39]. With regard to the scale of coordination, the forms have gone from the diplomatic channels to jurisdictional cooperation passing through administrative intervention, from indirect collaboration to direct cooperation passing through semi-direct cooperation, from the passive choice of abstention to the active duty of cooperation. Nowadays, the goal is not only to remedy the complex diversity of legal systems in order to avoid a denial of justice but to improve the efficiency of procedures in order to reach a fair and prompt solution of the case. This evolution translates into a tendency for a kind of "privatization" of judicial cooperation. The regulation of this cooperation is displaced from the general terrain of the law of conflicts applicable at the procedural form to the enactment of specific provisions for procedural issues by means of European material rules. The fundamental objective of mutual assistance between European judiciaries is not to preserve State sovereignty, a matter of public interest, but to assure the effectiveness of procedures, a matter of private interest. This is subject to the necessary individual procedural protection of the parties, particularly of the defendant[40].

C.

The third and final remark is more epistemological; the issue is the **approximation of categories of international private law and judicial private law**.

Traditionally the points of view of proceduralists and internationalists are rather different, at least in France: the proceduralist is concerned with the ***internal coherence*** of domestic justice while the internationalist is

39 See P. Schlosser, *op. cit.,* spec. pp. 29 *sq*.
40 See L. D'Avout, *op. cit.,* n° 11.

interested in the ***systemic coordination*** of national laws[41]. This difference makes sense in a world segmented by the phenomena of borders, inherited essentially from the 19th century; it makes sense in reference to the existence of State justice systems separated by their respective national sovereignty.

However the new forms of coordination between State justice systems show that the objective for coordination of private international law and the objective for coherence of private procedural law are not incompatible. On the one hand, coherence is not unknown to private international law while on the other hand, coordination is not unfamiliar to private procedural law[42].

As to **coordination**, with regard to private procedural law, individual State justice systems do not always appear themselves under the form of homogenous and closed systems. Legal systems of the federal type are confronted with these questions of internal coordination which are sometimes very complex, above all in the absence of a federal procedural law. But these questions of internal coordination are not unknown to legal systems of the unitary type, such as in France. Many illustrations are available: for example, in France, the unilateral and passive coordination such as that which occurs with *lis pendens* and related cases[43]; more active co-operation with many techniques of referral of the case from one court to another[44]; the collaborative process implemented by the rogatory commission[45]; the settlement of conflicts between different jurisdictional orders, in particular between the judicial jurisdiction and the administra-

41 See P. Mayer, *op. cit*., and E. Jeuland, "Les internationalistes et les processualistes ont-ils une vision commune de la notion même de coordination des justices étatiques? Etude de canardologie », *in* E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 11-21.

42 See L. Cadiet, « Conclusion d'un processualiste », *in* E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 209-229.

43 Art. 100-106 CPC.

44 Ex. art. 47, 97, 107 CPC.

45 Art. 730-732 CPC.

tive jurisdiction by the *Tribunal des conflits*[46], or between criminal and civil suits[47].

Inversely, **coherence** is not unknown to private international law. Particularly, the principles for a fair trial[48], which are part of the public order, favour an approximation and, therefore, a stronger coherence of foreign systems which contributes, in its sphere, to mutual trust and to make possible the free circulation of judgments in the international space just like in the domestic sphere.

Thus the European procedural system, combining coordination and coherence, illustrates what I would call a methodical jurisdictional pluralism which is not so far from the thesis of the *pluralisme ordonné* proposed in France by Mireille Delmas-Marty[49]. The Kelsenian metaphor of the pyramid is replaced by the metaphor of "network", or maybe "clouds",[50] and by the emergence of unedited forms of "contractualization" of the settlement of international litigation, which perfectly echoes contemporary contractualization of litigation, proceedings and judicial administration in State justice systems[51]. This phenomenon can be illustrated with transnational insolvency procedures for which the practice, (I

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46 The *Tribunal des conflits* was instituted by article 89 of the Constitution of 1848 to settle conflicts of attribution between the administrative and judicial authorities. Eliminated with the onset of the Second Empire, it was re-established by the law of 24 May 1872 regarding the reorganization of the Conseil d'État. These attributions were reinforced by the law of 20 April 1932 and the decree of 25 July 1960. See P. Gonod & L. Cadiet (dir.), *Le Tribunal des conflits*, Paris, Dalloz, 2009. Since this lecture, it has just reformed : Loi n° 2015-177 du 16 février 2015, compl. by Décret n° 2015-233 du 27 février 2015 relatif au Tribunal des conflits et aux questions préjudicielles. See B. Seiller, « Le Tribunal des conflits renforcé », *JCP* 2015, 514.

47 Art. 1er-10 CPP; art. 826-1 et 852-1 CPC.

48 According to the European convention for human rights, which are part of the public order clause in the EU regulation CJCE, 28 March 2000, *Krombach, JCP* 2001, II, 10607, note Nourrissat; *Europe* 2000, no 157, obs. Idot; *Gaz. Pal.* 1er-3 oct. 2000, 30, obs. Niboyet; *Rev. crit. DIP* 2000, 481, note Muir Watt. – See M.-L. Niboyet, « La confirmation par la Cour de justice des Communautés européennes de l'intégration des droits fondamentaux au système de la Convention de Bruxelles du 27 septembre 1968 », *Gaz. Pal.* 1er-3 oct. 2000, 21.

49 M. Delmas-Marty, *Les forces imaginantes du droit (II)- Le pluralisme ordonné, Paris,* Seuil, 2006.

50 See L. Cadiet, "La légalité procédurale en matière civile", *Bulletin d'information de la Cour de cassation,* n° 636, 15 March 2006, pp. 3-19.

51 See *infra* II, B.

mean legal firms, administrators and liquidators), has imagined and drafted protocols for coordination of national procedures, on the basis of standard contracts, eventually sanctioned by the relevant courts, aimed to optimizing the course of the different parallel procedures[52]. This goes further than the duty to cooperate and communicate information currently ruled by the EU Regulation on insolvency proceedings[53]. I think that the European legislator could contribute more to the spontaneous coordination of State justice systems in giving to national courts, together with their foreign counterparts, the power to adapt domestic procedural rules to the specific difficulties of international litigation brought before them.

This shift is not only noticeable at the European level. It is the same inside national systems: the same evolution towards dialogue between courts, the same evolution towards professional networks, the same evolution towards collaborative tools in proceedings and judicial administration. This internal evolution also refers to the emergence of a cooperative model of procedure[54].

But that is another aspect of the story that I will not emphasize. So let me conclude.

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52 See L. D'Avout, *op. cit.,* n° 29.

53 (EC) Regulation n° 1346/2000**,** 29 May 2000, on insolvency proceedings, spec. Art. 31. Duty to cooperate and communicate information: "1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings. 2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other. 3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings".

54 See L. Cadiet, "Avenir des catégories, catégories de l'avenir: perspectives", Rapport de clôture, *in Common Law – Civil Law, The future of categories/ Categories of the future, Looking ahead*, The Supreme Court Review – Second series, volume 49, 2010, pp. 635-655, ainsi que *in* J. Walker & O. G. Chase (eds), *Common Law, Civil Law, the Future of categories*, Toronto, LexisNexis, 2010, pp. 635-655.

Conclusion

To draw a conclusion to this too-long presentation, let me say that, in my opinion, the development of the horizontal model of cooperative justice and of cooperative procedure in Europe is not a fashion but a structural change in the way of thinking and implementing dispute settlements. Two recent European initiatives confirm the rooting of this evolution.

The main initiative is one of the European Commission, in particular of the EU Justice Commissioner Viviane Redding, who organized in Brussels, on 21-22 November 2013, the *Assises de la justice,* dedicated to shaping justice policies in Europe for the years to come after the Stockholm Programme[55]. This brainstorming was preparing the Communication on future initiatives in the field of Justice and Home Affairs policies that the EU Commission will present in spring 2014 and which will be discussed at the European Council in June 2014. The question addressed was: what will EU justice policy look like in 2020? A package of five discussion papers was presented covering European civil, criminal, and administrative law, as well as the rule of law and fundamental rights in the EU. As for procedural aspects, beyond what has been achieved, I must stress that a common aim is to enhance cooperation between actors of the judicial systems: cooperation and mutual trust are closely and dialectically connected. As for administrative matters, one of the challenges is to enhance cooperation between administrative authorities at national and EU level. In this field, the forms of cooperation are complex and need to be closely monitored. In criminal matters, the challenge is to consolidate, simplify and standardize the methods of judicial cooperation at each stage of the criminal proceeding because practitioners need to work together, exchange information in a fast and secure way, and obtain direct assistance from their colleagues through efficient collaborative tools. In civil matters, the service of documents is a crucial element whose good functioning supposes a fair cooperation between courts and parties. The current state of play is not satisfactory due to divergences between Member States on important issues such as the circumstances under which documents are to be served, by whom such service should or could take place, which documents may be served and so on.

55 See http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm.

Therefore it is not a surprise that this issue is also addressed by the second initiative I wish to highlight. This initiative has been taken by the European Law Institute which, in October of last year, launched the drafting of European principles of civil procedure on the basis of the UNIDROIT principles of transnational civil procedure[56]. I proposed this position some years ago[57] and I am happy to observe that it has been adopted. It is true that the time has not yet come for a European Model Code. But, in a first stage, three subjects have been identified to be chosen for drafting European principles and these subjects are, I think, the main subjects where further cooperation between all protagonists of justice is most needed. These subjects are: service of due notice of proceedings, provisional and protective measures and access to information and evidence. Other subjects up to and including enforcement of process will be considered in further stages of the project, mainly *res judicata*. Expert working groups have been constituted and are already working hard. So let us wait and see. The path is fraught with pitfalls, but the journey is quite fascinating[58].

I finally observe a strange shift of the paradigm described by Pierre Pescatore in his masterpiece. In order to singularize European law, which he qualified as a *droit de l'intégration*, compared with international law, he wrote: "*Si le droit international est un droit relationnel, au mieux coopératif, le droit de l'intégration est un droit fusionnel et unitaire*" / « *If international law is a relational law, at the very best a cooperative one, the integrated law is a fusional and unitary law*" [59]. However, it seems that EU law is becoming itself a cooperative law, but in a sense which is not the traditional sense adopted in international law; it is not a forced cooperation, imposed by State sovereignties, but a deliberate cooperation inherent to an emerging genuine European sovereignty. I know that things

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56 See http://www.europeanlawinstitute.eu/news-events/news-contd/article/eli-unidroit-workshop-on-civil-procedure-held-in-vienna/?tx_ttnews%5BbackPid%5D=132848&cHash=930285a737821cd28ad974bba61e4226.

57 See in Ph. Fouchard (dir.), *Vers un procès civil universel? Les règles transnationales de procédure civile et l'American Law Institute,* Paris, Editions Panthéon-Assa, 2011, spec. n° 155-163, 176-177, 180. *Adde* L. Cadiet, « La preuve », *in* F. Ferrand (dir.), *La procédure civile mondiale modélisée*, Paris, EJT, 2004, pp. 119-138, spec. n° 354.

58 See also the project for *Model Rules on EU Administrative Procedural Law*: http://www.reneual.eu.

59 P. Pescatore, *op. cit.,* Préface, p. 5.