



LEGAL PROBLEMS CONCERNING JURISDICTION OVER
ELECTRONIC CONTRACTS ON THE INTERNET

BY
MR. PANSITH BOONTHEPPRATAN

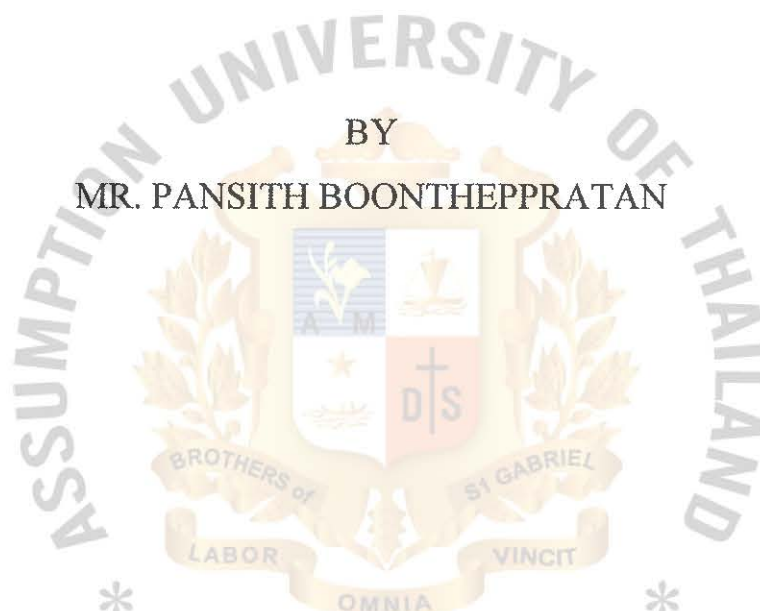
AN INDEPENDENT RESEARCH PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

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Independent Research Paper Title : Legal Problems Concerning Jurisdiction over
Electronic Contracts on the Internet
Author : Mr. Pansith Boontheppratan
Major : Business Law (English Program)
Advisor : Dr. Poom Moolsilpa
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ABSTRACT

According to Article 3 and 4 of Thai Civil Procedure Code, these codes provide information about territorial jurisdiction. When considering in the topic of electronic commerce running the business on the internet network, there is some dispute in case that the plaintiff and defendant are not Thai citizen and the cause of action of the electronic contract has not occurred in Thailand. However, it has some connection point of the case, such as having the assets in Thailand and the plaintiff wants to bring the case to Thai courts. Under the condition of Thai Civil Procedure, Thai court has to reject the case to proceed because of the domicile principle and causes of action principle are not in Thai territorial jurisdiction. It seems to be on the contrary with the situation of electronic transaction that can be made in any place and time in several ways. As a result, for the borderless trading such as trading on the internet network, the laws should have empowered to control and enforce the situation that may happen in future.

To resolve the problem, there should be some addition clause for the Thai territorial jurisdiction to support the electronic contract occurred on the internet network. Moreover, it has to specify for the case between parties who are not Thai resident and the cause of action is not in Thai territorial jurisdiction but the parties have the asset that may be enforced in Thailand. Consequently, there shall be some additional conditions related to territorial jurisdiction to apply with Thai Civil Procedure or Thai Electronic make the case become applicable in term of jurisdiction procedure.

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Chapter 1

Introduction

1.1 Background and General Statement of the Problems

At the present time, the Internet is one of most popular communication networks in the world. The reason why the internet services have become the famous form of communication network market is because there is high competition of the Internet Service Provider (ISP) all over the world. Most of the ISPs have released lots of promotions, such as reducing the cost, making it easy to connect and expand their network for electronic trading to attract more and more consumers. For this reason, a new form of business called “E-Commerce (Electronic Commerce)¹” has been started. The electronic commerce is the businesses in relation between the buyer and the seller which has offered and acceptance through the internet services trading. The new kind of trading makes the new form of contract called “E-Contract (Electronic Contract)” which the buyer and the seller are able to do business through real time trading. Hence, this means that the constrictions of time and place do not play a significant role, as they can be done before hand, making the world a smaller place with borderless trading.

Via the Internet, the borderless trading has been significantly increased. That is, the electronic trading has replaced the traditional form of business transaction which used the written documents to electronic documents and electronic transaction. These changes on business transaction lead to new conditions of agreement from signature to non signature allowing offers and agreements to appear under the electronic process. Therefore, there are new types of documents that will make the problems concerning in the dispute resolution proceeding. For instance, the proof of evidence may cause some problem in accepting the written evidence to use in court. The reason is that electronic documents printed from the original electronic source cannot be

¹Phasuk Chareonkeat, “The Jurisdiction over the Internet Dispute,” Bodbundith 58 Part 2 (June 2002): 25.

claimed as the original document. When original document is electronic, the printed document is merely a copy document that other people can intentionally false the document. In case of inevitably reason to use a document evident, there will be problems how to prove that the electronic document has come from the same original source which is not forged.

In the age of borderless network, the world's business transactions are not made between face to face and use the writing document contracts only, but also the electronic contracts on the internet. In year 2001, Thailand had enacted the Thai Electronic Transactions Act B.E. 2544 (2001) to support electronic commerce and all others business transactions concerning with electronic business transaction. There are many principles in this act, such as recognition of the electronic document from the electronic data to become in-line with written documents, recognition of the acceptance in electronic agreement as a signature agreement and recognition of the electronic data as evidence in the court. For all principles concerning with Thai Electronic Transactions Act B.E. 2544 (2001) are derived from the principle of model law from the UNCITRAL's Model Law. It is adapted to the domestic law of Thailand which is all about improving Thai laws. Also, this adapted law can cover and protect the electronic commerce in Thailand.

In the world of business moving further into the borderless trading, business transaction will also become more complicated as well. In the past, people did their business under the simple agreement that they offered and accepted the agreement under the specific contract law. Nevertheless, nowadays, the agreements are appeared more in the complicated ways. For example, one of the parties living in Japan has offered to sell the stock shareholdings in Thailand Stock Market and another party living in China accepts to buy it.

As both parties agree to secure the agreement via electronic transaction on the internet, the fact is that the Japanese party's server is set up in the United States and the Chinese party's server is set up in France. From this example, this business

transaction shows that the electronic commerce can happen everywhere and it is very borderless in the electronic transaction.

This example may also incur some legal problems on territorial jurisdiction under Thai law because the assets and the stockholdings are in Thailand but both parties are not Thai residence having not any domicile within Thailand. The key question is how confinable Thai law can be used to solve any disagreement that may occur. Therefore, from this aspect, the significant things shall be considered is that whether or not Thai law can cover and protect all the electronic commerce. Not only consider in the solution on legal controversy, the law shall consider which solution will make the best benefit for both parties.

According to electronic commerce dispute resolution, there are many processes to solve the argument, such as negotiation, mediation, arbitration and litigation. Each process has advantages and disadvantages. For example, mediation and arbitration save the proceeding cost and use less proceeding time than judicial proceeding. However, mediation and arbitration ruling cannot be enforced as same as a judgment. It has to be grounded for taking against action in judicial proceeding. Many countries try to standardize their law systems for other countries to use and to balance the disputes to support their domestic business.

In fact, law system do not solely concern about the balance, but also other factors, such as cost, timing process and trading secrets. One of the famous proceeding systems is arbitration as it can solve the problem of the trading parties in positive way. However, the level of arbitration is not effective enough to enforce as judicial proceeding. Thus, the judicial proceeding will be the last stand to solve and enforce for the dispute.

In the international business transaction, the form of law should control and protect the situation that may occur in the future. Such as the electronic commerce is one of international business transactions developed quickly because of the technologies, it makes the world smaller in everyday. If the legal cannot become the enforcement and

follow up in this electronic development, it will distract the business development causing effects directly to the economics of the country.

Nowadays, many countries have developed their local laws to support the borderless trading and some countries make themselves to be the center of dispute resolution. For example, Hong Kong is the best arbitration in real-property dispute resolution, Singapore is the best of arbitration proceeding and litigation proceeding that is acceptable in the business world. It is believed that Singapore has the balance and flexibility to resolve their dispute under the judge and balance concept. Hong Kong and Singapore have enacted their law and law system to support the important business dispute resolution and make a lot of benefit in commercial term. With this legal development, Hong Kong and Singapore is acceptable and trustable from businessmen who believe in judicial system and its abilities to solve the legal dispute. Both countries draw a strong believe from investors to invest in the country leading to good effects to the economic system. Still, the electronic commerce has complicate process on itself. To solve such disadvantage, many countries try to develop their systems and enact the international law to support in their countries. The United Nation Commission on International Trade Law (UNCITRAL) has proposed Model Law on Electronic Commerce² dealing with a number of matters in relation to Electronic Commerce, including requirements for signatures and writing. This model law will be the draft law of the countries to enact and control the electronic commerce against.

Thailand is a developing country trying to build up its self to attract more investors to invest in the country to become the center of business in South East Asia. The electronic commerce is the one of interesting businesses to invest because it is easy to set up the small investment business in Thailand more than other kind of other investment in common that has a lot requirement as capital, employee, place, etc. For this reason, electronic commerce has become a very attractive business with its fewer

² The Model Law with Guide to Enactment, in <http://www.uncitral.org>, access date October 16, 2007.

requirements in the investment systems. So, there should be a prepared system to anticipate any problems that may occur in the future. Thailand has many interruptions that one of them is the legal problem. If Thailand can make the law system to support the business system and gain the confidence from the investors, Thailand will become successful.

This research will mention on the territorial jurisdiction that is the legal problem in Thailand. According to Thai Civil Procedure Code, Article 3 and 4 has specified about the Thai territorial jurisdiction which it can cover the territorial jurisdiction for Thai courts to accept the case and procedure. But in the terms of trading over the internet network, the way of the contracts occurring can be happened in complicated way. Such as the parties come from different countries with their own different legal principles. While the situations of trading over the Internet network are running quickly, the laws should be improved to cover the dispute. In case of internet trading dispute, Thai courts can accept the case to proceeding the legal procedure by following and combing the function and condition of the Thai territorial jurisdiction under the Article 3 and 4 of Thai Civil Procedure Code. This is the reverse point of the internet trading, so, the trading on the internet can be happened in everywhere and the cause of action has occurred outside Thailand and the trading parties who are not Thai resident will be the group that cannot bring the case to Thai courts.

All things considered, there are many ways to solve the controversy on the internet trading. The resolution proceeding aims to stop the argument and make the trading parties gain benefits in balance with confidence and fairness. This research will demonstrate the way out of the legal problem in terms of trading on the internet network concerning with territorial jurisdiction and the enforcement under the foreign court decision under Thai law, and the study on foreign law system to find about the territorial jurisdiction to be enforced in trading on the internet in Thailand. Furthermore, these problems will be the main point of this research that may improve and develop Thailand to be ready to the electronic commerce having direct effects to the country.

1.2 Hypothesis of the Research

According to Thai Civil Procedure Code, the dispute that the plaintiff and defendant are not Thai citizen and the cause of action of the electronic contract has not been occurred in Thailand. However, it has some connection point such as assets which is in Thailand and the plaintiff wants to bring the case to Thai courts. Under the condition of Thai Civil Procedure, Thai court has to reject the case to proceed because of the domicile principle and cause of action principle. While the Thai laws have the specific function about the Thai territorial jurisdiction, the trading cases from the trading over the internet network can be happened in the several ways. It seems that Thai laws might not cover the trading over the Internet network case sufficiently. This is the disadvantage of Thai legal principles lacking of some condition to bring the case to the Thai courts. So, there should be adapting the law by fix and give more the Thai territorial jurisdiction to cover the legal case of the internet trading.

1.3 Objectives of the Research

1. To study about the characteristic of trading on the internet network dispute resolution concerning under Thai litigation.
2. To study the foreign legal principles concerning the problem of dispute resolution on trading over the internet network.
3. To study the legal problem of Thailand to solve the dispute on international electronic commerce dispute.
4. To study about the enforcement of court judgment concerning with foreign court judgment and Thai court judgment.

1.4 Research Methodology

The methodology of this research is a documentary research. The primary sources are laws such as rule and regulation of Thai Law, European Union Law and United States Law relevant to the issue will be studied, analyzed and presented. Furthermore, related books, sections in law journals and internet will also be studied.

1.5 Scope of the Research

This research will focus on the Thailand, European and United States laws concerning electronic commerce on the topic of jurisdiction and enforcement of the court judgment which is a comparison between Thailand to Foreign and Foreign to Thailand.

1.6 Expectation of the Research

1. To understand the principles in term of territorial jurisdiction.
2. To understand Thai laws concerning in electronic commerce dispute on the topic of territorial jurisdiction.
3. To understand foreign laws concerning in electronic commerce case on the topic of territorial jurisdiction.
4. To know legal problems under Thai law according to Thai litigation system.
5. To find out other measures and suitable domestic laws concerning the jurisdiction over the electronic commerce.
6. To find out other measures and suitable domestic laws concerning the enforcement of the foreign court judgment in Thailand.

Chapter 2

Judicial Proceeding of the Internet Commerce Dispute concerning Territorial Jurisdiction under Thai Law

This chapter will give the principles and background of electronic commerce concerning with internet trading dispute under Thai Law. It will regard to Thai litigation, judicial proceeding through the judgment of the court.

2.1 Background of the Electronic Commerce Dispute

According to the electronic commerce dispute, it can occur on the electronic business transaction by using the internet network or other forms of communication through the electronic network. Normally, the contract parties can be executed in the same country or in different countries since the electronic business transaction is borderless. When the contract has occurred under the intention of the parties' agreement in the different countries, the resolution for the dispute will be harder. For example, when the electronic dispute between the parties living in different countries has been occurred and they want to sue each others, the territorial jurisdiction of the parties shall be considered for the case. When the plaintiff sues the case in the court in the parties' countries by using the domicile principle, there might be some problems that how can the enforcement under the court's decision in one country be enforced in another country. Since the territorial jurisdiction in each country is different, it always protects people in their own country only.

Most electronic commerce dispute has happened in the internet business transaction formats. The business transaction between the seller and buyer happen when they use the internet connection to offer and sell their products. On the internet shops, the seller will display their products in the terms of electronic data. The product's price is set from low to high prices with the products' details. The buyer will find the products they want to buy and make the agreement in the terms of electronic contracts by accepting the order and payment. For instance, the buyer agrees to buy a book from

the internet bookstore. They have to order the product and agree to pay the goods' price to seller by credit card before they can get the books. After accepting the agreement and finish the purchasing process on the internet's website for ordering the goods, the seller will ship the goods to the buyer. As a result, by this trading process, it seems that the buyer will be at risk to call for any claim from the seller because the buyer has to pay before they get the goods. That is, buyer will not know if the product's quality is good or the products in the perfect condition after the shipment or not. In case that the goods are not in good condition, how the buyer can call for warranty to fix and refund from the seller. From this point, buyer is at disadvantage that all burdens are left with the buyer. Another important thing shall be considered for Thai buyer is the seller is not Thai. The question is that how Thai customers can sue the seller who lives in another country. If Thai customers claim for their damages with the Thai courts and Thai courts have made the judgment to enforce the damages from the defendant who lives in other countries, how far that Thai customer can receive or solve for their damages.

2.2 Principle of Thai Electronic Transaction Act B.E. 2544 (2001) concerning on Electronic Commerce

The principle of Thai Electronic Transactions Act B.E. 2544 (2001) is imperfect. This is because of the act is only an instrument to help the court that it is easy for the court to use the electronic contract as the writing contract in electronic commerce case. So, the important principle we should understand is that "When will the electronic contract be completed".

2.2.1 The Acceptability of Electronic Evidence in the Electronic Commerce Dispute Resolution

According to UNCITRAL Model Law on Electronic Commerce, in the Section 1, has specified that every electronic transaction is used through

the electronic activities³. Moreover, in the Section 2, it has specified about the data message of electronic data⁴ in the broadly meaning which is the creation of electronic data to send, receive and storage by using the lighting process or others process. So it makes this rule can be applied to use with all types of electronic transactions, such as, electronic mail, fax, telegraph and etc. For the Thai Electronic Transactions Act B.E. 2544 (2001) has specified electronic data in the Section 4, which defines the meaning of electronic data and electronic commerce in the same meaning for the model law. As well, under the Section 7 of Thai Electronic Transactions Act B.E. 2544 (2001), there is the specification to recognize the electronic evidence as legal evidence that can be used in the judicial procedure.

Since the electronic documents have influences on the world's business. The new principle to recognize the use of electronic documents as evidence in the judicial procedure to prove the evidence in the court has been executed. In the common procedure, the plaintiff and defendant have to show the original documents. However, in the electronic commerce dispute, they have to use the electronic documents which are different from the written documents. That is, all documents in electronic format come from the electronic data made from the electronic machine such as computer. Originally, any electronic data is considered as something internal of the electronic machine. When the user wants to take the electronic data from electronic machine, it can be made by using the output device, such as printer, to make the electronic data in form of the printed out paper. Therefore, it is not the original document as same as the writing documents. The output device machine only helps transferring the electronic data into the paper form. However, the electronic document can be the original and can be used as the evidence

³ UNCITRAL Model Law on Electronic Commerce 1996, article 1.

⁴ Ibid., article 2.

in the court by recognized under the law. Thailand has enacted the Thai Electronic Transactions Act B.E. 2544 (2001) to recognize the electronic document. In the Section 11 of Thai Electronic Transactions Act B.E. 2544 (2001), the clause determines that electronic evidence can be used in the legal term, such as using as evidence which has to consider in its limitation of using the electronic data as evidence document. For example, the important aspect shall be considered is that the electronic document has been changed from the original electronic machine or not. The major concept to concern in such point is because the electronic documents is being considered as the paper documents to be acceptable under the law by making the electronic documents be the original evidence which can use as evidence in writing⁵.

2.2.2 The Main Condition to Make the Electronic Contracts

The general way to know whether contract has been made depends on intention of the contract parties showing offer and acceptance. When the offer is made by the parties and it is accepted with intention and identical terms binding the parties. In this way, the basic requirements to create a contract can be defined as follows:

1. Offer;
2. Acceptance; and
3. Intention to create legal relations.

According to Thai Electronic Transactions Act B.E. 2544 (2001), under Section 14, the parties' agreement can be in the electronic data format by concerning in intentions of the parties. As a result, the electronic contracts can be made with the right intention and right form by the contract parties. The contract can enforce the parties and bind with the agreements and it will be considered as the complete contract.

⁵ Ibid., article 5.

Nevertheless, there is still another problem that should be concerned about the territorial of the court to accept the case. as in Section 14 of Thai Electronic Transactions Act B.E. 2544 (2001). If the origin of the contract is made outside the territorial, the court will not accept the case to consider. As the origin of executed contract will be the cause of action of the contract that the court can accept to procedure the case.

For the cause of action principles in Thai law, when the parties can use the electronic data as the electronic documents such as electronic contracts, we have to consider when the contract has occurred. Under Section 23 of the Thai Electronic Transactions Act B.E. 2544 (2001), it specifies that the electronic document will occurred when the electronic data has arrived in the electronic system of receiver.

Generally, the electronic contract has been made in the place where the parties have agreed to make the contract under the basic requirements to create a contract. In the electronic commerce, however, is different from the general commerce leading to the differences in writing contract too. Because the electronic commerce is a borderless business, allowing the parties to do the contract through the internet. Still, the problem is that the contract parties are from various parts of the world. And it is necessary to consider the origin place of the contract. As in Section 24 of Thai Electronic Transactions Act B.E. 2544 (2001), the clause define that the executed place of the contract depends on the offer or acceptance of the sender or receiver. Namely, if the sender or receivers have many establishments, then the most connection of the contract is recommended to choose as the contract executed place. If we cannot find any establishment, the place where the contract occurs is the place is the address of the principal business office.

2.3 Litigation Proceeding under Thai Law concerning Electronic Commerce Dispute

2.3.1 Thai Territorial Jurisdiction under The Thai Civil Procedure Code

It is common to draw a distinction between jurisdiction to legislate, jurisdiction to adjudicate and jurisdiction to enforce. Jurisdiction to prescribe has been defined as the authority of a State: “to make its law applicable to the activities, relations of status of persons, or the interests of persons in things, whether by legislation, by executive act of order, by administrative rule or regulation, or by determination of a court”.

Jurisdiction to adjudicate is the authority of the State to “subject persons or things to the process of its courts of administrative tribunals, whether in civil or in criminal proceeding, whether or not the State is a party to the proceedings”. Jurisdiction to enforce refers to “inducing or compelling compliance or to punishing non compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police or other non judicial action”.

About the Thai Territorial Jurisdiction, according to The Thai Civil Procedure Code Section 4; “Unless otherwise provided by law,

1. The complaints shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled or the Court within the territorial jurisdiction of which the cause of action arose, whether the defendant shall have domicile within the Kingdom or not,
2. The request shall be submitted to the Court within the territorial jurisdiction of which the cause of action arose or to the Court within the territorial jurisdiction of which the applicant is domiciled.”

The way to know where the domicile of the defendant is can be considered from the Civil and Commercial Code. For the natural

person, the domicile is the place where he has his principal residence. If a natural person has several residences where he lives alternately, or various centers of habitual occupation, either, one shall be considered his domicile. If the person selects any place with manifest intention of making it a special domicile for any act, which is deemed to be the domicile in respect to such act. The domicile of juristic person is the place where it has its principal office or the establishment, location of the main office or the office or which has been selected as a special domicile in its regulation or constitutive act.

The territorial jurisdiction that is the cause of action arose is the territorial jurisdiction which the cause to sue, happened. For example, it is the area that the parties have made the contract, defaulted through the warning has happened and the territorial jurisdiction, is the area which the unlawful act is happened.

According to The Thai Civil Procedure code Section 4 ter⁶; “the other plaint as provided other than the Section 4 bis, which the defendant is not domiciled within the Kingdom and the cause of action is not arose within the Kingdom, if the plaintiff has Thai nation or domicile within the Kingdom, it shall be submitted to the Civil Court of to the Court within the territorial jurisdiction of which the plaintiff is domiciled.”

This Section gives the authority to sue the defendant who does not has the domicile within the Kingdom. If the cause of action arose within the Kingdom or the defendant has the domicile within the Kingdom, this Section cannot use. To use this Section, it has to depend on following principles;

⁶ The Thai Civil Procedure Code, section 4 ter, 4 bis and section 4.

- 1) The case must not to concern with immovable property.
- 2) The plaintiffs have Thai nation or the domiciled within the Kingdom.
- 3) The defendant is not domiciled within the kingdom and the cause of action is not arisen within the Kingdom.

From this Section, it refers to the intention of the law that protects any one, any nationality who lives in Thailand.

According to The Thai Civil Procedure Code Section 3; "For the purpose in submission of the plaint:

- (1) In the case where the cause of action occurs in Thai vessel of aero plane outside the Kingdom, the Civil Court shall be the Court of the territorial jurisdiction,
- (2) In the case where the defendant is not domiciled within the Kingdom,
 - A. If the defendant is ever domiciled at any place of the Kingdom within the prescription of two years before the date of submitting the plaint, it shall be deemed that such place is domicile of the defendant,
 - B. if the defendant carries on or ever carried of the whole or some part of transaction within the Kingdom, irrespective of himself or agent or by having any person for being in continuance with such transaction with in the Kingdom, it shall be deemed that the place used or ever used to carry on such transaction or continuance, or the place which is residence of the agent or continues person in the date of submitting the plaint or before such prescription of two years, is domicile of the defendant."

This Section shows special conditions of the Thai territorial jurisdiction, the law legislative to help the plaintiff in the case of the defendant try to change the domicile to outside the Kingdom.

So, it is necessary to consider which case can be proceeded in the Thai territorial jurisdiction by making consideration based on power to accept the case and procedure of Thai court. That mean when the agreement has occurred or the parties is in the principle of domicile or not are important to know such facts.

Finally, the case that is not in Thai territorial jurisdiction is case that the parties is not in Thai domicile and the cause of action of the electronic contract has not occurred in Thai territorial jurisdiction under Thai Electronic Transactions Act B.E. 2544 (2001). Because Section 4 of The Thai Civil Procedure Code has specified to accept the statement of claim under Thai domicile and cause of action happened in Thai territorial jurisdiction. Therefore, the cases are not in Section 4 will not be accepted for Thai territorial jurisdiction. However, there are some exceptions in Section 4 ter, specified for others case that are not in Section 4 can be in Thai territorial jurisdiction by the condition that the defendant must not in Thai domicile and the cause of action must not occur in Thai territorial jurisdiction. If the plaintiff is Thai citizen, the case can be sued in Thai Civil Court.

2.3.2 Thai Territorial Jurisdiction under The Thai Civil Procedure Code concerning Electronic Contract

As the electronic contracts is different from written contract, there has specified in terms of literary to control and make it certainty to be as real documents used in litigation procedure. Thailand enacts the Thai Electronic Transactions Act B.E. 2544 (2001) to support for electronic contracts. The important things shall be concerned is that the electronic commerce dispute about when the electronic contract has occurred, what the limitations of Thai courts to accept the case are.

According to the UNCITRAL's Model Law, many countries use the cause of action principle to adapt with the electronic commerce. Normally, the cause of action place will be the place which the contract has made. In the electronic commerce, distance rule of the contract is used for consideration. The process of the electronic commerce in offering and accepting are the same as of the agreement that sent and received as the normal mail service. But the way to send and receive offering and acceptance will be use via the internet network related between the electronic machines. In this case, it seems to be harder to prove the place of sending and receiving electronic data. For example, Mr. A who is Japanese and uses the Hotmail server which set up at United States to offer to Mr. B who is German nation and uses the Yahoo server which setup at France. From this example, there are four places to consider about the cause of action between is Japan and Germany, the residence place of Mr. A and Mr. B, United States of America and France are the place that electronic mail server has set up for the electronic contract has made. Moreover, it will be even more complicated if Mr. A and Mr. B have opened and accepted the contract in other place such as they open their electronic mail in Thailand, because of the internet network can use in any place in the world. So, it

will be hard to prove where is the real place of cause of action has occurred.⁷

In the electronic commerce, it is important to consider when the contract has occurred. Thai it has to consider in Thai Civil and Commercial Code, Section 361,. It has specified “A contract between persons at a distance comes into existence at the time when the notice of acceptance reaches the offer”. So, to make the consideration about Thai Electronic Transactions Act B.E. 2544 (2001), techniques of the electronic system shall be considered. The electronic system is concerned with electronic network and it is multiplied between servers and clients of the electronic data. Under that Section 24 of Thai Electronic Transactions Act B.E. 2544 (2001), defines about the time and place of sending electronic data can be identified the agreement occurred in which place and what time and it will make that agreement should be used in law for consideration. The Thai Conflict of Laws Act B.E. 2481 has specified about the place that contract has occurred will be the place that the acceptance sent to the offer party on the distance of contracts. So the electronic will be fulfilled when the electronic data has sent to the offer party which is the place that the electronic data arrives.

According to electronic commerce dispute, when knowing that the electronic contract has occurred, this electronic commerce case will be in Thai territorial jurisdiction under The Thai Civil Procedure Code, Section 4. mentioned that the cause of action occurred in Thai territorial jurisdiction can be the statement of claim.

Even though we can specific the place that the contract has occur, it will not be enough to cover the dispute that may happen in the electronic commerce transaction. The cause of the parties may not be in the same

⁷ Phasuk Chareonkeat, op. cit., pp. 37 – 38.

place or they come from the different countries; therefore, it will cause problem about the domicile rule to accept the case to the judicial proceeding.

According domicile rule in Section 4 and 4 ter of The Thai Civil Procedure Code, the electronic commerce dispute can be in Thai territorial jurisdiction in two terms. First, if the defendant is in Thai domicile. Second, in case that the defendant is not Thai domicile and the cause of action is not in Thai territorial jurisdiction, if the plaintiff is Thai domicile, it can be in Thai territorial jurisdiction.

The question that may be one of the problems of the electronic commerce is about the plaintiff and defendant are not in Thai territorial jurisdiction and the cause of action is not occurring in Thai territorial jurisdiction, but its asset is in Thailand to claim, can the Thai law cover in this case? According to The Thai Civil Procedure Code, Section 3, the clause has specified that the place which the defendant carries on or has ever carried on the whole or some part of transaction within Thailand, such transaction of himself or agent by having any person for being in continuance with such transaction within Thailand shall be deemed that the place used or ever used to carry on such transaction or continuance. Also, the place where the residence of agent, or continuous person in date of submitting the statement of claim or before such as prescription of two years is the domicile of the defendant.

When considering in this Section 3 of The Thai Civil Procedure Code, it cannot solve all problems. The reason is that there are the parties whose domiciles are not in Thailand and the cause of action is not occurring in Thai territorial jurisdiction. They do the agreement by having not any agent, it will not be considered in the condition of this Section. Such as, one of the parties living in England has offered to sell the stock shareholding in Thailand's stock market and other parties which living in

France accept to buy it. Both parties agree to do the agreement by using the electronic transaction over the internet. Then, the electronic contract has occurred at Server in Hong Kong. From this example, both parties do the agreement by having not any agent to support their contracts and the agreements occurred out of Thai territorial jurisdiction. Thus, the question is how they can enforce to the stock shareholdings that they buy and sell in Thailand.

2.4 Enforcement of Court Judgment concerning Electronic Contract under Thai Courts

In the judicial procedure, the enforcement is the final procedure to solve under the claim of the plaintiff from the court's decision. Basically, the court judgment can enforce by following the statement of claim in the area of territorial jurisdiction of the court. But as the electronic commerce is the borderless business transaction, so the dispute is not in the domestic area only, but it can be happened worldwide. From this reason, sometimes the enforcement of the court judgment has to enforce in another countries. As a result, it has to consider that how far of the court judgment can enforce in another countries. For example, in case the plaintiff has got the court judgment and has to enforce for their damages in Thailand. The plaintiff will not be able to do that because Thailand has not any law to support about enforcement under the foreign court judgment.

In the civil case, it seems to be the parties who do the business that want the system to be certain that they will receive the justice when the dispute has occurred. So, if they have the right to bring the case to the court territorial jurisdiction, but they cannot enforce to follow up the court decision, it seems to be hard to do the business with each others. So this will be one of the obstructive things for Thailand economic, if they do not trust in the justice system.

2.4.1 Enforcement of the Foreign Court Judgment concerning in Thai Courts

In some countries, there are institutes governing about accepting foreign judgments, but some countries do not have such laws and they are satisfied to let this situation go along with customary law and general principles.

As for Thailand, the statute of international procedure is rather rare and not specified, especially the result of foreign judgments still have not any statute on the status of foreign judgments. The concerned principles of laws are hidden in many acts but the appearance of these legal principles at the present is quite hard to found.

Actually, Thailand does not have any law to support the idea of acceptance and enforcement of the foreign court decision. But, Thailand do not reject for this idea. It has shown under the Supreme Court's Decision indication of Thai courts attitude to the problem of acceptance of foreign judgments which is Supreme Court Decision 585/2461 adjudicated by Praya Thewitaphaholsaruyabadee, Praya Ranaetibunchakij and Mr. Senial. This decision states that Thai courts do not refuse to "accept and go along with" foreign court's decision; therefore, foreign court's decision may be enforced in Thailand but acceptance of foreign judgments by Thai courts is a conditional acceptance. The condition that the Supreme Court Decision 585/2461 has set two principles, which are;

1. The courts that decide the case in foreign courts must have jurisdiction.
2. The foreign court's decision must be the final adjudge the dispute between parties and this decision cannot be appealed again in Thai courts.

Furthermore, Supreme Court decision 585/2461 has shown that if the judgment debtor of foreign court fails to ask Thai courts to accept

and enforce to the foreign court's decision, Thai court may accept the debtor's authority to file a new case in the same factual basis. In this new case in Thai court, the debtor should use the foreign court's decision as the evidence of factual basis in the case.⁸

When these principles of law arise in the Supreme Court's decision without any statute's recognition, the unavoidable question is that what are the status and the enforcement of the legal principle.

The primary status of the judgment is merely a result of positive law's application in each case. But, this judgment has solved loophole problem in the law of recognition and enforcement of foreign judgments by Thai court. This judgment, therefore, has been widely accepted as the judgment confirming this principle of law since B.E. 2461 until now.

According to electronic commerce dispute, which concerns with two different nation parties and different domicile, it will make another condition for judicial proceeding about which law will be used in the judicial proceeding. This problem will be solved under the conflict of law principle which Thailand has enacted Conflict of Laws Act B.E. 2481 to support it.

⁸ Prasith Priwattanaphanith, "Recognition and Enforcement of Foreign Judgments in Thailand," Research Journal of International Law, Faculty of Law, Thammasart University, (2548): 30.

2.4.2 Principle of Conflict of laws⁹

Generally, the state should have sovereignty over the territorial completely and absolutely, but the state is the owner of the territorial also accepts the other state sovereignty, too. To accept the foreign law to become effective calls “Law on Conflict of Laws” or it is called shortly “Conflictual Law”.

The situation calls conflict of laws is the situation that the juristic laws between the domestic laws have effected with the foreign laws. It is a problem about what country’s law should be accepted to be an applicable law. The conflict of laws can solve this problem by using the foreign factor to choose the law. It can be easily called “The Rules on the choice of law.”

The laws on conflict of laws are not happened from the requirement of one’s likes. But, happen from the resolution of international state. So, the laws on conflict of laws can enforce any country to be executing an order.

However, to use laws on conflict of laws must have foreign factors. And it must depend on the connecting point.

The connecting points that Thai admits the laws for seven facts as follows:

1. Nationality of the person.
2. Domiciles of the person.
3. Intention of the person.

⁹ Phanthip Karnjanajrit Saisoonthorn, “The Sovereignty of the State and Legal Relation concerning to Civil Law of International settlement” Nitisart Journal Thamasart University Year 23 Vol. 4. (2536): 736 -737.

4. The place of the property.
5. The place where the juristic relation occur.
6. The place where the juristic relation effect.
7. The place to the consideration of the courts.

2.4.3 Conflict of Laws under Thai Laws

The legal cause between the countries is the situation that called "Law on Conflict of Laws". Because the relation of laws has concerned with countries about connecting laws, the connecting laws are legal of each country that may be the acceptable and applicable law to another countries. So the law on conflict of laws seems as the legal answer to support when choosing the law for using in the country in the international terms. The Law on Conflict of Laws is not the substantive Law; because of it is not the law that specifies rights and duties. It has occurred from the acceptance in each related countries to find and use the law in the tradition term.

Thailand has enacted Conflict of Laws Act B.E. 2481, this Act has specified about the international civil, personality, obligation, family, chose and succession which this Act is the civil law system. And it has specified the way to use and choose the law in the conflict case which the condition that the case have to be the connecting point. When the case has presented that it concerns with the international and have not any Thai law to consider, it seems to follow this act. If there is the connecting under the condition of the countries, such as convention, Thai court has to use the convention that is more related than the conflict of law principal. Until now, Thailand has not been in any convention about the conflict of law or accepts the sovereignty of other nation to use in Thailand.

2.4.4 Conflict of Law in Electronic Commerce Case under Thai Law

In the electronic commerce case concerning to the parties that have different nations, Thai court has to use Conflict of Laws Act B.E. 2481 for considering the case. In Section 13 of Conflict of Laws Act B.E. 2481, the clause has specified about which law will be used in the conflict of law in case of specifying on the intention of the parties. If it cannot specify to the intention parties and the parties are not from the same domicile, the law which the contract has occurred is needed to be used. According to Thai Electronic Transactions Act B.E. 2544 (2001), the place of the occurring contract is the place that the data has arrived through the parties. So, if the electronic contract has occurred in Thailand, it has to use Thai law.

Finally, the main principles to the Thai territorial jurisdiction are the domicile and the cause of action principle. When considering both principles in the electronic commerce, there will be some problems that Thai law cannot support the electronic commerce dispute case. For instance, the dispute concerns with foreign parties, and its cause of action is not in Thai territorial jurisdiction, but it has some enforcement in Thailand. How can it be brought the case to Thai courts. And another problem is about the enforcement of Thai court's decision to enforce in the foreign court, and the enforcement of foreign court to enforce in Thai court conversely.

Chapter 3

Judicial Proceeding of the Internet Commerce Dispute concerning Territorial Jurisdiction under Foreign Law

This chapter will explain and describe in the topic of foreign law which is International Law, European Union Law and United States Law to study about the principle of law in each system.

3.1 Fundamental Jurisdictional in International Law

3.1.1 Fundamental Jurisdictional Principles in United States

Traditionally, in the state courts of the United States, personal jurisdiction can be distinguished into two types: "general" and "specific" personal jurisdiction. Also, "in rem"¹⁰ is related to cyberspace law that especially concerns about the ownership of domain name.

1. General Jurisdiction¹¹

General jurisdiction in the U.S., the court is eligible to take over the jurisdiction from person who is under dispute and is unnecessarily relevant to the forum. Therefore, general jurisdiction under U.S. Constitutional adopts rigid due process for its application criteria. Such jurisdiction can be applied when satisfying forum by the defendant's contacts being "systematic" and "continuous" to show that the defendant might be reasonable to anticipate defending any type of claim¹² there. In the cases related to the internet, less

¹⁰ in rem, in http://en.wikipedia.org/wiki/In_rem, access date November 3, 2007.

¹¹ Denis T. Rice, Jurisdiction and E-Commerce Dispute in the United States and Europe (New York: American Bar Association, 2002), pp. 5 – 6.

¹² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ("International Shoe") (quoting *Milliken v. Meyer*, 311 U.S. 457 (1944)).

attention has been given to the general jurisdiction compared with the specific jurisdiction. It may improve its necessity as electronic commerce developed.

2. Specific Jurisdiction

Under U.S. law, a given forum has specific jurisdiction over a defendant with “relevant minimal” contacts to the forums dispute issue, providing that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”¹³. In 1945, the U.S. Supreme Court held the personal jurisdiction over a non-resident defendant. The required “minimum contacts” are determined under a three-part test:

- 1) The defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails him of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws.
- 2) The claim must be one arising out of relation to the defendant’s forum related activities.
- 3) The exercise of jurisdiction must comport with “fair play and substantial justice,” i.e., it must be reasonable.

Later on, it was found that Florida residents had written and edited an Article in the National Enquirer to slander California’s residents, and which were recognized as the significant example of “purpose direction” in the context of more traditional media. The U.S. Supreme Court in *Calder v. Jones*¹⁴ had concluded that defendants could have a reasonable forecast being taken into court in California by taking into consideration the elements that the Enquirer had its largest circulation in California, and both of

¹³ *International Shoe*, 326 U.S. 316 (1945).

¹⁴ *Calder v. Jones*, 465 U.S. 783 (1984) (“Calder”).

its contents and harm suffered. These were enough evidences to prove that it could be “possible to have destructive effect” over California’s residents and it was “targeted at California”. This “effects” test, sometimes labeled “targeting” (although on a strict analysis there were differences between the two), took on special significance in Internet jurisdiction discussed below at subsection IV.B.2.

While *Calder* related broadly with the distribution of printed media, the notion of “purposeful direction” have been used by lower court’s cases, in case of finding jurisdiction over nonresidents whose contact methods with the forum were only by radio and television. Thus, the television commentator, Walter Cronkite, was accused for an alleged defamation of an Oregon plaintiff.. Then, in 1966, a federal district court found jurisdiction over this case in Oregon by adopting a *Calder*-like analysis. While the court found that Cronkite had no physical contacts with Oregon, the facts that he produced the broadcast and he knew it would be aired in Oregon provided a sufficient nexus. Similarly, personal jurisdiction over the television personality, Ed Sullivan was asserted by an Arizona court, due to on the ground that Sullivan knew the television program which he produced may allegedly invade the privacy of residents in Arizona.

After *Calder*, the federal district court in Louisiana found jurisdiction in 1991 over the Mississippi television station and its reporter, who participated in producing and broadcasting a documentary that allegedly defamed the plaintiffs. Consequently, the court relied directly on *Calder*’s case. Likewise drawing on *Calder*, the federal Seventh Circuit Court of Appeals in 1994 upheld the jurisdiction in the State of Indiana over a Canadian Football League team in Baltimore, Maryland trying to use the

name "Baltimore Colts," which allegedly infringed on the trademark of the Indianapolis Colts (who had formerly been called the Baltimore Colts until they relocated to Indiana). The only activity the defendant had undertaken in Indiana was the broadcast of its games nationwide on cable television. The Seventh Circuit glossed over the concept of "purposeful direction" and instead focused on the place where the injury occurred.

Since there can be no tort without an injury, the state in which the injury occurs is the state where the tort occurs, and someone who commits a tort in Indiana should, one might suppose, be amenable to suit there.

About the Jurisdiction "in rem", it is a legal term describing the power of the court that may exercise over property or a "status" against a person over whom the court does not have personal jurisdiction. Jurisdiction in rem assumes the property or status is the primary object of the action, rather than personal liabilities not necessarily associated with the property.*

Within the US federal court system, jurisdiction in rem typically refers to the power of the federal court may exercise over large items of moveable property, or real property, located within the court's jurisdiction. The most frequent circumstance in which this occurs in the Anglo-American legal system is when a suit is brought in admiralty law against a vessel to satisfy debts arising from the operation or use of the vessel. However, it can involve with other things, such as Margaret Sanger's Japanese pessaries

in *United States v. One Package of Japanese Pessaries*¹⁵, an important case in United States is reproductive and obscenity law.

Within the US's state court system, jurisdiction in rem may refer to the power the state court may exercise over real property or personal property or a person's marital status. State courts have the power to determine legal ownership of any real or personal property within the state's boundaries.

A right in rem or a judgment in rem binds the world as opposed to rights and judgments inter parties which only bind those involved in their creations.

Originally, the notion of in rem jurisdiction arose in situations in which property was identified but the owner was unknown. Courts fell into the practice of styling a case not as "John Doe, Unknown owner of (Property)", but as just "Ex Parte (Property)" or perhaps the awkward "State v. (Property)", usually followed by a notice by publication seeking claimants to title to the property. This last style is awkward because in law, only a person may be a party to a judicial proceeding, and a non-person would at least has to have a guardian appointed to represent its interests, or the interests of the unknown owner.

The use of this kind of jurisdiction in asset forfeiture cases is troublesome because it has been increasingly used in situations where the party in possession is known, which by historical common law standards would make him the presumptive owner, and yet the prosecution and court presumes he is not the owner

¹⁵ *United States v. One Package of Japanese Pessaries*, 86 F.2d 737 (2nd Cir. 1936).

and proceeds accordingly. This kind of process has been used to seize large sums of cash from persons who are presumed to have obtained the case unlawfully. Because of the large amount, often in situations where the person could prove he was in lawful possession of it, but he was forced to spend more on legal fees to do so than the amount of money forfeited.

3.1.2 Fundamental Jurisdictional Principles in Europe

Basically, fundamentals of jurisdiction within European countries, European Union (E.U.)¹⁶ are different from those in the U.S. as a result of different perspectives in that the jurisdictions of European countries usually stand on statute or regulation, while those of the U.S. concentrate on interpreting constitutional due process limitations. However, both systems have the same purposes and the results are good enough. The controlling document for jurisdictional problems within the European Union is the Brussels Convention which sets the following rules;

First, residents of the E.U. member countries may be sued in the country that they live.¹⁷

Second, on the other hand, persons may be sued in the place that is impacted from the performance of the obligation.¹⁸

Third, persons should be sued in the place that problems have been occurred.¹⁹

¹⁶ Convention on Jurisdiction and the Enforcement of judgments in Civil and Commercial Matter (September 30, 1968) refer to Brussels Convention.

¹⁷ Ibid., article 2.

¹⁸ Ibid.

¹⁹ Ibid.

Fourth, consumers may be sued only in the country that they are residents, and at the same time consumers may decide to act in their home country or advertise in the consumer's domicile.²⁰

Lastly, in the situation that the problems do not impact a consumer, an agreement can be made among the parties. For example, outside of the Brussels Convention, France can declare jurisdiction at any time the plaintiff in a civil action is French nationality.²¹

The Brussels Convention does not need "minimum contacts" between the forum and the defendant because in contrast with jurisdiction in the U.S., that in the E.U. countries is not limited by constitutional principles. The Convention permits assertion of jurisdiction over a defendant if conduct wholly outside the forum resulted in a tortuous injury to the plaintiff with the forum.

3.2 Fundamental Jurisdictional Principles of Electronic Commerce Law under the UNCITRAL Model Law

The United Nation Commission on International Trade Law (UNCITRAL) is an organization that aims to support the international trading²². Meetings have been made to set the regulations for the Model Law on Electronic Commerce, 1996 and Model Law on Electronic Signatures, 2001 which both has the purpose to be a direction for the member countries in the electronic commerce issues in their countries. The laws

²⁰ Brussels Convention, Article 13 and 14.

²¹ Convention on Jurisdiction and the Enforcement of judgments in Civil and Commercial Matter, Article 17.

²² Intention of UNCITRAL, in <http://www.uncitral.org/uncitral/en/about/intention.html>, access date October 16, 2007.

are concerned about recognition in electronic documents, recognition in electronic signature, explanation of sending and receiving process on the electronic transaction.

As a result of different law systems, the model laws will allow the members to succeed in the electronic commerce business in terms of international trading²³. In this case, the laws intend to create harmony and unity in the international trade which should not make problems like the process that accepted the burden of proof same as the paper documents.

Under the UNCITRAL Model Law of electronic commerce, the trading documents can be used in the court. The territorial jurisdiction can bring two principles to court; the domicile rule and cause of action. About the domicile rule concerning on the electronic commerce does not create problems in bringing the case to the court because the plaintiff who lives in the territorial jurisdiction can perform. However, the problems usually come from the cause of action because different countries have different ways to accept principles. Therefore, some countries may change the law to suitable for the specific electronic commerce case.

3.3 The Regional Cooperation for Exchanging Convention on Recognition Foreign Judgments²⁴

As to the Regional Cooperation, there are two high level organizations in Europe trying to make European law that affect to Foreign Judgments which are European Economic Community (EEC) and Scandinavian Union.

Scandinavian Union forced Denmark, Norway, Finland, Sweden and Iceland to sign the Copenhagen on Recognition and Enforcement Foreign Judgments. Thus, this

²³ Ibid.

²⁴ Enforcement of foreign judgments, in http://en.wikipedia.org/wiki/Enforcement_of_foreign_judgments, access date September 19, 2007.

region has the legal stability providing international individual's life before the First World War.

As to EEC, they pushed this sort of convention among contractual states since 1968 which Brussels I and Enforcement of Foreign Judgments in civil and Commercial Matters. In 1988, EEC cooperated with European Association on Free Trade Area to encourage the members of both organizations to sign in Lugarno Convention. This convention establishes legal stability entire Europe. This phenomenon indicates that the convention for changing Recognition of Foreign Judgments can be easily established and efficient more than the regional level if the concerned states have the economical benefit together. Moreover, in America, Organization of American States (OAS) also tried to make the legal stability by persuading the members to mutually do the Agreement on International Procedure and 4 Conventions have been done under OAS's Influences.

1. Montevideo Treaty (February 11, 1889).
2. Havana Convention (February 20, 1928), Bustamante.
3. Montevideo Convention (March 19, 1940), International Procedure.
4. Montevideo Convention (May 8, 1979), Territorial Jurisdiction of Judgment and Award of Arbitration.

In Asia, league of Arab States support its member to sign the convention for exchanging recognition Foreign Judgments since 1952 which is Cairo on Enforcement.

Nowadays, Thailand is not a member of the convention that has concerned to recognition in foreign judgment. On such circumstance, this may result in bringing Thai courts decisions hard to enforce in others countries. However, for the electronic commerce, it is the borderless business transaction, so it can occur in any place and any time. If the Thai laws are not open to accept the foreign's influences on legal principles as other countries d, it will have effects to Thailand's economic system in the future.

3.4 The Method of Recognition in Foreign Judgment

3.4.1 Method of Recognition in Foreign Judgment in Common Law System Countries²⁵

According to Brussels Regulation, European countries which admit in this regulation have to follow in the 1968 Brussels convention on Jurisdiction and Recognition and Enforcement of Judgment in Civil and Commercial Matters. By admitting the regulation, the enforcement was made to their countries in term of recognition in foreign judgment in two parts: the recognition of foreign judgment which enforcement between the countries in European Union, and the recognition of foreign judgment which enforcement to the countries outside the European Union needed to follow up to domestic law of each countries that are not in the European Union.

In the common law system, the principles to recognise the foreign judgments are defined as the followings;

1. The foreign judgment must come from the court which have territorial jurisdiction to procedure the case.
2. The foreign judgment must be the final decision in the judicial proceeding, “res judicata”.²⁶
3. The foreign judgment must be the judgment in personal and concern to civil case only.

They are some comments for the United Kingdom about the judgment of the court that is included jurisdiction and religion but not included the arbitration.

²⁵ Prasith Priwawattanaphanith, op. cit., p. 9.

²⁶ Res judicata, *Black's Law*, in http://en.wikipedia.org/wiki/Res_judicata, access date September 29, 2007.

3.4.2 Method of Recognition in Foreign Judgment in Civil Law System Countries²⁷

There are two principles of recognition in foreign judgment in civil law system, acceptance and recognition,

1. The foreign judgment must come from the court which have territorial jurisdiction which follows in that countries procedure law and France's procedure law.
2. According to France's law, if the foreign judgment is concerning to personal status and capacity, France's court will recognition on that foreign judgment by not force on the exequatur. But for the enforcement under the France's court, the country has to have the exequatur before enforcing in foreign judgment.
3. The foreign judgment must not be fraud.
4. The foreign judgment must not be public policy.
5. The foreign judgment must be final decision.
6. The foreign judgment has to in the term of reciprocity between the countries.

3.4.3 The Global Cooperation for Exchanging Convention on Recognition of Foreign Judgments

Global international organization having an important vote to push the state to join the uniformity of law process in Foreign Judgment in convention form is Hague Conference on Private international of law:

Hague Conference has two conventions concerning recognition of foreign judgments, which are the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters

²⁷ Prasith Priwawattanaphanith, op. cit., pp. 15-18.

on February 1, 1971 and the supplementary protocol had signed on the same day.

3.5 Conflict of Laws concerning United States and European Union Laws

According to the contracts which are presumed to have equal bargaining power and ability to accept or reject such cause of the case. There causes are generally uncontroversial and enforceable. However, the equality between buyer and seller have not been presumed when one party of the contract is a consumer. Instead, the seller is assumed to define its market and set the terms of the contract for its own benefit. The buyer which in contrast is assumed to be confronted with either;

1. Accepting the terms imposed by one of a limited number of seller serving the buyer's market.
2. It's foregoing the purchase.

In an attempt to protect the consumer from disadvantage choice of forum and law cause, the European Union will enforce them only if they favor consumer. Although in the United State, they are enforced unless they are unreasonable.²⁸

If more than one country can be consistent with domestic and international law and be assertive with prescriptive jurisdiction, the choice of applied law will be determined by the forum's choice of law doctrine. However, in the United States and Europe, they have pursued different approaches to this doctrine in the issue as well as examine policies that weight the different interests in having their own law to apply. The particular issues about the controversy have displaced earlier and more rigid formulas.²⁹ Thus, Article 6 of the Restatement of Conflict of Laws, followed by most American states, directs a court's attention, absent a statutory directive, to concerns similar to those found in Restatement of Foreign Relation Law.

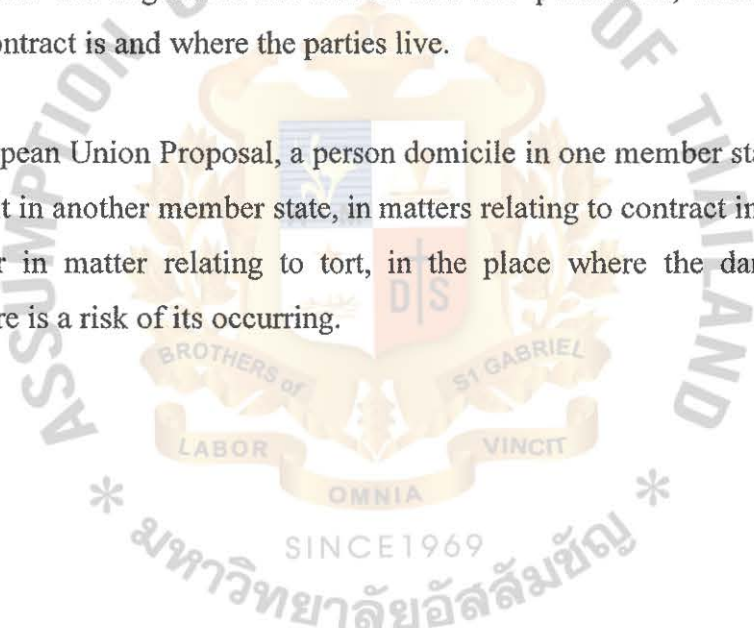
²⁸ Denis T. Rice, op.cit., p. 14.

²⁹ Shaffer v. Heitner, 433 U.S. 186, 204 – 106 (1997).

The American approach to jurisdiction over torts is summarized in Article 145 of the Restatement of Conflict of Laws which the law of the state with the most significant relationship to the occurrence and the parties is to be applied and taking into account such factor as where the damages occurred, where the conduct causing the damages occurred, the home of parties, and the place where any relationship between the parties is centered.

When the parties have not expressly chosen the law to be applied to contract dispute, the Restatement of Conflict of Laws, in Article 188 provides that the law of the state with the most significant relationship to the issue, should apply and take into account where the contract was negotiated and entered into and performed, where the subject matter of the contract is and where the parties live.

About the European Union Proposal, a person domicile in one member state would be subjected to suit in another member state, in matters relating to contract in the place of performance or in matter relating to tort, in the place where the damages event occurred or there is a risk of its occurring.



Chapter 4

Analysis of the Research Problems

4.1 Legal Problem of Thai Territorial Jurisdiction over the Electronic Contract on the Internet network

According to Thai law, the electronic commerce is a complicated transaction that can be occurred in any place and anytime. When considering about the territorial jurisdiction, it has two main principles which are domicile principle and cause of action principle. The domicile principle is seemed to be easier to adapt the law to the electronic commerce dispute. The reason is that it can specific where the residence of the plaintiff and defendant is. However, for the cause of action in the electronic commerce, it seems to be hard to specify the place of action where the contract has occurred. Even though, under the UNCITRAL' Model Law, there has designed principles to support it. For the domestic law, the principles may not be in the same content in each country.

Many countries have attended in the convention concerning to use the same of principle to solve their legal problems. Such as in the convention of recognition United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) which it's about the recognition for the award of arbitration can be enforced in the foreign court. Or, the convention of FTA (Free Trade Area) concerning to the countries in the commercial term to accept the civil judgment of the foreign court to be enforce in the country.

According to the electronic contract, which it can be occurring in anyplace and any time. The problem is about the dispute of the electronic may occur over the internet network. How far can it be solved the dispute of the parties? More importantly, the way to bring their cases to the courts which concern more than one country, which nation courts can accept the case to proceed shall be considered. For the litigation

procedure of the court on the electronic commerce case, the territorial jurisdiction is also needed to consider before accepting the case to litigation procedure.

As the electronic commerce is worldwide business, so the agreement parties may live in different countries and the agreement can occur in anywhere and anytime. In case of dispute on the agreement, the parties shall use the arbitration of the country to resolve the disagreement that both parties agree to use. For example, two companies agree to buy and sell the stock shareholdings registered with the Stock Exchange of Thailand. Both parties make the contract in France over the internet services. While the contract occurred, Party "A" is domicile of United Kingdom and Party "B" is domicile of Germany. In the content of the contract, there has specified for any dispute of both parties have to use the arbitration to dispute resolution which both parties agree to use Thai law and Thai arbitration. If any dispute of both parties can solve in the arbitration process, it will not necessary to consider. If the parties do not follow the award of arbitration again, the party who damages from that activity will sue the case to the court. If this case is the domestic dispute, it will not too complicate. In facts, there are four countries concerning in this case. The question is that how far that the awards of arbitration can enforce with the stock shareholdings registered with the Stock Exchange of Thailand.

4.2 The Study Case concerning to the Electronic Contract over the Internet Network Dispute

Mr. A who is an American citizen has come to study in Thailand since year 1990. He lived in Thailand for two years and then he went back to his home country. While living in Thailand, he bought some asset such as the Apple computer with the accessories and he did not bring it back to his country. When he came back to the United States, he had purpose to sell the Apple computer with the accessories on the E-Bay, the market of sale and buys the things over the internet. He posted his goods since year 1993 and there have some people who are interested in his product. But, Mr. A did not deal for the price. So, he went on his product on the internet. Until the middle of year 1993, Mr. B had dealt to buy it and Mr. A agreed to sell, by signing the

contract made over E-Bay system. Mr. B decided to buy it from Mr. A because he had planned to go to Thailand for studying at the end of year 1993. In their agreement, Mr. B agreed to pay for these goods over the E-Bay system which was specified before Mr. B received his goods. And Mr. A agreed to send his goods when Mr. B came to Thailand by leaving the computer at the place that Mr. B had to take it. After that, Mr. B came to Thailand and followed up to take the goods. He could not take it by the reason of the place to take was wrong. He had tried to contact Mr. A to call for the goods, there was no responses that Mr. A follow up for his calling. So Mr. B wanted to bring his dispute to Thai court and asked the Thai court for his claim or to force the goods that he bought from Mr. A. From this example case, Thai courts have no empowerment to accept the case by these following reasons;

According to The Thai Civil Procedure Code, there have to consider that the Thai courts can accept the case or not by consider in the territorial jurisdiction condition under the Section 3 and Section 4 of The Thai Civil Procedure Code;

Section 3³⁰ For the purpose in submission of the plaint

- (1) In the case where the cause of action occurs in the Thai vessel or airplane outside the Kingdom, the Civil Court shall be the Court of the territorial jurisdiction,
- (2) In the case where the defendant is not domicile within the Kingdom,
 - a) If the defendant is ever domicile at any place of the Kingdom within the prescription of two years before the date of submitting the paint, it shall be that such place is domicile of the defendant,
 - b) If the defendant carries on or ever carried on the whole or some part of transaction within the Kingdom, irrespective or agent or by having any person for being in continuous with such transaction within the Kingdom, it shall be deemed that the place used or ever used to carry or such transaction or continuance, or the place which is residence of the agent or continuo's person in the date of

³⁰ The Thai Civil Procedure Code B.E.2534, section 3.

submitting the plaint or before such prescription of two years, is domicile of the defendant.

Section 4³¹ Unless otherwise provided by law

- (1) The plaints shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled or to the Court within the territorial jurisdiction of which the cause of action arose, whether the defendant shall have domicile within the Kingdom or not,
- (2) The request shall be submitted to the Court within the territorial jurisdiction of which cause of action arose or to the Court within the territorial jurisdiction of which the applicant is domicile.

Section 4 ter³² The other plaint as provided other than the Section 4 bis, which the defendant is not domiciled within the Kingdom and the cause of action is not arose within the Kingdom, if the plaintiff has Thai nation or domicile within the Kingdom, it shall be submitted to the Civil Court within the territorial jurisdiction of which the plaintiff is domicile.

According these two Sections, it has to consider about the condition under Thai laws that the Thai court can accept the Mr. A and Mr. B's case to proceed by considering in Section 4. Mr. B can bring the case to Thai court by the condition of domicile principle and cause of action principle. But in this case, the cause of action had occurred over the E-Bay system which is setup outside of Thailand. So, Mr. B cannot submit his request to Thai courts. And for his plaints, it has to consider that Mr. A has the residence in Thailand or not. Because of Thai law has specified that the plaints shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled. When considering in the domicile of Mr. A, who lives in United States and he is an American citizen will not be in this condition. Even though, he had lived in Thailand, but because of Section 3 (2) (a) of The Thai Civil Procedure

³¹ Ibid.

³² Ibid., section 4 ter.

Code has specified, he must lived in Thailand within the prescription of two years before the date of submitting the plaint which it is in the end of the year 1992. And the agent condition under the Section 3 (2) (b) will not be effective, too, because of Mr. A's agent is E-Bay which has domicile in United State which not connecting in Thailand.

There have some exception for the case that may submit to Thai courts in the Section 4 ter, specified that the plaintiff must be Thai citizen. So, Mr. B cannot use this except condition because he is American citizen.

Finally, Mr. B cannot bring his case to Thai courts for enforcement or claim his damages. Because of Mr. A and Mr. B are not in the condition of domicile principle and the cause of action is not occurring in Thai territorial jurisdiction, even though he wants to request for the judgment of Thai courts to enforce for Mr. A's goods, Apple computer and accessories.

In another ways, Mr. B may submit his plaint to his home country courts, in the United States. But after the court of United States has the judgment, it will not be enforced in Thailand because Thai court will bring the case and use the foreign judgment to be the one of the causes of the case only.

4.3 Enforcement of the Foreign Judgment in Thailand

The International Law has use two principles for the court to accept the case: domicile principle and cause of action principle. The reason of using these two principles is the minimal contact of the dispute. And after the courts have the judgment; it will be effective for the domestic country of the enforcement only. If it has to be enforced in another country over the territorial jurisdiction, it has to consider about the convention between the countries and the domestic law for accepting the judgment of foreign courts and enforcement to follow under their judgment. This solution seems to be difficult to follow because each country wants to protect their domestic people and do not want to be empowered that effects with another countries.

Nowadays, Thailand still does not have any law to support the foreign judgment to enforce in Thai territorial jurisdiction. But, Thailand has not fully rejected it, because of the Supreme Court's decision 585/2461 has set the foundation to accept the foreign court's judgment to be enforced in Thailand but have to fulfill in the condition of the Supreme Court's decision 585/2461.

Another dispute resolution which is arbitration, it has the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). This convention has recognition for the award of arbitration for using and enforcement to the others country courts. According to Thai court, Thailand is a member of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). Therefore, Thai courts have to follow the convention and accept the award of arbitration to proceed and enforce. However, under Thai law, the award of arbitration will be the cause of action that uses in the judicial procedure only. When considering about the cause of action from the award of arbitration, the parties who are under the conditions of law, Section 3 and 4 of The Thai Civil Procedure Code, the court in Thailand will not be able to accept the case because of it is over Thai territorial jurisdiction.

According to Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ¹ Entered into force 20 August 1979, this convention specifies to the foreign judgment that will accept and follow by the member countries. This convention has recognized all matters in civil judgment and has the rule that does not affect with the important principles of the member states, such as principle of public moral. As a result, this convention is flexible to use on the principle with balance by breaking no main principles of sovereignty.

About the recognition in foreign judgment in Thailand, Thailand has not signed in the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Thailand has only Supreme Court's decision, which is Supreme Court decision 585/2461. It concerns that Thailand does not reject the foreign decision but have to consider that firstly the courts deciding the case in foreign courts

must have jurisdiction and secondly, the foreign court's decision must finally adjudges the dispute between parties and this decision cannot be appealed again in Thai courts. Hence, from the principle of Supreme Court's decision, the foreign court decision will be use in Thailand. But the main point of Thailand's laws, the Supreme Court's decision is not the law, so it cannot support for all factors that may happen in future.

Since the electronic commerce can be happened in the several ways from the effects of worldwide electronic commercial, the moment the parties have made the convention, the offer of recognition with foreign court decision is also made. Thailand has to consider that it has to adapt to the recognition rule in Thailand or not. In my opinion, Thailand should have the recognition rule to support and follow up the cases before it happens making Thailand be ready for worldwide trading.

After considering in this research, the way to solve the legal problem in foreign court's decision can be summarized as below;

1. Thailand has to adapt the Thai legal system by enacting the law from the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and commercial Matters by considering on the base of Thai legal which does not effect to the main forum of Thai law and
2. Thailand should sign the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters or
3. Thailand should fix The Thai Civil Procedure Code or Thai Arbitration Act B.E. 2545 to expand the territorial jurisdiction of Thai court such as Thai Central Intellectual Property and International Trade Court to recognition of the foreign court decision by the condition of this following;
 - 1) Both parties must be foreigners
 - 2) The cause of action must not occur in Thailand
 - 3) The enforcement has to enforce in Thailand
 - 4) Thailand has to enact the law to supporting the enforcement of the foreign judgment but not effect to the main legal forum of Thailand, sovereignty, public moral, and it should effect with the civil case only.

If these suggestions can be improved, Thai courts will be empowered with territorial jurisdiction to resolve the electronic commerce dispute.

Nowadays, Thailand has attended in the AFTA (Asian Free Trade Area) and FTA (Free Trade Area) with many countries. By this FTA Condition, it will make the many international dispute and Thailand have to prepare for the international litigation for solving the controversy that may occur in the future. One main condition of the FTA is the recognition of the foreign judgment which is similar to recognition of the arbitral award. Thailand does not have the specific law for this topic from the reason that it may because Thailand's lose of the sovereignty and the court's jurisdiction.

According to the arbitral award under the ICSID that can be enforced in Thailand, it has specified that the arbitral award of arbitration can enforce in the member countries as the court judgment in the member countries. This convention is pointing out for the arbitration, which is the business settlement. So the question is that why Thailand does not accept the foreign judgment from the foreign court, which is the organization having priority better than arbitration.

Finally, in the commercial world, when trading is related with more and more parties, it makes the world of business smaller, too. In this way, it is impossible for Thailand not to follow the legal principles on trading. The situation that the electronic commerce has effected with business transaction very quickly causes the dispute of the electronic commerce to be happened very fast as well. Thailand has to solve the legal problem in terms of jurisdiction and enforcement for support the dispute that may be possible to occur. If Thailand has developed the jurisdiction by not covering the electronic commerce function, it may lead to many problems that does not affect with Thai litigation only, but also it will make the negative effects of the country's economic system.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

Thailand has passed the Thai Electronic Commerce Act B.E. 2541 that supports and controls the electronic commerce's activities. Nonetheless, this Act is not suitable to use in terms of international cases concerning with the enforcement in Thailand. As international transaction presently can be occurred worldwide anytime and though Thailand is a member of New York Convention 1958 that is linked to recognition for the foreign award of arbitration, it is not sufficient for Thailand to enforce the cases that both parties are foreigners and the cause of action occurred outside Thailand.

Now that many countries have signed in the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, but Thailand has not signed in this convention yet. It will affect with Thai court decision and also the enforcement to other countries accepted in Thailand.

After summary the international law and suitable matter for the electronic commercial dispute, Thailand should have the law to support the electronic commerce business transaction because it will bring many benefits to Thailand, such as the advantages on economic by bringing in the confidence of the investors. As soon as, the world of judicial procedure will be in the same standard in trust and balance, Thailand have to prepare and plan for their law to support the changing of the world's business giving the best benefit for Thais and foreigners to make the business transaction together.

Till the past to the present time, Thailand has not rejected the principle of recognition of foreign court judgment, but somehow Thai law has not fully opened up to accept it in full term. Though, it does not accepted for all conditions of the principles, but it should accept the rules that will bring many benefits wholly to Thailand.

5.2 Recommendations

5.2.1 Additions to the Empower of Territorial Jurisdiction for Thai Courts to Accept the Case that is over Thai Territorial Jurisdiction.

Thailand should take it into consideration to support the electronic commerce which it can occur in several situations by giving more power for the court to accept the electronic case that the plaintiff and defendant are not in Thai domicile and the cause of action is not occurring in Thai territorial jurisdiction but have some asset, moveable property that have the enforcement in Thailand. Because of the electronic commerce does not run in the domestic only but it is also running in the international term. So, the law should not only cover and protect for the domestic people but should cover and protect for the situation that concerning to Thailand, too.

Thailand has enacted the Thai Electronic Transactions Act B.E. 2544 (2001) for supporting the electronic business. This Act, however, has not specified about the territorial jurisdiction that may occur over The Thai Civil Procedure Code. So, when Thailand has adopted this territorial jurisdiction term, it will perfectly protect the electronic commerce case.

5.2.2 Attend in the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1979.

According to Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1979 entered into force 20 August 1979, this convention specifies to the foreign judgment will accept and follow by the member countries. This convention has recognition all matter in civil judgments and have the rule that does not affect to the important principles of the member states such as principle of public moral. So, this convention is flexible to use on the principle of just with balance by no break on the main principle of sovereignty.

Thailand should attend to this convention because of this convention does not have effects with main principles in Thailand's forum laws but the civil and commerce case only. So, if Thailand has attend to this convention, it will make Thailand truly run in the real borderless trading with rights and protection for Thai customers through the Thai court's judgment and the enforcement to the foreign countries. Additionally, it will be supportive in terms of FTA (Free Trade Area), which Thailand will be attended in the future.



BIBLIOGRAPHY

Books

- Center for International Legal Studies. E-Commerce Law and Jurisdiction. United Kingdom: Kluwer Law International, 2002.
- Chissick, M., and Kelman, A. Electronic Commerce Law and Practice. London: Sweet and Maxwell, 1999.
- Pontier, J.A., and Burg, E. EU Principles on jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters. Netherland: T.M.C. Asser press, 2004.
- Rice, D.T. Jurisdiction and Electronic Dispute in The United State and Europe. New York: American Bar Association, 2002.
- Shaw QC, M.N. International Law, Fifth Edition. Cambridge: Cambridge University press, 2003.

Articles

- Denfar Ruengrith, The Legal Problems of the Admissibility of E-Document. Doonphap Year 53 Vol 3 (September – December, 2006).
- Nuttaphong Posakarboot, "The Comparison between Civil Law and Common Law concerning Electronic Commerce and Electronic Contract," in Raphee43, Bangkok: Assumption University, 2543.
- Phanthip Karnjanajrit Saisoonthorn, The Legal Problem of Recognition of Foreign Court Judgment. Nitisart Journal Thamasart University Year 22 Vol 2, (2535).
- Phanthip Karnjanajrit Saisoonthorn, The Sovereignty of the State and Legal Relation concerning to Civil Law of International settlement. Nitisart Journal Thamasart University Year 23 Vol 4, (2536).
- Phasuk Chareonkeat, "The Jurisdiction over the Internet Dispute," in Bodbundith 58 Part 2, 2002.
- Pinai NaNakorn, "Electronic Commerce and Admissibility of Electronic Signature," in Botbundith Volume 56 Part 2, 2543.

Prasith Priwawatanaphanith, Recognition and Enforcement of the foreign judgment in Thailand. Research of International Law Department, Thammasart University, 2005.

Rosner, N., Features – International Jurisdiction in European Union E-Commerce Contracts (May, 2002).

Swindells, C., and Henderson, K. “Legal Regulation of Electronic Commerce,” in Journal of Information Law and Technology, 2006.

Internet Network

Alternative Dispute Resolution. In http://en.wikipedia.org/wiki/Alternative_dispute_resolution. Access date September 28, 2007

Anastasia Tsakatoura. The immunity of Arbitrators. In <http://www.inter-lawyer.com>. Access date May 28, 2005.

Enforcement of foreign judgments. In http://en.wikipedia.org/wiki/Enforcement_of_foreign_judgments. Access date September 19, 2007.

In Rem. In http://en.wikipedia.org/wiki/In_rem. Access date August 2, 2007.

Intention of UNCITRAL. In <http://www.uncitral.org/uncitral/en/about/intention.html>, Access date August 16, 2007.

Lex loci arbitri. In http://en.wikipedia.org/wiki/Lex_loci_arbitri. Access date May 23, 2007.

Origin, Mandate and Composition of UNCITRAL. In <http://www.uncitral.org/uncitral/en/about/origin.html>, Access date October 16, 2007.

The Model Law with Guide to Enactment. In <http://www.uncitral.org>. Access date November 1, 1996.

Laws

The Thai Civil Procedure Code.

The Thai Electronic Transaction B.E. 2544.



CONVENTION ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

(Concluded 1 February 1971)

(Entered into force 20 August 1979)

The States signatory to the present Convention,
Desiring to establish common provisions on mutual recognition and enforcement of judicial decisions rendered in their respective countries,
Have resolved to conclude a Convention to this effect and have agreed on the following provisions:

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

This Convention shall apply to decisions rendered in civil or commercial matters by the courts of Contracting States.

It shall not apply to decisions the main object of which is to determine –

- (1) the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses;
- (2) the existence or constitution of legal persons or the powers of their officers;
- (3) maintenance obligations, so far as not included in sub-paragraph (1) of this Article;
- (4) questions of succession;
- (5) questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor;
- (6) questions of social security;
- (7) questions relating to damage or injury in nuclear matters.

This Convention does not apply to decisions for the payment of any customs duty, tax or penalty.

Article 2

This Convention shall apply to all decisions given by the courts of a Contracting State, irrespective of the name given by that State to the proceedings which gave rise to the decision or of the name given to the decision itself such as judgment, order or writ of execution.

However, it shall apply neither to decisions which order provisional or protective measures nor to decisions rendered by administrative tribunals.

Article 3

This Convention shall apply irrespective of the nationality of the parties.

CHAPTER II – CONDITIONS OF RECOGNITION AND ENFORCEMENT

Article 4

A decision rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention –

- (1) if the decision was given by a court considered to have jurisdiction within the meaning of this Convention, and
- (2) if it is no longer subject to ordinary forms of review in the State of origin.

In addition, to be enforceable in the State addressed, a decision must be enforceable in the State of origin.

Article 5

Recognition or enforcement of a decision may nevertheless be refused in any of the following cases –

- (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case;
- (2) if the decision was obtained by fraud in the procedural sense;
- (3) if proceedings between the same parties, based on the same facts and having the same purpose –
 - a) are pending before a court of the State addressed and those proceedings were the first to be instituted, or
 - b) have resulted in a decision by a court of the State addressed, or
 - c) have resulted in a decision by a court of another State which would be entitled to recognition and enforcement under the law of the State addressed.

Article 6

Without prejudice to the provisions of Article 5, a decision rendered by default shall neither be recognized nor enforced unless the defaulting party received notice of the institution of the proceedings in accordance with the law of the State of origin in sufficient time to enable him to defend the proceedings.

Article 7

Recognition or enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law of the State addressed.

Nevertheless, recognition or enforcement may be refused if, to reach its decision, the court of the State of origin had to decide a question relating either to the status or the capacity of a party or to his rights in other matters excluded from this Convention by sub-paragraphs (1)-(4) of the second paragraph of Article 1, and has reached a result different from that which would have followed from the application to that question of the rules of private international law of the State addressed.

Article 8

Without prejudice to such review as is required by the terms of the preceding Articles, there shall be no review of the merits of the decision rendered by the court of origin.

Article 9

In questions relating to the jurisdiction of the court of the State of origin, the authority addressed shall be bound by the findings of fact on which that court based its jurisdiction, unless the decision was rendered by default.

Article 10

The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention –

- (1) if the defendant had, at the time when the proceedings were instituted, his habitual residence in the State of origin, or, if the defendant is not a natural person, its seat, its place of incorporation or its principal place of business in that State;
- (2) if the defendant had, in the State of origin, at the time when the proceedings were instituted, a commercial, industrial or other business establishment, or a branch office, and was cited there in proceedings arising from business transacted by such establishment or branch office;
- (3) if the action had as its object the determination of an issue relating to immovable property situated in the State of origin;
- (4) in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the State of origin, and if the author of the injury or damage was present in that territory at the time when those facts occurred;
- (5) if, by a written agreement or by an oral agreement confirmed in writing within a reasonable time, the parties agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of the State addressed would not permit such an agreement because

of the subject-matter of the dispute;

(6) if the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless such jurisdiction shall not be recognized if the defendant has argued the merits in order to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute;

(7) if the person against whom recognition or enforcement is sought was the plaintiff in the proceedings in the court of origin and was unsuccessful in those proceedings, unless the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute.

Article 11

The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention to try a counterclaim—

(1) if that court would have had jurisdiction to try the action as a principal claim under sub-paragraphs (1)-(6) of Article 10, or

(2) if that court had jurisdiction under Article 10 to try the principal claim and if the counterclaim arose out of the contract or out of the facts on which the principal claim was based.

Article 12

The jurisdiction of the court of the State of origin need not be recognized by the authority addressed in the following cases—

(1) if the law of the State addressed confers upon its courts exclusive jurisdiction, either by reason of the subject-matter of the action or by virtue of an agreement between the parties as to the determination of the claim which gave rise to the foreign decision;

(2) if the law of the State addressed recognizes a different exclusive jurisdiction by reason of the subject-matter of the action, or if the authority addressed considers itself bound to recognize such an exclusive jurisdiction by reason of an agreement between the parties;

(3) if the authority addressed considers itself bound to recognize an agreement by which exclusive jurisdiction is conferred upon arbitrators.

CHAPTER III – RECOGNITION AND ENFORCEMENT PROCEDURES

Article 13

The party seeking recognition or applying for enforcement shall furnish –

(1) a complete and authenticated copy of the decision;

(2) if the decision was rendered by default, the originals or certified true copies of the documents required to establish that the summons was duly served on the defaulting party;

(3) all documents required to establish that the decision fulfills the conditions of sub-paragraph (2) of the first paragraph of Article 4, and, where appropriate, of the second paragraph of Article 4;

(4) unless the authority addressed otherwise requires, translations of the documents referred to above, certified as correct either by a diplomatic or consular agent or by a sworn translator or by any other person so authorized in either State.

If the terms of the decision do not permit the authority addressed to verify whether the conditions of this Convention have been complied with, that authority may require the production of any other necessary documents.

No legalisation or other like formality may be required.

Article 14

The procedure for the recognition or enforcement of foreign judgments is governed by the law of the State addressed so far as this Convention does not provide otherwise.

If the decision contains provisions which can be dissociated, any one or more of these may be separately

recognized or enforced.

Article 15

Recognition or enforcement of an award of judicial costs or expenses may be accorded by virtue of this Convention only if this Convention is applicable to the decision on the merits.

This Convention shall apply to decisions relating to judicial costs or expenses even if such decisions do not proceed from a court, provided that they derive from a decision which may be recognized or enforced under this Convention and that the decision relating to costs or expenses could have been subject to judicial review.

Article 16

A judgment for costs or expenses given in connection with the granting or refusal of recognition or enforcement of a decision may be enforced under this Convention only if the applicant in the proceedings for recognition or enforcement relied on this Convention.

Article 17

No security, bond or deposit, however termed under the law of the State addressed, shall be required by reason of the nationality or domicile of the applicant to guarantee the payment of judicial costs or expenses if the applicant, being a natural person, has his habitual residence in or, not being a natural person, has a place of business in a State which has concluded with the State addressed a Supplementary Agreement in accordance with Article 21.

Article 18

A party granted legal aid in the State of origin shall be extended such aid in accordance with the law of the State addressed in any proceedings for the recognition or for the enforcement of a foreign decision.

Article 19

Settlements made in court in the course of a pending proceeding which may be enforced in the State of origin shall be enforceable in the State addressed under the same conditions as decisions falling within this Convention, so far as those conditions apply to settlements.

CHAPTER IV – CONCURRENT ACTIONS

Article 20

If two States have concluded a Supplementary Agreement pursuant to Article 21, the judicial authorities of either State may dismiss an action brought before them or may stay such an action when other proceedings between the same parties, based on the same facts and having the same purpose, are pending in a court of another State and these proceedings may result in a decision which the authorities of the State in which the first mentioned action was brought would be bound to recognize under the terms of this Convention.

The authorities of these States may nevertheless order provisional or protective measures regardless of proceedings elsewhere.

CHAPTER V – SUPPLEMENTARY AGREEMENTS

Article 21

Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.

Article 22

This Convention shall not apply to decisions rendered before the entry into force of the Supplementary Agreement provided for in Article 21 unless that Agreement otherwise provides.

The Supplementary Agreement shall continue to be applicable to decisions in respect of which recognition or

enforcement proceedings have been instituted before any denunciation of that Agreement takes effect.

Article 23

In the Supplementary Agreements referred to in Article 21 the Contracting States may agree –

- (1) to clarify the meaning of the expression "civil and commercial matters", to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression "social security" and to define the expression "habitual residence";
- (2) to clarify the meaning of the term "law" in States with more than one legal system;
- (3) to include within the scope of this Convention questions relating to damage or injury in nuclear matters;
- (4) to apply this Convention to decisions ordering provisional or protective measures;
- (5) not to apply this Convention to decisions rendered in the course of criminal proceedings;
- (6) to specify the cases under which a decision is no longer subject to ordinary forms of review;
- (7) to recognize and enforce decisions upon which enforcement could be obtained in the State of origin even if such decisions are still subject to ordinary forms of review and in such a case to define the conditions under which a stay of proceedings for recognition or enforcement is possible;
- (8) not to apply Article 6 if the decision rendered by default was notified to the defaulting party and the latter had the opportunity to lodge a timely appeal against such a decision;
- (8 *bis*) that the Authority addressed shall not be bound by the findings of fact on which the court of the State of origin based its jurisdiction;
- (9) to consider the courts of the State in which the defendant has his "domicile" as having jurisdiction under Article 10;
- (10) that the court of origin shall be considered as having jurisdiction under the terms of this Convention in cases where its jurisdiction is admitted by another Convention in force between the State of origin and the State addressed if that other Convention contains no special rules relating to the recognition or enforcement of foreign judgments;
- (11) that the court of origin shall be considered as having jurisdiction under the terms of this Convention either when its jurisdiction is admitted by the law of the State addressed relating to the recognition or enforcement of foreign judgments, or on grounds additional to those in Article 10;
- (12) to define, for the purposes of the application of Article 12, the bases of jurisdiction which are exclusive by reason of the subject-matter of the action;
- (13) to exclude, in cases where jurisdiction is based on an agreement between the parties, the application of sub-paragraph (1) of Article 12 as well as to exclude that of sub-paragraph (3) of Article 12;
- (14) to regulate the procedure for obtaining recognition or enforcement;
- (15) to regulate the enforcement of judgments other than those which order the payment of a sum of money;
- (16) that the enforcement of a foreign judgment may be refused when a specified period has elapsed from its date;
- (17) to fix the rate of interest payable from the date of the judgment in the State of origin;
- (18) to adapt to the requirements of their legal systems the list of documents required by Article 13, but with the sole object of enabling the authority addressed to verify whether the conditions of this Convention have been fulfilled;
- (19) to subject the documents referred to in Article 13 to legalisation or to a similar formality;
- (20) to depart from the provisions of Article 17 and to depart from the provisions of Article 18;
- (21) to make the provisions of the first paragraph of Article 20 obligatory;
- (22) to include within the scope of this Convention "actes authentiques", including documents upon which immediate enforcement can be obtained, and to specify those documents.

CHAPTER VI – FINAL CLAUSES

Article 24

This Convention shall not affect other Conventions relating to the recognition and enforcement of judgments to which the Contracting States are already Parties so long as those States have not concluded a Supplementary

Agreement under the terms of Article 21.

Unless it is otherwise agreed, the provisions of a Supplementary Agreement concluded under Article 21 shall prevail over the terms of any prior Conventions in force between the Parties relating to the recognition and enforcement of judgments to the extent that their terms are mutually inconsistent.

Article 25

Whether or not they have concluded a Supplementary Agreement under Article 21, the Contracting States shall not conclude between themselves other Conventions relating to the recognition and enforcement of judgments within the scope of this Convention unless they consider it necessary, in particular, because of economic ties or of particular aspects of their legal systems.

Article 26

Notwithstanding the provisions of Articles 24 and 25, this Convention and the Supplementary Agreements made under Article 21 shall not prevail over Conventions to which the Contracting States are or may become Parties in special fields and which contain provisions for the recognition and enforcement of judgments.

Article 27

This Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law and Cyprus, Iceland and Malta. It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 28

This Convention shall enter into force on the sixtieth day after the deposit of the second instrument of ratification. This Convention shall enter into force for each State which ratifies it subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 29

Any State not falling within the provisions of the first paragraph of Article 27 may accede to this Convention after it has entered into force in accordance with the first paragraph of Article 28. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

This Convention shall enter into force for such a State in the absence of any objection from a State which has ratified this Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, this Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 30

Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of this Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands. This Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

The Parties to a Supplementary Agreement concluded under Article 21 shall determine its territorial application.

Article 31

This Convention shall have a duration of five years from the date on which it enters into force under the first paragraph of Article 28, even in its application to States which have subsequently ratified or acceded to it.

In the absence of any denunciation, this Convention shall be renewed tacitly every five years.
 Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
 Such denunciation may be limited to any one of the territories to which this Convention applies.
 Such denunciation shall affect only the notifying State. This Convention shall remain in force for the other Contracting States.

Article 32

Each Supplementary Agreement concluded under Article 21 shall take effect from the date specified in such Agreement; a certified copy and, if necessary, a translation into French or English shall be communicated to the Ministry of Foreign Affairs of the Netherlands.

Any Contracting State may, without denouncing this Convention, denounce a Supplementary Agreement either under any provision for denunciation in such Agreement or, if such Agreement contains no such provision, by giving six months' notice to the other State. Any State denouncing a Supplementary Agreement shall so inform the Ministry of Foreign Affairs of the Netherlands.

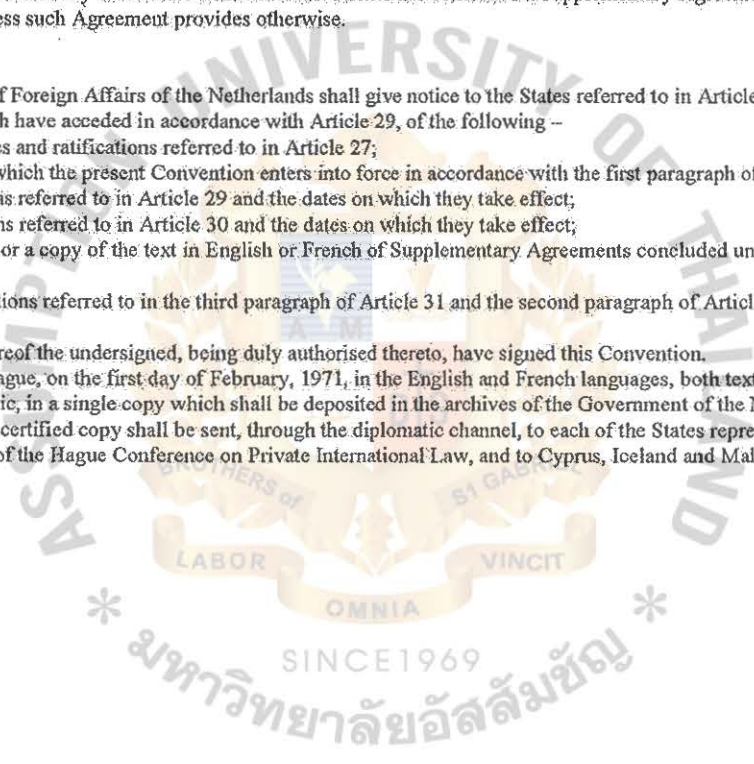
Notwithstanding the denunciation of this Convention, it shall nevertheless continue to have effect between the denouncing State and any other State with which the former has concluded a Supplementary Agreement under Article 21, unless such Agreement provides otherwise.

Article 33

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 27, and to the States which have acceded in accordance with Article 29, of the following --

- a) the signatures and ratifications referred to in Article 27;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 28;
- c) the accessions referred to in Article 29 and the dates on which they take effect;
- d) the extensions referred to in Article 30 and the dates on which they take effect;
- e) a translation or a copy of the text in English or French of Supplementary Agreements concluded under Article 21;
- f) the denunciations referred to in the third paragraph of Article 31 and the second paragraph of Article 32.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.
 Done at The Hague, on the first day of February, 1971, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law, and to Cyprus, Iceland and Malta.





I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 44/2001

of 22 December 2000

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the 'Brussels Convention')⁽⁴⁾. On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

⁽¹⁾ OJ C 376, 28.12.1999, p. 1.

⁽²⁾ Opinion delivered on 21 September 2000 (not yet published in the Official Journal).

⁽³⁾ OJ C 117, 26.4.2000, p. 6.

⁽⁴⁾ OJ L 299, 31.12.1972, p. 32.

OJ L 304, 30.10.1978, p. 1.

OJ L 388, 31.12.1982, p. 1.

OJ L 285, 3.10.1989, p. 1.

OJ C 15, 15.1.1997, p. 1.

For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

- (8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.
- (9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.
- (10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.
- (11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
- (12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.
- (13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.
- (14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.
- (15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.
- (16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.
- (17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
- (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.
- (19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol⁽¹⁾ should remain applicable also to cases already pending when this Regulation enters into force.
- (20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.
- (21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty
- (¹) OJ L 204, 2.8.1975, p. 28.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text see OJ C 27, 26.1.1998, p. 28.

establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

- (23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

- (24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

2. The Regulation shall not apply to:

- (25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

- (26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

- (27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(c) social security;

(d) arbitration.

3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

- (28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

Section 1

General provisions

- (29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁾.

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

(1) OJ L 184, 17.7.1999, p. 23.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled,

provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:
 - (a) in the courts of the Member State where he is domiciled, or
 - (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

- (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
4. any risk or interest connected with any of those referred to in points 1 to 3;
5. notwithstanding points 1 to 4, all 'large risks' as defined in Council Directive 73/239/EEC⁽¹⁾, as amended by Council Directives 88/357/EEC⁽²⁾ and 90/618/EEC⁽³⁾, as they may be amended.

Section 4

Jurisdiction over consumer contracts

Article 15

4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

- (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;
- (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

- (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

- (b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

⁽¹⁾ OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).

⁽²⁾ OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.

⁽³⁾ OJ L 330, 29.11.1990, p. 44.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
 - (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
 - (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or
2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated,

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall

have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8

Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁽¹⁾ shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9

Lis pendens — related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of

⁽¹⁾ OJ L 160, 30.6.2000, p. 37.

different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

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

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2

Article 43

Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

Section 3

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

Common provisions

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 55

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative *ad litem*.

