GENERAL INTRODUCTURY REPORT

by Prof. Dr M. STORME

I. BACKGROUND

It is probably a cliche to state that it was only in the 1970s that the world at large became aware of the fundamental problem of providing access to the courts. The "access-to-justice movement"(1) undoubtedly reflected a corresponding undercurrent in society. For many citizens, to address the courts was, and still is, the last resort, whether it be the citizen against the State and the public authorities, the wife against her husband, the children against their parents, the employee against the employer, the consumer against the producer, the patient against the doctor, the small residence against the twenty-storey building, the pedestrian against the heavy goods vehicle, etc.

This movement arose after the creation of the European Common Market. Up to that time, procedural law had been a stagnant affair. Moreover, it had been of interest to only a small circle of practitioners, not even capable of inspiring serious academic research (2).

However, this movement did not succeed in gaining access to the Community legal system. On the contrary, procedural law, in the broadest sense of the term - i.e. judicial organization, jurisdiction and rules of procedure - was excluded from the scope of European Community law, except for the purpose of access to the European Court of Justice.

It is perhaps worth while to track down the reasons for this negative attitude, in order to assess whether or not it was justified.

(a) For many years, procedural law was regarded as an area of the law which was of a specifically national character. This view elicited from BordeauxPigeau, who in the 19th century commented the "Code de procédure civile" (3), the observation that it was impossible to cite any precedent for the successful export of procedural law.

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(1) That this movement achieved a breakthrough was confirmed by the "opus magnum" of Mauro Cappelletti, who, together with

B. Garth, compiled its six parts and subsequently added an appraisal: Access to Justice, 6 vol., Milan 1978 - 1979; - Access to Justice and the Welfare State, Firenze, 1981.

(2) I naturally exempt from this statement the eminent Italian authors on procedural law, as well as a number of creative individuals, such as Franz Klein in Austria.

(3) Bordeaux, R., Philisophie de la procédure civile. Mémoire sur la réformation de la Justice, Evreux, 1857, p. 36.

Even as Bordeaux wrote these words, there was available significant evidence to the contrary, since in 1890, the German Code of Procedure (ZPO - adopted in 1877) had been translated and incorporated by Japan.

More recent examples of such incorporation include the Uniform Benelux Law on "Astreintes" (1980), this legislation having been based on the Dutch model (1) or the mareva-injunction being a copy of the continental "saisie conservatoire" (1 bis).

(b) According to the same school of thought, procedural law is also fraught with political overtones. The best example of this was the fundamental distinction which was made between the procedural law of Continental Western Europe and the so-called "Socialist procedural law " of Eastern Europe. In very general terms, it can be said that Western Europe applied the accusatorial system, as opposed to the inquisitorial system then in force in Eastern Europe.
Not only is this contrast gradually disappearing, but also it must be emphasised that the member countries of the European Community have always known the same political structure, i.e. parliamentary (and hence pluralist) democracy, in which the freedom and equality of the citizens are guaranteed.
Accordingly, the political nature of procedural law no longer justifies any divergence in the legal rules which apply within the European Community.
Even so, it is a fact that procedural law can be used to carry out a particular policy aimed at applying certain values or attaining certain objectives. This aspect will be dealt with at greater length later on.

(c) It has been rightly stated that the formal aspects of procedural law were the guarantors of freedom. On this subject, Montesquieu wrote (2): "Les formalités de la Justice sont nécessaires à la liberté". This concept was subsequently restated by von Jhering in the following terms:

"Ennemie jurée de l'arbitraire, la forme est la soeur jumelle de la liberté" (3). But this formalism explains why the European Community was more interested in substantive law than in procedural law.

In this context, however, it must be pointed out that there is a strong movement in favour of almost total abandonment of formality in procedural law, which finds its expression in the recent rule whereby defective procedural formalities may bring about the annulment of the instrument only where the result contemplated by these formalities was not achieved(4).

That this trend could come about was due to the ever-increasing influence of Article 6 of the ECHR, a consequence of the boldness of the case law developed by the Strasbourg-based European Court.

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(1) See in this connection : Storme, M., L'astreinte nel diritto belga, Riv. trim. dir. proc. civ., 1986, 602 et seq.

(1bis)

(2) Esprit des Lois, LXXIX, Ch. 1.

(3) Esprit du droit romain, translated by de Meulenaere, t.III, p.164.

(4) See, for example, the (new) Italian "Codice di procedure civile", Art.156: "La nullità non può mai essere pronunciata, se l'atto ha raggiunto lo scopo a cui èdestinato"; cf. Art. 867 (in its new version to take effect from 1 January 1993) of the Belgian Judicial Code: "s'il est établi que l'acte a réalisé le but que la loi lui assigne ...".

This provides adequate guarantees in Europe for the protection of the fundamental rights of the defendant in a fair trial, before an impartial and independent judge. From this point of view too, the disparate nature of procedural law in Europe is clearly an unnecessary obstacle within the internal market.

(d) Finally, it is claimed that procedural law forms part of the prerogative of the sovereignty of the State, since the judiciary is one of the three fundamental powers in the trias politica, and as such the structural expression of national sovereignty.

This reasoning was sufficiently convincing to deter the working party from tabling any proposal relating to the jurisdiction of the courts and to the judicial organisation.

However, it must be conceded that it is not always easy to draw a sharp line of demarcation here. A case in point is the procedural remedy of appeal, which is directly linked to the issue of organization of the courts.

SETTING-UP OF THE WORKING PARTY

As far back as the mid-eighties, at a time when 1992 had become that magic date for the completion of the internal market, advocates of the creation of a European system of judicial organization began, albeit tentatively, to make their voices heard (2).

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(2) See the paper which I delivered for the first time in Milan in 1986, and which was subsequently published, entitled Perorazione per un diritto giudiziario europeo, Riv. dir. proc. 1986, pp.293 et seq.; see also Fragistas, Ch., Rechtsstreit und Vollstreckung, in Angleichung des Rechts der Wirtschaft in Europa, Kölner Schriften zum Europarecht, Vol. 11 (1972), pp.636 et seq.; - Storme, M., Rechtsvereinheitlichung in Europa, Ein Plädoyer für ein einheitliches europäisches Prozesrecht, Rabels Z., 1992, p. 290 et seq.; - Prütting, H., Prozessvereinheitlichung im Binnenmarkt, Festschrift Baum-gärtel, 1990, p. 457 et seq.; - Tarzia, G., L'Europa del 1993 e il processo civile, Istituto Lombardo 1990, 79 et seq.

Initially, they contacted members of the Commission(1), of the European Parliament (2), of the European Council of Ministers (3) and of the European Administration (4).

Without waiting for any formal and definitive assent, but strengthened by the knowledge that, thanks to the encouragement given by some senior European officials, our voice would ultimately be heard by the Commission, we made an informal start in late 1987 (5) with the setting-up of a working party whose ambition was to compile a European Judicial Code.
The working party, which consisted of leading experts in the field of procedural law from the twelve Member States, lost no time in preparing a memorandum, which was presented to the European Commission on 1 May 1988 (6). This was followed by the definitive contract (7), which meant that the working party could now commence its operations on a formal basis.

Meetings were held successively in Gent, Rheims, Coimbra, Köln, Valladolid, Milano, Athens, The Hague, Lisboa, Gent, Copenhague, Caen.

Pursuant to the terms of the contract, a brief interim report was presented (8).

In response to a request for more time, since it looked as though the final date, 31 August 1992, could not be met, the working party was granted a short extension of its commission (9).

Accordingly, this report is hereby presented to the European Commission as the final report.

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(1) Mention should be made here of Commissioner Sutherland and his chef de cabinet, J.R. Verstrynghe.

(2) Including in particular B. Croux, MEP.

(3) A number of Ministers of Justice in the Member States were contacted.

(4) Dr Ehlermann, Dr Y. Schwartz and Dr Taschner.

(5) Meeting held in Gent on...., at which the following were present: W. Habscheid, A. Huss, J. Jacob, K. Kerameus, P. Meyknecht, C. de Miguel, J. Normand, a. Pessoa Vaz, E. Smith, M. Storme, G. Tarzia.

(6) See Appendix I.

(7) See Appendix II.

(8) See Appendix III.

(9) See Appendix IV.

I. THE NEED FOR APPROXIMATIOn OR, WHERE APPROPRIATE, HARMONIZATION OF EUROPEEN PROCEDURAL LAW

A. General need for world-wide approximation

Although comparative law had for a whole century been considered an established method for achieving unification of various legal systems, it can hardly be claimed that a comparative study of procedural law was a realistic proposition. In 1910, Albert Tissier wrote "que les bibliothèques sont vides quant à la procédure civile comparée". (1)

This approach changed radically as people in all parts of the world became increasingly aware of the urgent need to improve access to justice (see above). There was a universal desire for a system of procedural law which would enable justice to be administered promptly, cheaply and properly (2).

This concern had already been expressed earlier in international agreements. However, it was not realized at the time exactly what an explosive train of events would be set in motion by these agreements, more particularly through the case law developed not only by the international courts, but also at the domestic level. This applies to both the ECHR of 1950 and the International Covenant on civil and political rights (3). The first-named of these instruments was given its main impulses in the seventies by the decisions of the Strasbourg Court, whereas the second, by virtue of the precedence accorded to international law over domestic law, achieved a breakthrough via the case law of the national courts in those countries in which the International Covenant on civil and political rights had been given legal effect.

However, it was especially the Treaty of New York (1958) which, more than the general principles of good procedural behaviour as expressed in the two aforementioned international treaties, achieved a real degree of uniformity in the field of procedural law.

Although this treaty concerns international arbitration, where the need for unification is particularly marked in the business world, this does not alter the fact that we have here a splendid example of successful world-scale (4) unification (5).

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(1) In the meantime this changed. See f.i. : Snijders, H.J., Toegang tot buitenlands burgerlijk procesrecht, Arnhem 1992;

Habscheid, W., Introduzione al diritto processuale civile comparato, Rimini, 1985.

(2) In his book "Judges, Legislators and Professors" (Cambridge 1987), R.C. Van Caenegem sets out the eight characteristics of good law; naturally these include "accessible justice" (o.c., pp.157 et seq., spec. pp.162-163).

(3) Treaty done at New York on 19 December 1966.

(4) The Treaty was subsequently ratified in 86 States.

(5) For further comments, see Van den Bergh, A.J., The New York Arbitration Convention, Deventer, 1981.

True unification was subsequently achieved on a very broad regional - i.e. not world - scale in Europe and in Latin America. In Europe, the European Enforcement of Judgments Convention was signed and its territorial scope has continued to widen (1).

In Latin America, a model code was adopted in the shape of the Codigo tipo ibero-americano (1988). Although this code had no binding force, its text is a model for any reforms in procedural law in Latin America (2). This can be illustrated by the new Codigo General del Proceso in Uruguay (November 1989) (3).

At this point it is appropriate to reflect on the status of unification of procedural law, its scope and its limitations (4).

Any unification project must meet a particular need and at the same time be feasible.

In an area of law which is particularly oriented towards legal practice, it appears to us that unification must be dictated by the requirements of the practitioner.

If such unification is to be attained, it should for preference be set about in areas which are linked both geographically and by legal culture. Hence the reason why in the following passages we shall devote our attention largely to the European internal market.

B. What is needed in the European Community

§ 1. Requirements specific to procedural law

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(1) The Brussels Convention of 1958 entered into force on 1 February 1973, was amended in 1982 and 1989, and is currently in force in every Member State.

(2) See in this connection: El codigo procesal civil modelo para Iberoamerica. Historia, antecedentes, exposicion de motivos, texto del Anteproyecto, Ed. preparada por E. Vescovi o, Montevideo, 1988; see also on this subject the excellent lecture delivered by Carlos de Miguel y Alonso, Hacia un proceso civil universal, Valladolid, 1991.

(3) Vescovi, E., and del Carmen Rueco, M., Los primeros resultados de la Reforma de la Justicia en Uruguay, Un balance a los dieciochi meses de la entrada en vigencia del Codigo General del Proceso, Montevideo, 1991; - Vescovi, E.,

Il nuovo sistema giudiziario dell' Uruguay, Riv. dir. proc., 1991, 388 et seq.

(4) See on this subject the marvelous contribution by K. Kerameus, Procedural Unification: the Need and the Limitations, in International Perspectives on Civil Justice, Essays in honour of Sir Jack I.H. Jacob, London, 1990, pp.47 et seq.

A particularly important point which can be made at the outset and which highlights the need for a unified system of procedural law is this: the courts may apply the substantive law, but not the procedural law, of another country.

Consequently, it is possible for all the courts in Europe to apply f.i. Italian substantive law on the basis of the rules of international private law, but none of them may apply any rules of procedural law other than those which are applicable in the judge's own country (1).

Many rules of procedural law are such that they are capable of cross-frontier application, and therefore require an international or uniform system - for example, the rules relating to jurisdiction, evidence, exequatur, enforcement, etc.

In intra-community relations within the European internal market, the question as to which procedural law applies to a legal dispute will be important from aspects such as the gathering of evidence, any clause in the contract which makes provision for arbitration proceedings or for determining the court which shall have jurisdiction, or the creation of legal persons having the required capacity to act in court proceedings.

Approximation could prevent surprises from occurring in many of these areas.

However, uniformity could also be required in the context of purely national disputes, i.e. where the systems of procedural law in question are in permanent contact with each other.

This is certainly the case within the European internal market: the interpenetration of European law firms, the mobility of persons and enterprises, the constant problem of disparate rules of procedural law - these are factors of a kind which call for approximation, or even harmonisation, of the procedural law systems in question.

§ 2. Requirements specific to the internal market

In general terms, it can be said that any form of integration requires a certain form of procedural law unification: "Procedural unification goes hand in hand with overall unification" (2).

The need for legal certainty has - for well-known reasons - increased exponentially. European citizens and enterprises will

require extensive legal protection within the European internal market, not only in their own countries but frequently also

(1) See Kerameus, K., o.c., p.49, with extensive references under footnote (10).

(2) Kerameus, K., o.c., p.66.

(3) Cappelletti, M., Access to Justice and the Welfare State. final part.
Here reference was made to "skyrocketing litigation",o.c., p. 265.

in one or more Member States of the European Community.

Confidence in the institutions, and in particular the judiciary, is a major component of the foundations of the European edifice.

Reinforcement of such confidence can be accomplished only if the citizen is fully aware that throughout Europe there exist equal, analogous and/or equivalent judicial procedures which give citizen and enterprise alike equal access to a system of procedural law which operates as straightforwardly, swiftly, efficiently and economically as possible.

Fundamental confidence in European justice must be gradually built up by setting the Community's sights, as from 1993, on approximation procedural law.

However, more is obviously required in order to stimulate a desire for unification procedural law in Europe.

More particularly, there are two specific classes of needs which stand out in this context, i.e. economic and legal. In addition, there are a number of impending dangers which make this approximation process a matter of urgency, since member States continue to reform their national procedural laws.

Both the aforementioned types of needs are examined more closely below.

1. The internal market and its need for more approximated procedural law from an economic standpoint

(a) It is common knowledge that the world of international business requires an effective and transparent system of procedural law. This is becoming all the more necessary with the multiplication of transnational contacts. Unification will be ineluctable as soon as such commercial contacts assume a permanent character. In Europe, internal barriers have been removed from the internal market; all the greater, then, is the expectation of potential litigants that a judicial system will be created which is available to them on more or less equal terms, wherever they may be.

(b) On analysing more closely the various systems of procedural law in Europe (1), one is struck not only by their diversity but also by the disparate nature of the results obtained with respect to the three vital questions which must precede any litigation:

(1) What will it cost?

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(1) Actually, there are 14 such systems, when account is taken of the marked procedural differences between England and Scotland and the minor differences between England and Northern Ireland.

(2) How long will it take to complete?
(3) What benefit will I get from it or what will I be required to pay in the way of compensation? (1)

Cost, delay and vexation form the "three-headed hydra" to which Sir Jack Jacob refers in connection with present-day court proceedings (2).

We could reply to these questions by providing detailed analyses of the various procedural systems in operation. However, this report is not a comparative dissertation.

Since the cost of litigation is the most sensitive area from an economic standpoint and since, moreover, it lends itself best to a comparative analysis, we set out below some of the most striking differences:

(a) Interest fixed by the court ranges from 4% (Germany) to 34% (Greece).

(b) Legal aid is available to those whose incomes falls below a threshold which varies from 3,800 ECU (England and Wales) to approximately 22,000 ECU (Denmark).

(c) The remuneration to which lawyers are entitled (lawyers' fees) is laid down by statute (Germany), assessed by the courts (England and Wales) or left to the reasonable discretion of the lawyers themselves.

(d) In some countries it is the client who has to pay either the major part (Belgium) or the full amount (Luxembourg) of the lawyer's remuneration, whereas in others it is the losing party who has to bear either the major part (England and Wales: "if proper and necessary") or the full amount of such remuneration.

(e) In most EC countries, the "contingency-fee system" is prohibited, although in some of them a debate is in progress on this issue; this system is, however, authorized in exceptional cases (Germany, The Netherlands) or permitted up to a certain percentage (Greece, where the relevant proportion is 20%)

(f) Court costs vary considerably from country to country; they are determined on either a flat-rate or a percentage basis.

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(1) See in this connection the study commissioned from a number of European law firms by the Tokyo Marine and Fire Insurance Company: Cicil procedures in E.C. countries, London, 1991.

(2) Jacob, J., Justice between man and man, in Current legal problems, 1985, 211 et seq., spec. 226.

Anyone who peruses only this - moreover, very brief - overview will be forced to admit that serious distortions (Article 101 of the EEC Treaty) exist in the procedural laws of Europe. They have the effect of distorting conditions of competition.

Such inequality of access to the courts not only results in wrongful discrimination but will also encourage firms, under the expert guidance of their legal advisers, to engage in forum shopping, and therefore also in market shopping.

Thus any foreign firm - whether or not European - will give its preference to trading with or investing in a country whose system of procedural law offers greater advantages in terms of time, cost and efficiency than those of other countries.

(c) The internal frontiers with their lack of transparency still exists for the European litigants. This is the actual paradox of the internal market for the European Citizens.

2. The European community law and the techniques specific to Community law similarly call for approximation of procedural law

(a) The preliminary ruling procedure (Article 177 of the EEC Treaty.
The "Strategic Note" (cf. Appendix) has already demonstrated the extent to which this procedure differs from Member State to Member State in terms of structure, treatment and implications.

(b) No legal system can afford to tolerate internal disparities in procedural law. This applies a fortiori to the European Community.

Three examples can be adduced to illustrate this point: proceedings in absentia, orders for payment and the consequences of the appeal proceedings.

A defendant can conduct his defence in a number of ways. However, he must realize that if he chooses not to put forward any defence, the decision will be awarded against him. In some countries this will be by means of proceedings in absentia; in others, subject to certain conditions, the case will lead to a judgment which will be considered as a contradictory one (1).

In some countries, it is possible to obtain an ex parte payment order against debtors from one of the other Member States; in others, such an order can be obtained only against a citizen of the same member country; there are also countries in which it can

be obtained only after a full hearing on both sides.

Furthermore, the consequence of forming appeal against a court decision also differs in many cases from country to country. In some states, appeal proceedings defer the enforceability of court decisions; in others, the decision appealed against can be enforced in spite of appeal proceedings; in others again, the decision may be enforced only with the express authorization of the court.

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(1) The recently introduced Belgian law of 3 August 1992 stipulates that any party who has appeared once and presented his pleadings once shall have his action settled after a full hearing of both parties, even if he failed to appear at a subsequent hearing. On the subject of the marked differences as regards proceedings in absentia, see Kerameus, K., o.c., pp.63-64.

In Belgium f.i. appeal proceedings suspend the enforcement of the decision appealed against unless it is provisionally enforceable, but in England and Wales, an appeal does not operate automatically as a stay of execution, although a stay can be granted by the court.

It is therefore quite conceivable for one and the same creditor to be faced with different rules on proceedings in absentia, payment orders or appeal, depending on the Member State in which the case was brought.

It has already emerged from the foregoing that the differences in the rules relating to costs can also constitute an infringe- ment of the equality of arms principle.

(c) The Francovich decision of the European Court of Justice dated 19 November 1991 adds a further dimension to arguments which seek to justify the necessity for harmonization of procedural law.

According to this decision, European citizens will be able to claim compensation from their national authorities on the grounds of failure to implement a European directive or to implement it within the prescribed time-limit.

This means that where the directive in question contemplated the creation of a compensation fund for all employees in the event of closure of a firm, equal treatment in all Member States is jeopardized on two counts: one under substantive law and one under procedural law.

The substantive differences in the legal basis and scope of the rules relating to the civil liability of the public authorities for their actions could give rise to disparate results; however, this is not our concern for the time being.

Our concern is rather with the manner in which these disputes are brought before and settled by the State courts.

How will a case be brought before a court? Is it possible for the court to deliver a provisional remedy by way of provisional measures ? Can the State be ordered to establish a compensation fund subject to payment of an "astreinte" ? Are the procedural deadlines the same, and are they calculated on the same basis?
What is the influence of an appeal proceeding?

The conclusion is that any national system of procedural law could cause a distortion of the principle of equal - and therefore more or less uniform - access to a civil liability action before the national courts of any of the Member States. This procedural aspect threatens to strike a severe blow at the authority of the leading decision in the Francovich case

3. Harmonization of procedural law is becoming a matter of urgency on account of the impending danger of persistent differentiation

Procedural law is currently in a state of considerable fermentation, because throughout the world, but in particular in Europe, efforts are repeatedly being made to achieve better functioning of the judicial machinery.

In most cases, these efforts are following two courses: the traditional course of legislation designed to improve the rules governing procedure; and the most recently developed course, called Alternative Dispute Resolution.

Both trends have resulted in still greater diversity, and therefore Community-wide action in the field of European procedural law is a matter of urgency.

a. Ever-increasing reforms of procedural law

The problem is not only that the existing codices are quite disparate. In recent years, a number of EEC countries have carried out reforms which may give rise to still greater distortions.

Belgium was the first country in the second half of the 20th century to break away from the old procedural law - in casu, the French **Code de procédure civile**, dating from 1806 - by introducing a completely new Judicial Code (1967). Since then, new laws have brought about a number of changes to this Code[2], the most recent being that of 18 July 1991 concerning the selection and appointment of judicial officers and that of 3 August 1992 concerning the actual proceedings involved.

In France.... (chaque membre est prié de faire l'ajout nécessaire)

In Germany... each member is invited to insert the
In Italy.....information concerning its country)

One should mention also i.a. : Spain (Ley de Enjuiciamiento Civil : 30 april 1992); Italy (Provvedimenti urgenti per il processo civile : 26 november 1990); the Nouveau Code de procédure civile in France; the new law on the Enforcement in The Netherlands, ... Also in England we find new developments in the traditional "adversary system" (3)

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(2) From 1967 to 1982, i.e. over a period of 25 years, 150 amended laws were passed in Belgium.

(3) See Jolowicz, J.A., La réforme de la procédure civile anglaise: une dérogation au système adversatif? in Legrand, P. (ed), Common law d'un siècle l'autre, 233 et seq.

If swift action is not taken to approximate a number of procedural rules, further separate development of procedural law in the Member States will accentuate the existing differences.

b. **Alternative dispute resolution**

To provide an answer to the vexing problem inherent in the explosive increase in disputes and lawsuits and the mounting backlog of court cases, recourse is being had on all sides to alternative dispute resolu- tion, i.e. settlement by persons and institutions other than the officially appointed judge.

This, while possibly not a regrettable development in itself, is something to be deplored in the context of European Community law. The point can best be illustrated by taking the optimum form of alternative dispute resolu- tion, namely resolution by arbitrators.

Arbitration proceedings have in fact been marked by a refusal to link up with Community law, in two matters of principle.

On the one hand, it was argued that under the preliminary ruling procedure set out in Article 177 of the EEC Treaty the arbitrator is unable to obtain access to the Court of Justice[1]. On the other hand, it was decided that the EEX Treaty is likewise inapplicable in arbitration proceedings -

pursuant to Article 1 of the Treaty - even in cases brought before the officially appointed judge and relating to an arbitration procedure[2].

What applies to arbitration procedures applies a fortiori to all other alternative forms of dispute resolution (mediation, conciliation, rent a judge, etc.)[3].

Thus a great many cases have been excluded from the uniform functioning of European Community law.

This trend can be curbed only if more or less uniform rules of procedure are introduced in Europe which ensure equal and straightforward access to the judge in all Member States.

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1 CJ, 23 March 1982, Nordsee, 102/81, Rec. 1982, 1095; - for commantary, see Goffin, L., Liber amicorum A. Fettweis, Bruxelles, 1989. Arbitrage et droit communautaire,..

2 CJ, Marco Rich 25 july 1991, Arbitration International 1991, 251, with contributions by P. Schlosser and A. Jenard.

3 See Storme, M., Contractuele mogelijkheden om geschillenalternatief op te lossen, in Storme, Merchiers, Herbots (ed.), Antwerpen, 1990, p. 565 et seq.

§3. The administration of justice

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There is also a need for judicial institutions which work well from a technical standpoint.

By this is meant that, apart from the specific needs of the internal market (see above), citizens in Europe cherish the hope that Community policy will not be confined to economic purposes but will also recognize the necessity of a properly functioning "fabric of justice"[1].

Confidence in the courts will be a significant factor in the internal market. Citizens must accordingly have the feeling that those in authority will constantly be bending their minds to the pursuit of a harmonizing policy in the field of procedural law.

Now that the full authority of the Court of Justice is being recognized and appreciated, the second stage is obvious: absolute respect by and for all judges in Europe through constant heed to European procedural law.

For the sake of completeness, it should be added that approximation, although not automatic, can also contribute to the improvement of the national procedural law of each of the Member States.[2]

For instance, it is clear that the uniform introduction of the "astreinte" in many of the Member States would be an improvement in the field of enforceability of non-money judgments).

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[1] The term has been taken from Sir Jack Jacob, The Fabric of English Civil Justice, London, 1987.

[2] It was Kerameus who underlined the fact that quality does not always go hand in hand with unification; "unification on the practical level is deprived of any quality aspiration" (o.c., p.49). I do not subscribe to this far too radical pronouncement.

§ 4 Procedural law as the embodiment of European values

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From time immemorial, European law has been characterized as a set of instruments which can be used to fulfil socio-political aims; needless to say, it can also introduce or stress certain values.

First and foremost, adequate legal protection for the European citizen constitutes a major value as such. When it is considered what tremendous influence Article 6 of the European Convention on Human Rights (ECHR) (fair trial) has had on the case law of the Council of Europe countries, it can also be readily imagined that, for instance, the value of equal access to Justice is a European value in itself.

Equal access thus also means increased access, in which efforts are made to abolish all exceptions hampering procedure, which would assuage the lamentations expressed by Lord Devlin : *"Where injustice is to be found is not so much in the cases that come to Court, but in those that are never brought there. The main field of injustice is not litigation but non-litigation".*(1)

Next, an approximation of the rules of procedural law can undoubtedly lead to a common legal culture for Europe. Thus, by way of example, in such a legal culture more value could be attached to decisions by State courts than to decisions by private judges.

More important still in my opinion is the fact that in Europe aims can be pursued which lie beyond the proper administration of justice.

Examples come readily to hand:

(1) Adequate protection of the consumer, and of the environment, postulates a European judicial system for dealing with complaints in these sectors. For instance, class action in all Member States would be a particularly valuable instrument2.

(2) Uniform rules on confidentiality of correspondence between lawyers (barristers and company lawyers) could exercise a salutary influence because that would make it easier to settle disputes amicably.

(3) Uniform rules on court costs would be a remarkable achievement. In such a context, cost-free proceedings, to take an example, can be formulated as a principle. Again, the contingency-fee system can be either confirmed or rejected as a common rule. Furthermore, a general rule can be postulated which states that lawyers' fees must be paid by the losing party.

(1) Lord Devlin, Who is at Fault when Injustice occurs, in Michael Zander ed.), What's wrong with the law ? B.B.C. 1970,72.

(2) Goyens, M. and Vos, E.I.L., Transborder consumer complaints, European Consumer Law Journal, 1991, pp. 193 et seq.; - see also Storme, M., The legal authority of the European Community to intervene in the matter of group actions for consumers and the choice of legal instrumentation, in Group actions and Consumer Protection, Louvain le Neuve, 1992, p. 179 et seq.

(4) Victims of offences in general and traffic accidents in particular would have to be able to obtain compensation for damage in a single concentrated action. This is an action in which the criminal conviction and the award of damages are pronounced at the same time.

From these few examples, it can be seen that new social and/or ethical values can be framed through the medium of uniform procedural law.

The conclusion, then, is that there must be a widening of the scope, at least in Europe, for the "quest for justice"[1] . Deliberation on and preparation of the way for an approximated procedural law can provide the necessary impulses.

II. Feasibility

Realization of the existence of a need for approximation is not enough; the task must be carried out with some sense of limits and possibilities.

The following passage will serve to demonstrate that there are already a number of pointers to the readiness with which harmonization can be achieved (A). It is moreover, clear that even where difficulties can be expected to arise, unification is not impossible (B). On top of this, it must be recognized that certain components of procedural law do not, or not as yet, lend themselves to any form of harmonization (C).

A. High degree of feasibility

1. The starting point is simple: acceptance of uniform rules of procedure will be all the readier as the need for them comes to be felt. This has been illustrated in detail above (see above).

2. It can hardly be denied that there is already a certain degree of uniformity in the procedural laws of the Member States.

That, on the one hand, the Brussels Convention of 27 September 1968 (EEX Convention) and, on the other hand, the ECHR of 4 November 1950 have laid the groundwork for such harmonization has already been underlined in our working party's Preparatory Strategic Note dated 1 May 1988 (see annex).

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[1] See Tunc, A., The quest for Justice, in Cappelletti, M., Access to Justice and the Welfare State, Florence, 1981, pp.115 et seq.

But legislative activity by the European Community itself has also brought about a number of approximations of the various legal systems (see below).

The very fact of contiguity in a vast economic association has given rise to an interactive process. The Dutch concept "dwangsom" "astreinte" has been converted into a uniform Benelux law (1980) (1), while French law's "astreinte administrative" (similar measure) has been adopted in Belgium (1990). And the "référé-provision" has made its way from France to Belgium and The Netherlands (2).

3. Unification of procedural law is marked by a striking phenomenon, namely its fragmentary character (3). That is to say, specific procedures can be unified or only a partial degree of unification can be carried out. This is more difficult in substantive law, where there is a greater tendency towards overall standardization: the law of contracts and the law of bankruptcy, for instance, form a coherent whole, so that it is difficult to put forward partial reforms.

This explains why our working party has grouped its harmonization proposals around small entities. A complete codex is not a matter of immediate necessity.

4. Furthermore, the choice of a uniform rule of procedure is a wide and unrestricted choice, since autonomous procedural law, i.e. the general rules of procedure, is not bound up with well-defined constitutional or substantive rules of law.

In other words, procedural law can be abstracted and detached from the rest of the legal system. This affords the greatest possible freedom in the choice of the rules of law for harmonization.

Thus preference can be given to rules regarded as easiest for unification.

5. Any approximation of procedural law on the internal market has the advantage that it can rest on the foundations of the European Community. In other words, there is an infrastructure for any measure designed to build up European procedural law.

6. The practice of procedural law is buttressed by the leading legal practitioners, barristers and the judges. It is unthinkable that any reform, let alone harmonization, could be achieved without their cooperation.

Conversely, the chances of putting through a measure for unifying procedural law will be all the better as the barristers and the judges become aware of the need for such a measure and in addition are prepared to help it on its way.

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(1) See Jacobsson, U., and Jacob, J., Trends in the enforcement of non-money judgments and orders, Deventer, 1988, with initervention of T. Sterk and M. Storme, p. 254 et seq.

(2) See in this connection: Versteegh, L., Haken en ogen aan het incasso-kort geding, N.J.B., 1992, 1138 et seq.

(3) See Kerameus, K., o.c., p.55.

And the fact is that barristers and judges have for years been in search of suitable structures to ensure the proper functioning of the bar councils and of the Judiciary.

The need for unification is becoming clearer from day to day, now that more and more barristers are being confronted with European case law; economic interests and office mergers are shouldering the responsibility for the coming unification.

7. Last but not least, there is an exceptionally important instrument that does not exist anywhere else in the world in such a wide context: the preliminary ruling procedure.

This procedure, which since its inception has been copied time and time again[1], has the outstanding merit that a single European Court is responsible for ensuring uniform interpretation of the various standards applying in Europe[2].

It is obvious that in the event of approximation of procedural law, the preliminary ruling procedure will ensure uniform interpretation of the provisions which have in the meantime been harmonized.

Moreover, the most recent development as regards interpretation in compliance with directives will play a significant role in such cases.

B. The impossible takes a little longer

In the debates on the unification of procedural law, the same question always arises: Continental v. Common law?

Not only do I find, when it comes down to the "nitty-gritty", that the distinction between the two legal families is less than is believed, but also, as my experience in our working party showed, that in the final analysis the differences are more of a formal and/or terminological nature.

It goes without saying that hisorically there are fundamental differences between procedural law in the common-law countries and in the continental-law countries, but in this day and age the approximation process is intensifying in the light of what I have described as "il principio del finalismo":

"Instead of arguing about the dogmatic bases of procedural law, it is better to adopt a pragmatic line, which leads straight to

what is wanted, namely an end to the dispute.

The pattern could be as follows.

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[1] See, for example, Benelux Court of Justice in Brussels (Treaty of 31 March 1965) and Court of Arbitration in Belgium : Art.26 et seq. Law of 6 Januari 1989.

[2] Art. 177 of the EEC Treaty.

One party decides to submit the dispute to the judge: together with its co-litigants, it demarcates the ground on which the case will be conducted (dispute, object).

But from that moment a judge comes into play and a certain amount - even a definite amount - of cooperation stamps its mark throughout the proceedings.

It would, moreover, be as well to make this cooperation absolutely plain at the outset by allowing the judge to call the parties together and draw their attention to the need to adjust the procedure and to add any other relevant facts and the underlying evidence or bring in third parties. The judge will then take the opportunity to point out what in his opinion are the appropriate bases in law of the dispute ("Rechtsgespräch").

From that time, the judge will direct the subsequent course of the proceedings with due regard to the rights of the defendant, the other parties remaining free and independent as to the content and the limits of their claim or their defence.

The procedural formalities will be judged in accordance with the "principio del finalismo"[1].

The foregoing description may contain the elements of the simplified European model for an ordinary procedure, but unfortunately we have not yet advanced so far.

Unless the course adopted is that of a two-speed reform of procedural law - for which I see no necessity at all - I contend that, despite a number of intractable technical problems, we must opt resolutely for a rapid approximation of some priority rules in procedural law.

The technical problems referred to are due to the fact that divergent procedures conceal themselves under the same name; a case in point is that of proceedings in absentia, as already explained.

They are also due to the fact that similar institutes conceal themselves under different names. Some that come to mind are French law's "Saisie conservatoire" (= seizure for security), and English law's "Mareva injunction", German law's "Mahnverfahren" (= debt enforcement proceedings)[2] and English law's "Order for payment".(3)

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[1] General report which I, together with Prof. D. Coester-Waltjen, presented at the Coïmbra Congress (1991): Relatorios gerais, V.1, pp.405 et seq., spec. p.487.

[2] See Freudenthal, M., Het "Mahnverfahren": voorbeeld van een incasso-procedure, N.J.B., 1992, 1133 et seq.

3 See also the Anton Piller Order comparable with the "saisie en cas de contrefaçon"; - see also Tillers of Justice, N.L.J., 1992, 323 et seq.

C. Limitations to approximation

It is customary in treaty texts to specify what fields fall outside the scope of the treaty. The most familiar example is, of course, Article 1 of the EEX Treaty with the known exceptions[1].

1. From the outset it was clear that the working party would not concern itself with the rules of judicial organization and competence. These are fields which come "par excellence" under the sovereignty of the State. It is, moreover, obvious that today no Member State will allow its fundamental rights to be interfered with in this sphere.

Furthermore, it must be borne in mind that where territorial competence is concerned some important, and Community, rules have already been introduced as a result of the aforementioned Brussels Convention of 1958.

The first limitation to European unification therefore means that nothing more than harmonization is envisaged in the field of procedural law as regards the ordinary cours of proceedings.

2. A second constraint on unification of procedural law lies in those procedures which are closely interwoven with substantive law. There are procedures that are conditioned by the view taken of certain legal concepts or institutions. These include, for instance, marriage and divorce. It can hardly be denied that in this field there is a world of difference between Italian and Danish family law. Any move towards drafting a uniform family procedural law would therefore appear to be ruled out.

Valuable guidance in the task of delineating this area is to be found in the aforementioned Brussels Convention, Article 1 of which runs as follows:

"This Convention 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.

This Convention shall not apply to:

1. the status or legal capacity of natural persons, rights to property arising out of a matrimonial relationship, wills and succession;

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[1] The most notorious exception since the Marco Rich judgment

is that of arbitration: see Arbitration International, 1991, 251 et seq.

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements and analogous proceedings;

3. social security;

4. arbitration;