Introduction

PETER SCHLOSSER[1]

It is true that an introduction to a book dealing with research in legal science should not be an anticipated review. Nevertheless, it is a welcome opportunity to express the gratitude of the anonymous collective of scholars and practitioners interested in this field. It is an expression of gratitude for this extremely timely volume.

Primarily, this is a classical work of analytical comparative legal research. In a well-defined but rather broad field, the isolated and inconsistent developments of multiple domestic legal systems have been analysed and put in a categorized order. The volume also includes essays of individual authors on interesting subjects related to the focus of the research programme. These essays stem from seminars and conferences made possible by the European Commission's generous award to the British Institute of International and Comparative Law. This award did not fall out of the blue.

Therefore, the first achievement to be grateful for is the proper identification of the research programme. Until recently, scholarly endeavour in the field of international civil procedure was almost exclusively restricted to jurisdiction and recognition of judgments. But even in this respect, the coming into force of the Brussels Convention had to be realized in order for our minds to be opened up to the neighbouring legal systems. The issue is the practical outcome of recognition and enforcement of judgments in another state. This has for a long time remained outside the interests of legal scholars, even though it has been evident that the topic is of utmost impact in practice. As late as 1996, Konstantinos Kerameus was still able to commence his seminal course *Enforcement in the International Context* in The Hague Academy by saying: 'Some years ago, it would have appeared strange to propose a course on enforcement proceedings in the framework of an international law programme.'[2]

This course and the publication of the tenth chapter of volume 16 ('Enforcement Proceedings') of the International Encyclopaedia of Comparative Law[3] by the same academic in 2002, were, in civil matters, the first pioneering publications on comparative law of enforcement procedures. Some other works succeeded, such as

---

[1] Institut für Bürgerliches Recht und Zivilprozeßrecht, Faculty of Law, University of Munich.

[2] *Académie de Droit International de la Haye/Hague Academy of International Law Recueil des Cours, Collected Courses* vol 264 (1997).

[3] KD Kerameus *Enforcement Proceedings* ch 10 vol 16 (2002); *International Encyclopedia of Comparative Law* K. Zweigert and U. Drobnig (eds) JCB F Mohr Siebeck (Tübingen/Martinus Nijhoff Leiden Boston).

those referred to in chapter 3 of this book by Burkhard Hess. All of them achieved the height of what a single scholar is able to perform in his or her research.

Yet this is still far from being a reliable and sufficiently substantiated basis for the efforts of the European Community to bring the enforcement proceedings of its Member States into line with each other. This field of law is, more than any other branch of private law, characterized by an impenetrable mixture of legal and administrative rules as well as customary practice, the knowledge of which is to a great extent exclusive to the staff to whom enforcement is entrusted. Consequently, for the single outside observer, it is in many respects impossible to acquire the necessary knowledge, all the more so where there is a divergence between legal scholarship and practice.

Much gratitude is due to Directorate C ('Civil Justice and Citizenship') of the Justice and Home Affairs Directorate General of the European Commission. It immediately realized that the research of the British Institute of International and Comparative Law was directed precisely at forming the proper basis for its policy and legislative activities. Therefore the Commission granted an award to the Institute, reaching the very upper limit of what its practice of awarding funds had been. Even though the contributing scholars were not personally paid for their work out of Brussels funds, the research would not have been possible without promotion and support from Brussels.

Furthermore, the broad horizon of the project's supporters in Brussels is demonstrated by the fact that they did not limit their support to collecting materials and organizing meetings of the scholars involved for the purpose of integrating their respective findings into a suitable system of comparative yardsticks. Rather, they have extended their support to supplementary seminars and conferences on subjects relevant to the research programme. Parts II–IV of this volume are the fruits of such events. Professor Mads Andenas has been immensely successful in finding eminent authors for these sections.

In the same way as enforcement proceedings, provisional and protective measures were absent in comparative law research prior to the groundbreaking course by Sir Lawrence Collins – now a judge of the English High Court – given in 1992 to the Hague Academy of International law entitled *Provisional and Protective Measures in International Litigation.*[4] Nevertheless, in the context of cross-border protective measures, many difficulties remain. The European Court of Justice has taken a less than consistent approach and the Court's case law has given rise to many new problems. It follows that the Commission is well advised to promote further research in this field.

It is almost self-evident that in the matter of enforcement, the European Convention on Human Rights must, by necessity, have a major impact. Unfortunately, in some countries, such as Germany, the case law of the European Court of Human

[4] 'Provisional and Protective Measures in International Litigation' 234 *RdC* (1992).

Rights has only occasionally found its way into standard publications such as popular legal reviews, practitioners' handbooks and commentaries on respective domestic legislation. The fact that the official languages of the Council of Europe are only English and French has not been the only barrier. Lawyers are also sometimes in principle reluctant to accept the intrusion of a foreign court into their legal world. It is true that the European Community is not as such a party to the European Convention on Human Rights, let alone the European Union. Nevertheless, the substantive provisions of the European Convention have been integrated by the European Court of Justice into the legal framework of the Community. Formally, this will be changed once the European Constitution comes into force, because it will set out its own list of fundamental rights. One would, however, be narrow-minded not to anticipate that the case law of the European Court of Human Rights will become the case law of the European Constitution. The Commission should be encouraged further to promote the idea – with all proper diplomatic delicacy – that the European Convention on Human Rights, soon being integrated into the European Constitution, will to a large degree replace domestic constitutional law.

Last but not least, thanks must be extended to the scholars participating in the research programme. They have developed working practices and an idealism far beyond their duties. They were not satisfied in juxtaposing pieces of information and logically deriving 'principles'. In procedural law, the test is one of efficiency (including efficiency in protecting the defendant from ill-treatment) rather than the effective application of 'principles'. In procedural law in general, and in enforcement law in particular, it is important for an outside observer to learn how things are organized in practice (even when they are poorly organized). Experience shows that, for this purpose, it does not suffice to invite practitioners of a series of given domestic legal systems to tell how things occur in their home states. Apparently, in a very early phase of their research, the participating scholars found out that an appropriate device by which to achieve insight into other enforcement systems was a series of comparative case studies on unlawful enforcement (see the Appendix). In his comparative chapter on these, Paul Oberhammer discloses with mild amusement that time and again national reporters confessed 'not to fully understand' the questions in the respective questionnaire. The authors of this volume made every effort to overcome these barriers to mutual understanding, finding a way through their hidden causes and clearly to identify differences and similarities.

Finally, overall thanks must be given to the British Institute of International and Comparative law, personified by its Director, Professor Mads Andenas and his collaborators, for having organized the research project admirably. Someone who has never been involved in basic comparative law research cannot appreciate the amount of organizational work and imagination demanded to avoid a superficial and, hence, misleading analysis of a rather broad field of socio-legal activities. Normally, a single law school is not sufficiently equipped to carry out such research. Nor is temporary support, such as was awarded in this case by the Commission, a proper substitute for the necessary permanent infrastructure.

May the sponsors of this Institute keep their minds open!