COOPERATION IN THE TAKING OF EVIDENCE: THE EUROPEAN ATTITUDE

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Abstract

Access to justice – a fundamental right of European citizens – also includes access to evidence. In our globalized world it often happens that litigation starts in one country and evidence is located in another country. Nevertheless, the topic of taking of evidence abroad is highly controversial. In the European area, Regulation 1206/2001 tries to foster cooperation between courts of the Member States. By focusing on the Regulation, this article – through an analysis of decisions of the European Court of Justice and of national courts – examines the regulation's advantages and disadvantages and underlines its silence on the most crucial question, that is the exclusive or not exclusive character of its procedures.

Accès à la justice, ce principe fondamental pour les citoyens européens, signifie aussi accès à la preuve. Dans un monde désormais globalisé, il arrive souvent que les litiges naissent dans un pays et que les preuves soient situées dans un autre pays. Néanmoins, la question de l'obtention des preuves à l'étranger reste encore très controversée. Dans le domaine européen, le Règlement n° 1206/2001 tente de favoriser la coopération entre les juridictions des États membres. Mettant l'accent sur le Règlement, tout en analysant les décisions de la Cour européenne de justice et des tribunaux nationaux, l'article examine les points positifs et négatifs du Règlement, et s'interroge en particulier sur la question du silence qui règne à propos de la question la plus cruciale: le caractère exclusif ou non exclusif de ses procédures.

Zugang zur Justiz – ein Grundrecht für europäische Bürger – umfasst auch den Zugang zu Beweismitteln. In unserer globalisierten Welt kommt es oft vor, dass ein Rechtsstreit seinen Ursprung in einem Staat hat, während die Beweismittel in einem anderen Staat belegen sind. Dennoch ist das Thema der Beweisaufnahme im Ausland sehr umstritten. In der Europäischen Union versucht die Verordnung Nr. 1206/2001 die Zusammenarbeit zwischen den Gerichten der Mitgliedstaaten zu verbessern. Der Beitrag untersucht die Stärken und Schwächen dieser Verordnung durch eine Analyse von Entscheidungen des Europäischen Gerichtshofes und nationaler Gerichte und hinterfragt ihr Schweigen zu den meisten grundlegenden Fragen, etwa zu dem ausschließlichen oder nicht ausschließlichen Charakter seiner Verfahrensmechanismen.

L'accesso alla giustizia – principio fondamentale per il cittadino europeo – per essere effettivo comprende il diritto di accesso alla prova. Nell'attuale società della globalizzazione succede spesso che un processo si svolga in un paese e la prova dei fatti per esso rilevanti si trovi invece in un altro paese. Il tema dell'assunzione all'estero delle prove resta, però, un tema altamente controverso. Nello spazio europeo il regolamento n. 1206/2001 è lo strumento teso a favorire la cooperazione tra i giudici degli stati membri. L'articolo è appunto dedicato ad una riflessione sul regolamento, esaminandone, anche grazie all'analisi delle decisioni sul tema della Corte europea di giustizia e di alcune corti nazionali, i profili positivi e quelli negativi, ponendo in particolare in luce il silenzio su quella che si sta rivelando la questione ermeneutica più importante, ossia il carattere esclusivo oppure no dei meccanismi di cooperazione giudiziale dal regolamento disegnati.

El acceso a la justicia –un principio fundamental para los ciudadanos europeos- comporta también el acceso a la prueba. En un mundo globalizado ocurre con frecuencia que el proceso comienza en un Estado y que la prueba se encuentra situada en otro. El tema de la obtención de pruebas en el extranjero, sin embargo, sigue siendo altamente controvertido. En el ámbito europeo, el Reglamento 1206/2001 trata de favorecer la cooperación entre los tribunales de los Estados miembros. Centrándose en el Reglamento, y sobre la base del análisis de las resoluciones del Tribunal Europeo de Justicia y de los tribunales nacionales, el presente artículo examina los aspectos positivos y negativos de la regulación y subraya su silencio sobre una cuestión crucial, como es el carácter exclusivo o no de los procedimientos establecidos en él.

Keywords: abroad; Europe; evidence; taking

Mots-clefs: transfrontière; Europe; preuve; obtention des preuves

Stichwörter: grenzüberschreitend; Europa; Beweis; Erhebung

Parole chiave: estero; Europa; assunzione delle prove; prove

Palabras clave: extranjero; Europa; obtención de pruebas; pruebas

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Summary

I. INTRODUCTION

Access to justice – as set forth by article 6 of the Convention of the Human Rights and by article 47 of the Charter of Fundamental Rights – is a fundamental guarantee to all European citizens. The guarantee, however, is void if the parties do not have the possibility of establishing the facts relevant to the case.[1] To establish facts parties need access to evidence, and in our contemporary world, characterized by continuous cross-border exchanges of goods and people and the increasing integration between the countries' economies, it may often happen evidence is located in a state other than the state where litigation takes place.

In these situations the gathering of evidence is far from simple. On the one hand the sovereignty of other states is to respect. On the other hand the differences, often substantial, of the procedures whereby evidence is taken are to consider. Common law and civil law jurisdictions, as we know, have distinct styles of evidence-taking.[2] These differences are not accidental, but deeply-rooted in the history of the two families. They reflect a distinct structure of the proceedings that mirrors a different balance of powers between the court and the parties and a different ideology of litigation. Discovery devices are, in this respect, emblematic. Traditionally absent in civil law systems, they have been for centuries a crucial feature of Anglo-American systems; they are closely connected with the division of the proceedings in the pre-trial and trial phases and, grounded on the activities of the parties' lawyers rather than of the court's, they are consistent with the adversarial character of the common law litigation.

The scenario implies – in order to guarantee citizens access to evidence located abroad – the building of instruments of cooperation, instruments that at the same

1 Cf. Italian Constitutional Court, decision 20 February 1997, n. 46, in www.cortecostituzionale.it.

2 In the Anglo-American systems we have an adversary presentation of evidence by battling lawyers where witnesses are examined and cross-examined by the lawyers and experts are presented by the parties on the same basis as other witnesses; in the European-continental process, on the contrary, it is the court that conducts the examination of the witnesses and appoints the experts. In addition, in the Anglo-American systems the parties are compelled to disclose all relevant information, while in continental Europe systems they do not have a similar duty.

time have to be respectful of the limits of sovereignty of foreign states and able to collect evidence effectively so as to give the parties and the court information useful to the case.

In this direction has moved the Hague Conference on Private International Law, that in 1970 adopted a Convention specifically devoted to the "taking of evidence abroad in civil or commercial matters".[3] The idea was to build a "bridge" between common law and civil law traditions, combining the formal and official function of evidence-taking typical of the civil law approach, with the lawyers' initiative typical of common law.[4] Centred on the role of the states' "central authority", the Convention designs two methods for the taking of evidence: by letters of request[5] and by direct taking through diplomats and commissioners.[6]

The Hague Convention has not proven successful. The "bridge" between traditions has broken on article 23, under which a contracting state may declare that it will not execute letters of request issued for the purpose of obtaining "pre-trial discovery of documents as known in common law countries". The provision has generated a *Justiz-Konflikt* between the United States and the rest of the world (and specifically Europe).[7] European contracting states made the reservation permitted by article 23. Moreover, some of them issued the so-called blocking statutes, i.e. statutes imposing a penal sanction on nationals performing foreign discovery requests non-compliant with the Convention.[8] American courts were ready to reply, by giving a limited interpretation of the Convention scope of application, which led to the well-known

3 Currently the number of contracting states to the Convention – opened for signature on 18 March 1970 – is 56 (last update: 25.01.2012, see the list on www.hcch.net).

4 The initiative of the Convention came largely from the US. See the United States *memorandum*, in *Conférence de La Haye de droit international privé. Actes et documents de la onzième session*, IV, The Hague, 1970, 15–18.

5 The request of the court is transmitted to the central authority of the state where the evidence is located, that forwards the letters of request to the court which, in turn, takes the evidence. The court applies its own law as to the procedures to be followed, but will comply with a request of the requesting court to follow a special method, unless this is incompatible with the internal law or is in opposition to internal practices or by reason of practical difficulties (cf. article 9 of the Convention).

6 Following the permission of the central authority of the state where the evidence is located (articles 15–18 of the Convention).

7 For an effective overview of the conflict cf. Lowenfeld, *International Litigation and the Quest for Reasonableness*, Oxford, 1996, 137.

8 As to France, see Law 80–538 of 16 July 1980, which prohibits responding to discovery requests that do not comply with the procedures of the Convention and inflicts penal sanctions on citizens failing to observe them. For one of the rare example of a sentence under the statute cf. *Cour de cassation, chambre crim.*, 12 December 2007, *In re Christopher X*, Juris-Data No. 2007–83228, which confirmed the judgment of the Paris *Cour d'appel*, 28 March 2007, that sentenced the French correspondent of an American lawyer, assigned to a case in the United States against a French company, for violating Law 80–538.

decision by the US Supreme Court in the *Aérospatiale* case[9], where the Convention procedures were considered just as an auxiliary instrument, whose application requires "a prior scrutiny in each case of the particular facts, sovereign interests and likelihood that resort to those procedures will prove effective".[10]

If the real crisis of the Convention has turned on discovery requests, other negative aspects had been pointed out[11]: limited usefulness, in terms of evidence results, of its procedures, elevated costs, and delays.[12] The average time to get a request executed is undoubtedly not short: the hearing of a party or a witness rarely takes less than six months, and the appointment of an expert and the preparation of the expert opinion usually take over twelve months.[13]

II. EC REGULATION 1206/2001: OBJECTIVES, STRUCTURE, AND RULES

The problematic application of the Hague Convention, together with the fact that not all EU Member States had signed the treaty[14], led, in the years in which the European legislator – having abandoned the idea of a European code of civil

9 *Société Nationale Industrielle Aérospatiale versus United States District Court for the Southern District of Iowa*, 1987 LEXIS 2615. For an analysis of the case cf. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale decision*, *Tulane Law Review* (63), 1989, 525 ff.

10 The Supreme Court examined four possible interpretations of the relationship between the Hague Convention and the US federal discovery rules: the Convention excludes any other discovery procedures; the Convention requires first, but not exclusive, use of its procedures; the Convention establishes a supplemental set of discovery procedures, which are strictly optional, to which concerns of comity nevertheless require first resort by American courts; the Convention has to be viewed as an undertaking to facilitate discovery to which an American court should resort, after considering the situations of the parties before it, as well as the interests of the foreign state concerned. The first two of the interpretations – according to the language and the negotiation history of the Convention – were rejected, nor was the third interpretation accepted either (in many cases, the Convention procedures 'would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the federal rules'); therefore – the Court concluded – the Convention merely represents an auxiliary instrument.

11 For a proposal of a new Convention on the taking of evidence abroad cf. Murray, *Taking Evidence Abroad: Understanding American Exceptionalism*, in Stürner-Kawano (ed. by), *Current Topics of International Litigation*, Tübingen, 2009, 211–213.

12 See the conclusions and recommendations of the Special Commission on the practical operation of the Evidence Convention, The Hague, 2–12 February 2009, point 42.

13 Cf. the reports of the Special Commissions on the practical operation of the Convention and the responses to the questionnaire drawn up by the American Bar Association (*Report on Survey of Experience of US Lawyers with the Hague Evidence Convention Letter of Request Procedure*, 9 October 2003), all available on the Hague Conference's website, www.hcch.net).

14 When the Evidence Regulation was adopted, the Hague Evidence Convention just applied between eleven of the at that time Member States of the European Union (see recital 6 to the Regulation).

procedure[15] – started the building of the European judicial area, to the adoption of Regulation 1206/2001.[16]

The title itself of the Regulation – "on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters" – proves the lineage from the Convention with, in addition, the emphasis on state courts, instead of on state central authorities, cooperation. Structured in three chapters and twenty-four articles, the Regulation provides two different forms of cooperation.

First, the court of the state where the process is pending – the requesting court – asks the court of the state where the evidence is located – the requested court – to collect it. The mechanism is simpler compared to the Hague Convention. The Regulation removes the need to transmit the request to the central authority[17] which, in turn, forwards it to the court: the requesting court directly asks the other court to gather the evidence.[18]

Second, the requesting court may collect evidence in the other state (once authorized of its central authority[19]), directly or through any other designated person. The direct by initiative by the requesting court is considered as the

15 The idea has been embodied in the results of the Storme Commission (cf. Storme, *Rapprochement du Droit Judiciaire de l'Union européenne*, Dordrecht, 1994).

16 The Regulation was adopted by the European Council on 28 May 2001. The proposal for a Regulation on cooperation on the taking of evidence was made by a Member State, Germany, and published in November 2000 (in *Official Journal of the European Communities*, 3.11.2000, C 314/2). Its political support can be found in the Tampere European Council conclusions, which recalled legislation in the area of procedural law should be enacted, in particular as to the cooperation of courts in evidence taking (recital 3 to the Regulation, cf. Storskrubb, *Civil Procedure and EU Law*, Oxford, 2008, 114 ff.). Nourissat (*Publication du rapport d'application du règlement relatif à l'obtention des preuves en matière civile et commerciale*, *Procèdures*, 2008, n. 109, 15) talks of the Regulation 1206 as the poor relative of the European judicial area, and affirms that the literature about it is almost non-existent. The opinion is, perhaps, too severe. Cf., for instance, Payan, *Quel bilan pour le Reglement (CE) n° 1206/2001*, in Douchy Oudot-Guinchard (ed. by), *La justice civile eurepeenne en marche*, Paris, 2012, 116 ff.; Paulino Pereira, *La coopération judiciaire en matière civile dans l'Union euroéenne*, in *Revue critique de DIP*, 2010, 22 ff.; Villamarín López, *La obtención de pruebas en el proceso civil en Europa*, Madrid, 2005; Trocker, *Giusto processo e cooperazione europea nell'assunzione delle prove in materia civile*, in *Studi in onore di Giuseppe Tarzia*, I, Milano, 2005, 623 ff.; Lebeau-Niboyet, *Regards croisés du processualiste et de l'internationaliste sur le règlement CE du 28 mai 2001 relatif à l'obtention des preuves civiles à l'étranger*, *Gazette du Palais*, 2003, 221 ff.; Fumagalli, *La nuova disciplina comunitaria dell'assunzione delle prove all'estero in materia civile*, *Rivista di diritto intermazionale privato e processuale*, 2002, 327 ff.; Berger, *Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelsachen*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2001, 522 ff.

17 Central authorities – central bodies, under article 3 of the Regulation – continue to exist and be used in high administration (cf. articles 3 and 17).

18 Article 10 of the Regulation. Under articles 11 and 12, the parties and, if any, their representatives, and representatives of the requesting court have the right to be present during the evidence collection.

19 Article 17: direct taking of evidence by the requesting court, or by its delegate, may take place once the request is accepted by the central authority, which may refuse direct taking of evidence only if it 'is contrary to fundamental principles of law in its Member State'.

most innovative feature of the regulation[20], since it implies the renunciation of the principle of territoriality on evidence-taking, thus opening out the European judicial area. This possibility, however, applies only when the individual spontaneously performs the request and no measures of compulsion are necessary. The restriction might be unduly time-consuming and expensive.[21] By analogy with article 18 of the Hague Convention, it might have been useful to allow the requesting court to apply with the other state for the appropriate assistance to obtain evidence by compulsion.

Key words in the Regulation are simplification, acceleration and efficiency. As to simplification, alongside the direct cooperation between courts and the direct taking of evidence, the Regulation introduced the use of model forms[22]: the forms designed are ten and they cover all steps of the procedures of both mechanisms of the evidence taking. The procedures are accelerated by fixing time limits – in a rather obsessive way – for the execution of the activities: for instance, the taking of evidence by the requested court must be concluded within ninety days and the authorisation allowing the requesting court to directly collect the evidence must be either granted or denied within thirty days and so forth. However, no sanction is envisaged for non-compliance within the fixed time limits. Definitely in the direction of a greater efficiency of the taking of evidence is the possibility of using communication technologies – promoted by article 10 (4) – and in particular video and teleconference.[23]

Cooperation is between courts.[24] The Regulation does not provide for the gathering of evidence – on the contrary provided for under the Hague Convention – by diplomatic or consular agents and commissioners. The omission does not imply that evidence could not be taken by this procedure. Under article 17 (3), "any person" could be designated for the direct taking of evidence, and thus the requesting court may appoint a consular or diplomatic agent or a commissioner as well.[25]

Under article 1, the Regulation applies in "civil or commercial matters". The formula is identical to the one used in the Hague Convention, which has been subject to different interpretations. Excluding criminal matters, there are doubts as to the application of the Convention to public law matters in general and to fiscal

20 This feature of the Regulation is underlined by Cadiet, *Observations sur l'internalisation du droit de la prevue*, in *Studi in onore di Giuseppe Tarzia*, I, Milano, 2005, 322–323.

21 Lebeau-Niboyet, *supra* note 16, 228.

22 In fact, the failure of the Hague Convention to provide mandatory model forms has created several difficulties (see the conclusions and recommendations of the Special Commission, *supra* note 12, point 54).

23 The *Practice Guide for the application of the Regulation*, drawn up by the Commission Services, at 18 f. qualifies the modern means of communication as 'considerably' important.

24 The Regulation does not define what is meant by 'court'. According to the *supra* quoted *Practice Guide*, 6, the concept does not cover arbitral tribunals.

25 Cf. Storskrubb, *supra* note 16, 120; Lebeau, *Règlement (CE) n° 1206/2001*, in Cadiet-Jeuland-Amirani Mekki, *Droit processuel civil de l'Union Européenne*, Paris, 2011, 194.

ones in particular. While civil law systems exclude recourse to the Convention in such cases[26], the interpretation by common law systems includes all non-criminal matters, and on the point the United States and the United Kingdom[27] share the same view. What about the Evidence Regulation? The restrictive interpretation is usually sustained, on the idea of adopting the same approach to Regulation 44/2001 and Regulation 1206/2001.[28] The conclusion is not unavoidable: the Brussels Convention and Regulation 44/2001 explicitly exclude "tax, custom and administrative matters". On the contrary, Regulation 1206 does not mention such an exclusion. The extensive interpretation is therefore viable and has to be preferred, since it promotes a broader use of the Regulation, and thus greater European judicial cooperation.[29]

The Regulation does not define the concept of "evidence".[30] Article 4, dedicated to form and contents of the request, makes reference to the "examination of a person" and to "documents or other object to be inspected", i.e. all means of evidence, thus showing an openness to all procedures whereby evidence is taken. As a matter of fact, the German proposal excluded "inquiries to be conducted by an expert"[31], but the exclusion is not provided for by the Regulation, while article 18 makes direct references to experts.[32] Obviously, differences in the procedures whereby evidence is taken may often cause problems as to the efficacy and probative value of the results of evidence taken: the requested court executes the request under its law that may be substantially different from the law applicable by the

26 See Fumagalli, *supra* note 16, 330 ff.

27 As to the United Kingdom, see the decision of the House of Lords, March 3, 1989 (*In re State of Norway*, with notes by Boyd, *American Journal of International Law* (83), 1989, 933–936). As to the United States, see the report of the US delegation to the Special Commission on the operation of the Hague Convention: 'the United States will honour requests under the Convention for evidence to be used in foreign administrative proceedings (including fiscal matters), civil law suits drawing into issue the enforcement of public laws, and family relations' (*Conférence de La Haye de droit international privé. Actes et documents de la quatorzième session, Actes et documents*, IV, La Haye, 1983, 400).

28 See Fumagalli, *supra* note 16.

29 The *Practice Guide for the application of the Regulation* says that the notion of 'civil and commercial matters' is an autonomous concept of Community law, which has to be interpreted under the objectives of the Regulation and of the EC Treaty, and gives a series of examples (5 f. of the *Guide*, *supra* note 23).

30 The above quoted *Practice Guide*, 6, cites, as examples, 'hearing of witnesses, of the parties, of experts, production of documents, verifications, establishment of facts, expertise on family or child welfare'. Betetto, *Introduction and practical cases on Council Regulation (EC) No 1206/2001*, *The European Legal Forum*, 2006, 137 ff., affirms that the concept of evidence taking must be interpreted autonomously and certain points of support are contained in the statute of the EU Court of Justice and its rules of civil procedure.

31 Cf. article 1 (1) of the Proposal, *supra* note 16.

32 Storskrubb, *supra* note 16, 121.

requesting court[33] (but the requesting court may ask for the request to be executed with a special procedure provided for by its law or by video or teleconference, article 10).

The evidence – article 1 (2) – has to be intended for use in pending or in contemplated proceedings. The expression "contemplated proceedings" leads to consider that requests under the Regulation also covering ancillary measures aimed, before the commencement of a lawsuit, at the collection and preservation of evidence.[34]

Being a Regulation, it did not have to be implemented by national states.[35] Still, to foster and clarify its application some states adopted specific domestic rules. An example is Germany, where the *EG-Beweisaufnahmedurchfüringsgesetz* of 4 November 2003 introduced a chapter in the book 11 of the *Zivilprozessordnung* on the "Taking of evidence in accordance with Council Regulation (EC) No 1206/2001".[36]

III. FIRST DATA ON THE APPLICATION OF THE REGULATION

The Evidence Regulation applies since 1 January 2004. Every five years – pursuant to article 23 – the EU Commission is obliged to report on its practical application, paying special attention to the mechanism of direct taking of evidence and to costs.

Thanks to the first report – published at the end of 2007[37] – we have some data and can make some observations about the fulfillment of the Regulation's objectives, in terms of improvement, acceleration and simplification of the cooperation between courts.

33 Biavati, *Problemi aperti in materia di assunzione delle prove civili in Europa*, *Rivista trimestrale di diritto e procedura civile*, 2005, 444 ff., suggests that, in order to render as effective as possible the evidence taking, the requesting court must evaluate the evidence according to the rules of the requested court.

34 The measures for preservation of evidence were on the contrary expressly excluded by the German proposal of the Regulation, art. 1 (1), *supra* note 16. On the topic cf. below the arguments of the Tedesco case.

35 The Regulation applies to all Member States, with the exception of Denmark (cf. recital 22 and article 1).

36 See sections 1072–1075 of the ZPO. Another, recent, example, is Latvia, where the code of civil procedure has been supplemented with rules concerning transnational cooperation in obtaining evidence (cf. Kostina, *Latvia: a civil approach*, *European Lawyer*, 2010, 95, 48–49).

37 EU Commission, *Report on the application of the EC Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, Bruxelles, 5.12.2007. The report was preceded by an empirical study, based on a survey carried out from November 2006 to January 2007 (*Study on the application of Council Regulation N° 1206/2001*, March 2007). 11.000 professionals involved in the application of the Regulation were invited to answer two kinds of interviews, by written questionnaires and by telephone interviews.

The Regulation – it appears from the report – has been rarely used, probably because it was not sufficiently known, due to the relative novelty of the instrument, among legal practitioners.[38]

As to the compliance with time limits, in most cases requests for the taking of evidence were executed within the 90-day limit (less than a third of requests went over the limit). The time, however, differed from country to country. If in countries like Italy and Spain the average time was more than six months, in countries like Sweden and the Netherlands the average time was less than ninety days.

According to the Regulation design, cooperation is between courts, with a participation of central authorities limited to exceptional cases. As a matter of fact, in the majority of cases (65%) the requests were not transmitted directly, but through the central authorities, again probably because the mechanism dictated by the Regulation is relatively recent.

One of the novelties of the Regulation was the introduction of the obligatory use of predetermined forms. The novelty was usually perceived as unproblematic and positive in terms of simplicity and clarity, even if from some answers it was indicated the risk of an excess of inflexibility and bureaucracy.[39] The preparatory study of the report underlined that there is not a language accepted by all Member States (quite obviously, the most commonly accepted language is the English one) and proposed to reach an agreement as to the choice of a common language for cross-border communications.[40]

Very limited has been the use of the procedure for the direct taking of evidence (in some countries it was never used, the courts that used it the most were in Austria, France, Germany, and Poland). The requests were directed to obtain witness evidence (including expert evidence), production of documents, site inspections, especially related to family and road accident cases.[41]

Also rare has been the use of communication technologies and the study recommended plans for the implementation of videoconferencing systems.[42]

As to the concept of evidence, not defined by the Regulation, there have been diverging interpretations about the taking of DNA and blood samples.

The conclusion of the report was that no modifications of the Regulation are necessary, but its functioning has to be improved. On the one side the Regulation is not enough known, on the other side the use of communication technologies and the direct taking of evidence are to be fostered and developed.

38 We will know whether the use of the Regulation has meanwhile increased thanks to the next report on its application, that is expected in 2012–2013, cf. the Communication from the Commission, *Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Program*, Brussels, 20.4.2010, COM(2010) 171 final, 23.

39 *Study on the application of Council Regulation N° 1206/2001*, *supra* note 37, 59.

40 *Study on the application of Council Regulation N° 1206/2001*, *supra* note 37, 62 s.

41 Cf. the *Study on the application of Council Regulation N° 1206/2001*, *supra* note 37, 91 s.

42 *Study on the application of Council Regulation N° 1206/2001*, *supra* note 37, 69.

The study and the report only considered the practical functioning of the Regulation's mechanisms of cooperation[43] and did not face the "big" issues arising from its application by national courts.

IV. INTERPRETATIVE ROLE OF THE EUROPEAN COURT OF JUSTICE

At present, the EU Court of Justice has resolved on just one preliminary ruling on the interpretation of the Regulation.[44] The reference was made by a Polish court[45] in the course of a proceedings concerning a damages claim between an employee, Mr. Weryński, and his former employer, Mediatel. The Polish court requested an Irish court – the Dublin Metropolitan District Court – to examine a witness under Regulation 1206. The requested court made the witness examination conditional on the payment of the witness's expenses and asked the requesting court that amount. The Polish court, then, stayed the proceedings and referred to the Court of Justice the question on whether the requested court had the right to demand expenses or should rather cover them with its financial resources.

The sum in question was very small[46], but the issue – it is possible or not to refuse to execute a request on the grounds of expenses when article 18 at (1) states that "the execution of the request (...) shall not give rise to a claim for any reimbursement of taxes or costs" and at (3) specifies that, except for the opinion of an expert, "a deposit or advance shall not be a condition for the execution of a request" – raised the problem of the different attitudes of common law and civil law systems towards the taking of evidence.

The position of the Irish court, in fact, was based on the rule of Irish law under which a witness is obliged to appear before a court only after receiving payment for travel expenses. And witnesses expenses, thanks to the adversarial nature of Irish civil proceedings, are the responsibility of the party summoning the witnesses rather than of the court. Therefore, they are not court "costs" under article 18: the requested

43 For an English application of the procedure established by the Regulation see the decision by the Judge of the High Court Keith in the case *Paul Sayers and Others v. Smithkline Beecham Plc*, 5 April 2004, 2004 WL 1174310.

44 EU Court of Justice, Case-283/09, Judgment 17 February 2011, *Arthur Weryński v Mediatel*, http://curia.europa.eu. For a comment cf. Franzina, *I costi del processo nello spazio giudiziario europeo: considerazioni alla luce della sentenza Weryński*, *Rivista internazionale di diritto privato e processuale*, 2011, 675 ff.; Fortunova, *Le renvoi préjudiciel dans le cadre de coopération judiciaire d'obtention des preuves en matière civile et commerciale*, *Revue des affaires européennes*, 2011, 201 ff.

45 Reference for a preliminary ruling, *Arthur Weryński v Mediatel*, 10 October 2009, Case C-283/09, *Official Journal of the European Union*, C 244/2.

46 The sum required was forty euros. As a matter of fact, the sum was paid by the requesting court and then the witness examined by the Irish court before the decision of the Court of Justice.

court could not be held responsible for their payment which was therefore due by the requesting court.

The Court of Justice, in its judgment, rejected the Irish position. Faced to different attitudes of national systems, the value to secure is the effectiveness of the Regulation, so that the possibility of refusing to execute a request should be confined to strictly limited exceptional situations.[47] The concept of costs must be autonomously defined under European law and should not depend on classifications under national law. With regard to the terms used in article 18, taxes should be understood as the sums received by the court for carrying out its functions, whereas costs are to be understood as the sums paid by the court to third parties in the course of proceedings, in particular to experts or witnesses. The spirit and purpose of the Regulation – which is to enable evidence to be taken in a cross-border context in a simple, efficient and rapid way – also supports a broad understanding of the concept of taxes and costs within the meaning of article 18.

Another preliminary ruling was already referred by an Italian court in 2006.[48] In this case, an Italian plaintiff applied – in connection with an intellectual property infringement case – the Court of Genoa for a "description" of goods and samples located in London. The Court requested the cooperation of the High Court under Article 4 of the Evidence Regulation. The Senior Master of the Queen's Bench division declined to comply, on the grounds that "search and seizure of goods and documents fall outside the practice of the agents of the Senior Master". The Italian Court then referred the case to the European Court, asking whether a request for a description of goods under Italian law falls within the forms of the taking of evidence prescribed by Regulation 1206/2001 and, whether the requested court would be obliged to act in accordance with article 7 of the Regulation.

The Court of Justice did not answer. Before the decision, the Italian proceedings had been withdrawn and the case was removed from the register of the European Court.[49] But the Advocate General had the time to deposit her opinion[50], which allows us to make a few comments. In her extensive opinion, firstly the Advocate examined the concept of evidence and observed that the aim of the Regulation – simplification and acceleration of the cooperation between courts in the taking of evidence – is facilitated if the mechanisms provided for are applied to as many judicial measures for obtaining information as possible. Therefore the "concept of evidence

47 See also the opinion of the Advocate general Kokott, delivered on 2 September 2010, points 51 ff., http://curia.europa.eu.

48 Reference for a preliminary ruling from the Tribunale civile di Genova lodged on 24 March 2006, *Alessandro Tedesco v Tomasoni Fittings Srl*, *Official Journal of the European Union*, 1.7.2006, C 154/8. For a comment of the case cf. Fumagalli, *Il caso 'Tedesco': un rinvio pregiudiziale relativo al regolamento n. 1206/2001*, in Venturini-Bariatti (ed. by), *Nuovi strumenti del diritto internazionale privato*, Milano, 2009, 393.

49 Order of the 27 September 2007, in *Official Journal of the European Union*, 22/12/2007, C 315/31.

50 Opinion of Advocate general Kokott, delivered on 18 July 2007, http://curia.europa.eu.

taking should not be interpreted too strictly" and includes procedures, like the Italian description, for collecting and preserving information even before the beginning of the main proceedings. The Advocate noted that information should be specified and described with sufficient precision and be directly linked to the subject-matter of the dispute in order to exclude the so-called "fishing expeditions".[51] The Advocate then considered the grounds for refusal to execute requests provided for by article 14 (2) and in particular when "the execution of the request (...) does not fall within the function of the judiciary". The guiding principle – as the Court later stressed in the Weryński case – is that, in order to secure the effectiveness of the Regulation, the possibility to refuse cooperation should be limited to narrowly defined exceptional situations. The United Kingdom government took the view that the requested measures fell outside the functions of the English judiciary: under common law, the obtainment of evidence is not a duty of the court or judicial agencies, but rather of the parties. The supervising solicitor who, under section 7 of the Civil Procedure Act, serves and performs a search order is an officer of the court, but not a court agent. In response, the Advocate[52] observed that a distinction must be drawn between ordering a measure and the performance thereof, and that the decisive factor is that courts are entitled to order the requested measures. Nor is it an imperative requirement that judicial functions may be exercised only by persons belonging to the court system.

In the Tedesco case, therefore, we find once again the fundamental issue already seen in the Weryński case, i.e. the different approach in the taking of evidence by common law and civil law systems. The basic idea of the Regulation on cooperation between courts reflects the civil law official idea of the taking of evidence and therefore fits with difficulty to the common law taking of evidence style, with protagonists the parties and their lawyers.

V. RELATIONS BETWEEN EC COOPERATION INSTRUMENTS: THE ST. PAUL CASE

The Tedesco case opened another perspective.[53] In the observations submitted to the Court, it was suggested – by the United Kingdom government – that the measures at issue could have been sought directly before an English court on the basis of Regulation 44/2001.

51 In this part of the opinion of the Advocate it is clearly present an echo of the debate developed on article 23 of the Hague Convention. As a matter of fact, if the Evidence Regulation does not include any article equivalent to article 23, in 2001 the EC Council adopted the statement n. 54/01, that affirms 'the scope of application of this Regulation shall not cover pre-trial discovery, including the so-called 'fishing expeditions', Brussels, doc. n. 10571/01, *Monthly Summary of Council Acts*, May 2001.

Under article 31 of the Regulation 44/2001, an application may be made "for such provisional, including protective, measures as may be available under the law of that state, even if (..) the courts of another state have jurisdiction as to the substance of the matter". Provisional measures are – according to the Court of Justice[54] – measures which are intended to preserve a factual or legal situation so as to safeguard rights. The definition could apply to the evidence pre-action proceedings: they are intended to preserve evidence to be used in the main proceedings and to secure the right to evidence of the parties. A European citizen, therefore, could apply directly to the competent court of the state where the evidence is located requesting evidence preservation under the *lex fori*. There was a large consensus.[55]

The opinion expressed by the Advocate General, however, was negative: in the light of the Court of Justice case law, the possibility of having evidence preserved directly by a court in the place in which the evidence is situated cannot be envisaged.

The reference was to the decision of the Court of Justice in the St Paul's Dairy case.[56] The question asked, by a Dutch court, was whether the preliminary examination of witnesses under Dutch law[57] would qualify as a provisional measure in the sense of Article 31 of the Judgment Regulation.[58] The answer of the Court was negative. The granting of the measure is not subject to any particular conditions. Function of the mechanism[59] is not only to prevent evidence to be lost, but, above all, to enable citizens involved in future civil actions to obtain clarification of the facts, in advance, to better assess their procedural positions and decide whether to bring forward a case. In the absence of any justification other than the interest of the applicant in deciding whether to bring a case, the measure – asserted the Court of Justice – does not pursue the aim of article 31 and cannot be qualified as a provisional measure.

Moreover – we read at the end of the judgment –, the application of Article 31 could be used as a means of sidestepping the rules of the Evidence Regulation, governing the transmission and handling of applications made by a court wishing to

54 EU Court of Justice, Case-261/90, Judgment 26 March 1992, *Reichert and Kockler v. Dresdner Bank AG*, http://curia.europa.eu.

55 Cf. Hess, *Preservation and Taking of Evidence in Cross-Border Proceedings*, in Nuyts (ed.), *International Litigation in Intellectual Property and Information Technology*, The Netherlands, 2008, 294; Stürner, *Das ausländische Beweissicherungsverfahren, Praxis des internationalen Privat- und Verfahrensrechts*, 1984, 299 ff.

56 EU Court of Justice, Case-104/03, Judgment 28 April 2005, *St. Paul Dairy Industries NV v. Unibel Exser BVBA*, http://curia.europa.eu. For a comment see Nuyts, *Le règlement communautaire sur l'obtention des preuves: un instrument exclusif?*, *Revue critique DIP*, 2007, 53 ff.

57 According to Article 186 of the Dutch Code of Civil Procedure, a court may, in cases where the law allows witness evidence, order a provisional hearing of a witness before the beginning of the action.

58 The reference – lodged on 6 March 2003 – related, in fact, to the interpretation of Article 24 of the Brussels Convention, but the text of Article 24 was transposed in Article 31 of the Judgement

have an inquiry carried out in another state. The conclusion of the Court of Justice in favour of Regulation 1206/2001 is strengthened by the remarks of the Advocate General who, in his opinion, affirmed that Regulation 1206/2001 prevails over other agreements or arrangements concluded by the Member States, included Regulation 44/2001.[60]

As a matter of fact, the decision by the Court of Justice may be differently read. In the St. Paul's case, the Court did not affirm that a pre-action evidence measure never qualified as a provisional measure under Article 31 of the Judgment Regulation, but that it is so "in the absence of any justification other than the interest of the applicant in deciding whether to bring proceedings on the substance". This means that when there is another, just, justification the applicant may directly apply with the court in the place where the evidence is located and ask for a provisional measure under the Judgment Regulation. When can this happen? A just justification can be seen in the risk of losing evidence or in the necessity to define without delay the main proceedings.[61] The mechanisms of cooperation between courts provided by the Evidence Regulation need lengths of time that are not required by the direct application to the local court. The Regulation – as noted above – tries to accelerate cooperation by fixing time limits, but no sanctions are provided for non-compliance, and in any case, the time limits are rather lengthy.[62] In situations where delay may harm rights of European citizens, the latter should be free to apply directly, under article 31 of the Judgment Regulation, to the court of the Member State where the evidence is located.

Also according to this interpretation of the St. Paul decision, however, the possibility of obtaining information directly from the court of the place where it is located is limited and does not cover situations where the taking of evidence is not justified by the risk of harming the parties' rights.

VI. EXCLUSIVE OR NON-EXCLUSIVE CHARACTER OF THE REGULATION'S PROCEDURES

Does the position expressed by the Court of Justice in the St. Paul case mean that the mechanisms of cooperation between courts designed by the Regulation, are mandatory? This would mean that in the European judicial area courts are not allowed to use their so-called extra-territorial powers and cannot, for example, summon the witness who resides in another Member State to compare before them to give her testimony or order a party or a non-party to produce documents that are located in another Member State.

60 Opinion of Advocate general Ruiz-Jarabo Colomer, delivered on 9 September 2004, n. 61, http://curia.europa.eu.

61 See Nuyts, *Le règlement communautaire sur l'obtention des preuves*, *supra* note 56, 62 ff.

62 Cf. *supra*, at II.

The question may appear, to a naïve reader, quite easy to answer. As stated in the introduction, European states have been quite adamant in affirming the mandatory character of the Hague Evidence Convention procedure and have even introduced "blocking" statutes clearly aimed at obliging persons disclosing elements of evidence in their possession to do so by means of judicial cooperation.[63] As a consequence, one would expect these very same states to consider mandatory the cooperation instruments of the Evidence Regulation.[64]

Actually, the answer is not that obvious. The Regulation is silent on the point[65], and national courts of European states have repeatedly ordered the gathering of evidence abroad relying on their powers and without resorting to international forms of cooperation.[66]

The question was discussed in one of the last cases in which the Appellate Committee of the House of Lords gave an opinion[67] before dying and rising again as the Supreme Court.[68] In Masri v Consolidated Contractors the claimant – who was owed a judgment debt of several millions by the two defendants – sought and obtained an order against Mr. K., the former chairman and director, domiciled in Greece, of one of the defendants companies, for his examination in England in respect of the company's foreign assets. Mr. K. applied for the order to be set aside on the principal grounds that any order for the taking of evidence was regulated by the Evidence Regulation. The Master set aside the order for want of jurisdiction. The Court of Appeal[69] allowed the creditor's appeal, holding that Community law did

63 Le Berre-Pataut, *La recherche de preuves en France au soutien de procédures étrangères au fond*, *Revue de droit des affaires internationales*, 2004, n. 1, 55.

64 Strongly in support of the mandatory character of the mechanisms of cooperation set by the Hague Convention has spoken the EU Council in the response given on 29 July 2007 to the Permanent Bureau of the Hague Conference, but the view has not been supported by all EC states (and precisely not by Denmark and Greece, see Permanent Bureau, *The mandatory/non mandatory character of the Evidence Convention*, Preliminary Document n. 10, The Hague, December 2008, 3 ff.).

65 For Trocker, *Il regolamento (CE) n. 1206/2001*, in Taruffo-Varano (ed. by), *Manuale di diritto processuale civile europeo*, Torino, 2011, 304 ff., the silence of the Regulation means that it is to the *lex fori* to decide about it.

66 For French, German and British examples see Besso, *Taking of evidence abroad*, in Nuyts-Watté, *International Civil Litigation in Europe and Relations with Third States*, Bruxelles, 2005, 377 f. In the literature cf. Murray-Stürner, *German Civil Justice*, Durham, 2004, 568 f., who are of the opinion that witnesses resident abroad may be invited to appear at hearings for the taking of evidence in Germany, although their attendance may not be compelled, and a German court can require extra-territorial production of evidence by a party or even a witness associated with a party.

67 *Masri v Consolidated Contractors International Ltd*, 30 July 2009, [2010] 1 A.C. 90–144. For a comment cf. Whomoersley, *Principle and limits of jurisdiction*, *Law Quarterly Review*, 2010, 126(Apr), 171–175.

68 Established by the Constitutional Reform Act of 2005 and active since October 2009, the Supreme Court replaces the Appellate Committee of the House of Lords and is the highest appellate court of the United Kingdom.

69 Decision of the Court of Appeal, 8 July 2008, [2009] 2 WLR 699.

not displace the national law, that its wording was sufficient to include the order and there was no breach of international law or comity for the order to be made.

In the arguments brought before the Court by the Counsel for the defendants and by the (then) Master of the Rolls Sir Clark we find the interpretative elements underlying the two thesis of the mandatory or non-mandatory character of Regulation 1206/2001.[70] For the Counsel the Evidence Regulation is a "complete code for the taking of evidence between Member States" and is the sole and exclusive route by which evidence may be obtained from a non-party who is in the territory of another Member State; article 1, therefore, is to be broadly interpreted as to include an order for evidence to be obtained *from* but not *in* another Member State. On the contrary, for Sir Clark the Regulation concerns only the taking of evidence and therefore "applies where the requesting court wants another Member State to *take* evidence, or itself to *take* evidence directly in another Member State", but it does not apply to the situation in which an order is made by the court of the Member State with jurisdiction as to the substance of the matter.[71]

The House of Lords gave leave to appeal, but Lord Mance concluded that the European issue considered by the Court of Appeal did not arise, and it was not necessary to make any reference to the EU Court of Justice.[72]

In the near future though, a clear answer on the question will be provided by the Court of Justice. Two references for a preliminary ruling are in fact pending before the Court. The *Hoge Raad* of the Netherlands lodged on 7 April 2011 the first reference[73], asking to the Court whether the Evidence Regulation, and in particular article 1, has to be interpreted as meaning that a court wishing to hear a witness who resides in another Member State has always to resort to the methods envisaged by the Regulation, or if it also has the power to use the methods provided by its own national procedural law, thus directly summoning the witness. The Hof van Cassatie of Belgium lodged on 30 June 2011 the second reference[74], this time asking whether articles 1 and 17 of the Regulation must be interpreted as meaning that the court ordering an investigation by a judicial expert, to be carried out partly in the territory of the Member State to which the court belongs, but partly also in another Member State, should, for the direct performance of the latter part of the task, resort exclusively to the method referred to in article 17 of the Regulation.[75]

70 Cf. *Masri v Consolidated Contractors International Ltd, supra* note 67, 98 f., 112 ff.

71 Meyer Fabre, *L'obtention des preuves à l'étranger, Droit international privé*, années 2002–2004, Paris, 2005, 212, too, makes the distinction, noting that the court may decide to take the evidence where it is located – and in this case has to use the international cooperation instruments – but may also decide to 'faire venir à lui' the evidence, making for example an order to the party to produce a document that is located abroad.

72 *Masri v Consolidated Contractors International Ltd, supra* note 67, 144.

73 Case C-170/11, *Official Journal of the European Communities*, 18.6.2011, C 179/12.

74 Case C-332/11, *Official Journal of the European Communities*, 10.9.2011, C 269/31.

75 The German proposal (*supra* note 16, under article 1) under the experts directly appointed by the court with jurisdiction on the merits, conducting inquiries in another Member State without any prior consent or notification of that state being required, but the provision was deleted in the final version of the Regulation.

VII. CONCLUSIVE REMARKS

With the issue of the exclusive character of the Regulation procedures still unsolved, and awaiting the decision of the Court of Justice, some comments about the European attitude towards cooperation in the gathering of evidence are nevertheless possible.

The still limited application of the Regulation has proved that within the same European Union area the differences between the procedural systems of the Member States – differences that before being related to specific rules are related to the foundation principles of the law of evidence (and in particular to the diverse balance of powers between the courts and the parties) – collide on the trans-border gathering of evidence, preventing the effective functioning of a scheme of cooperation. As a matter of fact, the Regulation merely devised mechanisms of judicial cooperation between systems that remain not homogenous as to the law of evidence.[76] The point is clear to the Commission that, in its Action plan for implementing the Stockholm program, announced that the next report on the application of the Evidence Regulation (expected in 2012–2013) will be "if necessary followed by a proposal for revision which could include the establishment of common minimum standards".[77]

The sketched framework has highlighted another profile. The attitude – present in the decisions of the Court of Justice and in the opinions of the Advocate general – is that to apply the mechanisms of cooperation to as many measures for obtaining information as possible. This, however, is limited to the mechanisms designed by the Evidence Regulation, i.e. to cooperation between courts and on the initiative of the court which does have jurisdiction on the merits. On the contrary, the cooperation from a national court in favor of a European citizen – who has begun or intends to begin a proceedings before a court of another Member State and directly applies the court for the taking of evidence – has been, if not entirely excluded, extremely limited.[78] And this despite the existence, in the European judicial area, of article 31

76 Cf. Trocker, *Giusto processo e cooperazione europea, supra* note 16, 651, for a list of the differences currently present in the European national systems of the law of evidence.

77 Communication from the Commission, *Delivering an area of freedom, security and justice for Europe's citizens, supra* note 38, 23.

78 The reference is to the Court of Justice decision in the St. Paul case (*supra* at V). As a matter of fact, the position expressed by the Court of Justice in the St. Paul case does not seem quite followed by national courts. Consider a case decided by the *Cour d'Appel* of Paris on 29 June 2011. These were the facts: a Swiss company, Bobst, a holder of an European patent, after having had a *saisie-contrefaçon* carried out in France served a summons before the *Tribunal de Grande Instance* of Paris for infringement upon a German company, Heidelberg Postpress. The *Tribunal de Grande Instance* of Paris enjoined Heidelberg Postpress from continuing the marketing of the machine in dispute and ordered the defendant to pay to Bobst a sum of money. Heidelberg Postpress then appealed the decision, and in particular requested the *Cour d'Appel* to hold invalid a *saisie conservatoire* ordered by a Dutch Court and carried out in the Netherlands where had finally

of Regulation 44/2001, which, by allowing the application for "provisional measures", could be used for this form of cooperation.[79]

This limited approach towards cooperation was confirmed by the English High Court decision in the Dendron Gmh case[80], one of the first decisions concerning Regulation 1206. The issue was the collateral use of the evidence taken under the Regulation in other proceedings. Dendron commenced proceedings in England, seeking the revocation of a patent owned by the defendant at a time when opposition proceedings were progressing in other jurisdictions. The Judge allowed an application for a request to a German court for the examination and production of documents by an expert witness in Germany. The request was made under the procedure set out in the Evidence Regulation. Subsequently, the claimant applied for court's orders to use the evidence obtained in other proceedings (before the European Patent Office and on foot in Europe and in the US). Judge Laddie affirmed the restricted scope of the Regulation: even from its title it is apparent that it concerns cooperation between courts, the courts have to belong to Member States and the cooperation only applies to civil and commercial matters. Therefore, it does not apply in non-judicial proceedings, such as opposition proceedings in the European patent office, and any use outside that limited purpose is prohibited save with the permission of the requesting court or the person or parties from whom the evidence is being sought.

This attitude – cooperation is between European judicial courts, under the initiative of the court which has jurisdiction on the merits and under forms of indirect state control by central authorities or bodies, and with the use of evidence limited to the European area – is in striking contrast with the scenario opened in 2004 by the decision of the US Supreme Court in the case *Intel v Advanced Micro Devices*.[81] In a case involving competition proceedings pending before the European Commission, an American court was requested to order the production of documents, previously

been transported the machine subject of the French *saisie-contrefaçon* (thanks to this *saisie conservatoire* Bobst obtained documents which they used before the French Court as evidence of the materiality of the alleged infringement). Heidelberg Postpress requested that the *Courd'Appel* hold invalid this *saisie conservatoire* which, they affirmed, the Dutch Court had no jurisdiction to authorize since this operation, which was merely the continuation of the French *saisie-contrefaçon*, could only be ordered by the *Cour d'Appel*, before which this dispute was referred to, pursuant to Regulation 1206/2001. The *Cour d'Appel* rejected the argument and affirmed that the Regulation 'does not result in prohibiting the concerned party from performing itself all gathering of evidence which it considers useful to assert its rights in a foreign state pursuant to the law applying in that state'. The decision is available on http://kluwerpatentblog.com/files/2011/10/2011-06-29_CA_Paris_Heidelberg_Postpress_Deutschland_c_Bobst.pdf.

79 See Hess, *supra* note 55, 299, 301; Schlosser, in Hess-Pfeiffer-Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Munich, 2007, 321 f.

80 High Court, Chancery division, Patents court, Judge Laddie, March 23, 2004, *Dendron Gmh v The Regents of the University of California*, [2005] *1 Weekly Law Reports*, 200–214.

81 *Intel Corporation v Advanced Micro Devices* (2004). For a comment see Besso, *Discovery all'estero: un nuovo capitolo del confronto tra Europa e Stati Uniti*, in Consolo-De Cristofaro (ed. by), *Il diritto processuale civile internazionale*, Milano, 2006, 1387–1397.

produced by the defendant in a US action; the motion, denied by the Court of first instance, was granted by the Court of Appeal. The Supreme Court decided that 28 US Code., section 1782(a) – which provides that an American court may order a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal (...) upon the application of any interested person" – authorizes a federal court to provide assistance to complainants in foreign proceedings, leaving the district court to decide whether assistance was appropriate in the case.[82]

This "generosity", which makes the US formidable discovery devices available to foreign proceedings on the most comprehensive basis, certainly reflects ideas of justice and citizens' rights of access to evidence and information very far from the European legal culture.

I nevertheless believe that, at least within the judicial European area, the national courts should provide the maximum cooperation possible in the taking of evidence, in order to reinforce the parties' access to evidence and therefore to justice.

82 After Intel, and the denial of the Supreme Court to restrict a priori the possibility of using the devices of American discovery, several US courts were asked, and ordered the production of documents for use in proceedings abroad, even when the documents were located outside the United States and even for use by arbitration tribunals. See Trocker, *US-Style discovery for non-US proceedings: judicial assistance or judicial interference?*, *IJPL*, 2011, 2, 299–336; Boyle, *The long arm of the law: the availability of US Discovery in non-US cases*, *Civil Justice Quarterly*, 2010, 73–93.