RECENT DEVELOPMENT

EUROPEAN ECONOMIC COMMUNITIES—EUROPEAN COURT OF JUSTICE—CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS—COURT INDEPENDENTLY DEFINES PHRASE "SALE ON INSTALMENT CREDIT TERMS" TO LIMIT JURISDICTIONAL ADVANTAGE TO PRIVATE FINAL CONSUMERS

In February 1972, Société Bertrand, a company registered in France, contracted to purchase a machine tool from Paul Ott KG, an undertaking registered in the Federal Republic of Germany. The sale price was to be paid by two bills of exchange which were payable at intervals of sixty and ninety days.[1] Bertrand became partially insolvent[2] and Ott instituted proceedings against it before the Landgericht Stuttgart. Bertrand did not appear and the German court entered a default judgment against it on May 10, 1974.[3] Ott then brought an action in France to enforce the German default judgment. The Tribunal de Grande Instance at Le Mans[4] issued an order for enforcement of the judgment[5] pursuant to Article 31 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was in ef-

[1] The price of the machine tool was fixed at DM 74,205 in an invoice of May 26, 1972. A separate invoice relating to transport and installation was later drawn up in the sum of DM 2,224. Payment was to be made in two equal instalments. Société Bertrand v. Paul Ott, KG, [1978] ECR 1431, (Case 150/77, judgment of 21 June 1978), [1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8497. [Editor's Note: Citations in this Recent Development to EEC Materials conforms to European conventions rather than to the Uniform System of Citation usually followed by this publication. The Official Journal is cited "O.J." and European Court of Justice cases are cited to their publication in the European Court Reports, "ECR."]

[2] DM 4,915 of the first instalment was not paid, and no payment at all was made on the second invoice. *Id.*

[3] On May 10, 1974, the Landgericht (Regional Court) Stuttgart ordered Bertrand, in its absence, to pay to Ott, apart from the sum owing of DM 7,139, 10% interest on DM 4,915 as from October 11, 1972 and on DM 2,224 as from August 21, 1973. The judgment was notified on June 14, 1974 and thereafter became final, no appeal having been lodged. *Id.* at 1433.

[4] "The application (for the enforcement of a judgment) shall be submitted: . . . in France, to the presiding judge of the 'Tribunal de Grande Instance,'" Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 21 O.J. 1978, No. L 304, 41, at Art. 32. [hereinafter cited as Convention]. The Convention entered into force February 2, 1973.

[5] The judgment was declared to be enforceable in France, first by order of June 30, 1975 of the Tribunal de Grande Instance, Le Mans, and subsequently by a confirmatory judgment of the Cour d'Appeal, Angers, of May 20, 1976 which stated in particular "It is a matter of principle that a sale against deferred payments amount to a cash sale." [1978] ECR 1431, at 1433.

fect among the six original Member States of the European Economic Community.[6] Bertrand appealed that order to the French Cour de Cassation on these grounds: that a sale in which the price must be paid by two bills of exchange constitutes a credit sale;[7] that it is mandatory for an action against a credit buyer to be brought before the courts of the State in which the buyer is domiciled;[8] and that a decision of a foreign court which has not complied with this binding rule on jurisdiction cannot be made enforceable in France.[9] The Cour de Cassation[10] found that the solution to the problem thus posed depended on the classification of the contract either as cash sale or sale on instalment credit terms, and asked the Court of Justice of the European Communities to give an interpretive ruling concerning Articles 13, 14 and 28 of the Convention.[11] The question presented to the Court of Justice was

> whether the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of two equal bills of exchange payable at 60 and 90 days can be held to be a sale of goods on instalment credit terms within the meaning of Article 13 of the Brussels Convention.[12]

On referral to the Court of Justice, *held*, the concept of the sale of goods on instalment credit terms, within the meaning of Article 13 of the Convention, does not extend to the sale of a machine which

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[6] "A judgment given in a contracting state and enforceable in that state shall be enforced in another contracting state when, on the application of any interested party, the order for its enforcement has been issued there." Convention, *supra* note 4, at Art. 31.

[7] "In matters relating to the sale of goods on instalment credit terms, or to loans expressly made to finance the sale of goods and repayable by instalments, jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5(5)." *Id.* at Art. 13.

[8] "Proceedings may be brought by a seller against a buyer or by a lender against a borrower only in the courts of the state in which the defendant is domiciled." *Id.* at Art. 14, para. II.

[9] "Moreover, a judgment shall not be recognized if it conflicts with the provisions of Sections 3, 4 or 5 of the Title II." *Id.* at Art. 28, para. I.

[10] "The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation: . . . in France, la Cour de Cassation and Le Conseil d'Etat." Protocol concerning the Interpretation of the Convention on Jurisdiction and the Enforcement of Judgments, June 3, 1971, O.J. 1978, No. L 304, 51, at Art. 2 [hereinafter cited as Protocol].

[11] "1. Where a question of interpretation of the Convention or of one of the other instruments referred to in Article 1 is raised in a case pending before one of the courts listed in Article 2(1), that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." *Id.* at Art. 3.

For simplicity, the British spelling "instalment" will be used in this Recent Development, in conformity with the official English translation of the case.

[12] [1978] ECR 1431, at 1433.

one company makes to another on the basis of a price to be paid by bills of exchange spread over a period of time. *Société Bertrand v. Paul Ott KG, [1978] ECR 1431,* (Case 150/77, judgment of 27 June 1978), *[1978 Transfer Binder] COMM. MKT. REP. (CCH)* ¶ 8497.

In 1957, the Treaty of Rome established the European Economic Community[13] with the ultimate goal of creating a unified commercial market free from national barriers. As a step towards the attainment of this goal, the Member States negotiated the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[14] and provided in the Protocol,[15] which was subsequently annexed to the Convention, that questions relating to the interpretation of the Convention would be referred to the Court of Justice of the European Communities.[16] This provision was added to guarantee that the Convention would be interpreted in the same way throughout the Community.[17] Referral to the Court of Justice enables it to interpret and apply Community law uniformly, thereby creating an independent and consistent body of Community law. This objective of uniform interpretation is central not only to the Convention but also to the Treaty of Rome, where the guiding intention is for all of the parts to combine into a greater whole through unification and cooperation.[18]

The evolution of this question of interpretation is illustrated by three cases which involved the interpretation of the Convention and which were referred to the Court of Justice of the European Communities under the Protocol of the Convention.[19] In *Industrie Tessili Italiana Como v. Dunlop AG,*[20] the first case involving interpretation of the Convention under the Protocol,[21] the Court was

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[13] Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome].

[14] Convention, *supra* note 4.

[15] Protocol, *supra* note 10.

[16] "1. Where a question of interpretation of the Convention . . . is raised in a case pending before one of the courts listed in Article 2(1), that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."
Protocol, *supra* note 10, at Art. 3.

[17] Jenard Report, O.J. 1979, No. C 59.

[18] Treaty of Rome, *supra* note 13.

[19] The Protocol to the Convention provides for referral to the Court of Justice. *See* note 10 *supra.*

[20] Industrie Tessili Italiana Como v. Dunlop AG, [1976] ECR 1473, (Case 12/76, judgment of 6 October 1976), [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8375.

[21] *Id.* at 1487.

called upon to interpret the expression "place of performance"[22] as it related to a controversy between an Italian manufacturer of ski wear and a German purchaser. Tessili argued that the phrase should be given a uniform interpretation based on the Convention and on Community law, in order to achieve the goal of uniformity articulated by the drafters of both the Convention and the Treaty of Rome.[23] The Court, however, adopted a rather conservative position and ruled that although the Convention should be interpreted with regard to its own principles and those of the Rome Treaty,[24] the "place of performance" must be determined in accordance with the law which governs the obligation in question according to the conflict of laws rules of the particular court before which the matter is brought.[25] In his opinion, Mr. Advocate-General Mayras said that the aim of the Convention was to determine which court in a given State had jurisdiction over a question. He felt that it would be difficult to go any further on the uniform interpretation of concepts as long as there was no applicable body of substantive Community law.[26] The Court followed the opinion of the Advocate General, choosing the traditional rules of conflict of laws over an independent, untested and possibly unauthorized interpretation of an expression contained in the Convention.

This conservative approach to the question of interpretation was abandoned by the Court in its disposition of a subsequent case. In *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*,[27] the Court was requested to give an interpretation

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[22] *Id.*

[23] "[T]he objective of the Convention . . . is to lay down uniform rules on jurisdiction—applicable to the settlement by courts of disputes arising from these relations and likely to guarantee that in the future similar situations will be dealt with in the same way." *Id.* at 1476.

[24] "[T]he Convention must be interpreted having regard both to its principles and objectives and to its relationship with the Treaty." *Id.* at 1484.

[25] [T]he question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the Matter is first brought. Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of article 220 of the Treaty. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular case.

Id. at 1484.

[26] *Id.* at 1494.

[27] LTU Lufttransportunterhehmen GmbH & Co. KG v. Eurocontrol, [1976] ECR 1541, (Case 1, judgment of 24 October 1976), [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8377. For a thorough report on this case, *see also* 17 VA. J. INT'L L. 553 (1977).

of the expression "civil and commercial matters."[28] In this case, the Court indicated a strong preference for uniformity when it ruled that, in matters of interpretation, reference must not be made to the law of one of the states. Instead, the Court should refer first to the objectives and schemes of the Convention and second to the general principles of all of the Member States' national legal systems.[29] The Court said that because the Convention applies in civil and commercial matters, regardless of the nature of the court or tribunal where a case is brought, it is not possible to base an interpretation solely on the principles of one jurisdiction.[30] After ruling that the objectives of the Convention required an independent definition of the phrase "civil and commercial matters," the Court held that the conflict between the parties, one a legal person governed by private law and the other a public authority exercising its public powers, was excluded from the area of application of the Convention.[31] The Court wanted to expand the recognition of foreign judgments and at the same time avoid multiple interpretations of Community law which might hamper the effectiveness of the Convention. The adoption of an independent concept in this case allowed the Court to deny jurisdiction without diminishing the scope of reciprocal recognition and enforcement of judgments within the Community.[32]

The next case to request the interpretation of an expression contained in the Convention was *Industrial Diamond Supplies v. Luigi Riva.*[33] The question put to the Court concerned the proper interpretation of the expression "ordinary appeal." Because of the differences in the legal concepts of the Member States with regard to the distinction between "ordinary" and "extraordinary" appeals, it was impractical to try to determine the meaning of this concept by referring to the national legal systems of the States involved in the controversy.[34] To reduce the uncertainty which would result from reference to various national legal systems, the

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[28] [1976] ECR 1541.

[29] "In the interpretation of the concept 'civil and commercial matters' for the purposes of application of the Convention . . . reference must not be made to the law of one of the states concerned but, first, to the objectives and schemes of the Convention and secondly, to the general principles which stem from the corpus of the national legal systems." [1976] ECR 1541, at 1552.

[30] [1976] ECR 1541, at 1550-51.

[31] [1976] ECR 1541, at 1552.

[32] *See* 17 VA. J. INT'L L. 553, 564 (1977).

[33] Industrial Diamond Supplies v. Luigi Riva, [1977] ECR 2175, (Case 43/77, judgment of 22 November 1977), [1977 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8453.

[34] [1977] ECR 2175, at 2188.

Court decided to determine the meaning of the phrase within the framework of the Convention itself and not according to the laws of the State where the judgment was rendered or the State where enforcement was sought.[35] The Court ruled that the expression must be given an independent meaning and then went on to define an "ordinary appeal."[36] This decision is significant because the Court, with little hesitation, defined a concept for the future reference of the Community and in so doing virtually created substantive Community law. Significantly, the Court relied on the Convention, which was intended originally only as a tool to promote "full faith and credit" among the Member States of the EEC.

In the present case, Paul Ott KG brought an action for enforcement of the German judgment in the French courts in accordance with the provisions of the Convention.[37] It was able to do this as a result of the evolution of Community law from 1957 to the present. Article 220 of the Treaty of Rome encouraged negotiations among the Member States on issues which would promote unity and equal protection regardless of nationality.[38] The Convention was drafted in direct response to Article 220, providing uniform and concise guidelines for reciprocal recognition and enforcement of judgments in civil and commercial matters.[39] The 1971 Protocol annexed to the Convention provides that referral be made to the Court of Justice when questions of interpretation of the Convention arise.[40] This was the groundwork which enabled the Court of Justice to accept the request from the French Cour de Cassation

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[35] [1977] ECR 2175, at 2191-92.

[36] [1977] ECR 2175, at 2192.

[37] Convention, *supra* note 4.

The original six Member States (Belgium, West Germany, France, Italy, Luxembourg and the Netherlands) were parties to the Convention at the time the present case was brought before the Court. Upon the accession of the United Kingdom, Denmark and Ireland, the Convention was renegotiated and amended. This amended treaty was signed by the nine Member States on October 9, 1978. Although the amended convention was not in effect when this case was brought before the Court, negotiations were near conclusion. For the text of the Convention of Accession of October 9, 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice, *see* O.J. 1978, No. L 304. [hereinafter cited as Convention of Accession].

[38] "Member States shall, insofar as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals . . . . the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Treaty of Rome, *supra* note 13, at Article 220.

[39] "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal." Convention, *supra* note 4, at Article 1. *See also* [1976] ECR 1541.

[40] Protocol, *supra* note 10, at Art. 3(1).

for an interpretive ruling on the meaning of the phrase "sale on instalment credit terms" when it arose in the case of *Bertrand v. Ott.*

In addition to briefs for Paul Ott KG and Société Bertrand, the Court received written observations from the German and Italian governments and from the Commission of the European Communities.[41] The government of the United Kingdom also submitted its observations to the Court.[42] These comments focused on the criteria to be adopted by the Court for interpreting sale of goods on instalment credit terms. At issue was whether the phrase "sale on instalment credit terms" should be interpreted according to the international principle of *lex fori* or should be given an independent meaning under the Convention.

Realizing that referral to the Court of Justice provided a final chance to escape the German judgment, Bertrand maintained that its contract with Ott should be characterized as a sale of goods on instalment credit terms. The courts at Le Mans and Angers had classified the contract as a cash sale[43] and Bertrand had appealed the order of *exequatur.*[44] The Cour de Cassation found that the classification of the contract as a cash or credit sale was essential to the solution of the problem and referred this question to the Court of Justice for a preliminary ruling. Bertrand contended that the Court of Justice should adopt an independent meaning of the concept rather than define it on the basis of *lex fori.* Not only the protective legislation, but even the very concept of sale of goods on instalment credit terms varies from one Member State to the next. To avoid contradictory interpretation, Bertrand argued, a single Community classification should be superimposed on the various national rules without reference to any particular protec-

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[41] "[T]he parties, the Member States, the Commission and, where appropriate, the Council, shall be entitled to submit statements of case or written observations to the Court." Protocol on the Statute of the Court of Justice of the European Economic Community, April 17, 1957, at Art. 20.

[42] Even though the Convention as amended by the Convention of Accession has not yet entered into force for the United Kingdom, Ireland and Denmark, the government of the United Kingdom was nonetheless entitled to submit a written observation to the Court under the Protocol on the Statute of the Court of Justice of the European Economic Community, Art. 20.

[43] "[A] judgment shall not be recognized if it conflicts with the provisions of Section 3, 4 or 5 of Title II. . . ." Convention, *supra* note 4, at Art. 28.

[44] [1978] ECR 1431. The Court in which the action for enforcement was brought was entitled to review the subject matter of the German decision so far as it concerned the classification of the contract. *See also* [1976] ECR 1541, where it was accepted that the court applied to may review the classification of the subject-matter dealt with by the court of first instance.

tive legislation. Thus, it concluded, a sale on instalment credit terms, construed within the meaning of Article 13 of the Convention, can only be a credit sale in which the price is paid by successive amounts. This would make the German judgment unenforceable in France; the German court lacked subject matter jurisdiction because it failed to comply with the compulsory rule expressed in Article 14, paragraph 2 of the Convention.[45]

Ott agreed that if there is no uniform concept of sale on instalment credit terms common to all member states, the primary objective of the Convention, namely, the free movement of judgments, would be hindered. It argued, however, that the public policy objective of Section 4 of the Convention is the protection of a certain class of buyers and it is necessary to distinguish between the private final consumer and the professional or trade purchaser. Since post-Convention national laws regarding sales on instalment credit terms were oriented toward protection of the consumer, it would be logical to conclude that the drafters of the Convention had the same objective in mind. It would defeat the purpose of Article 14 of the Convention to accord the jurisdictional advantage indiscriminately to professional and non-professional buyers. Ott argued that the Court should declare a uniform Community concept of a sale on instalment credit terms, restrict application of Article 14 to non-professional buyers, and declare the contract with Bertrand not to be a sale on instalment credit terms within the meaning of Article 14 of the Convention.[46]

The Commission of the European Communities also argued that an independent concept based on general principles of the national rules should be established. The question presented by this case, the Commission contended, is whether the arrangement for payment in this contract constituted a sale on instalment credit terms or was merely an example of the common trade practice of a credit sale. The Commission observed that in many national laws the criteria for classification of a contract are the status of the buyer (professional or non-professional), whether or not the laws set maximum price limits and whether the payment agreement permits a simple deferred payment (a common trade practice) or provides an elaborate financing agreement with a deposit, interest and time limits. In the oral proceedings, the Commission argued that while traders should not be excluded systematically from the

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[45] [1978] ECR 1431, at 1433-35. *See* note 8, *supra.*

[46] [1978] ECR 1431, at 1435-39.

protection provided by the Convention, contracts concerning industrial machines or concluded by industrial companies should be excluded. The Commission also mentioned the proposed amendments to the Convention[47] which would limit the application of the Section 4 jurisdictional advantage to contracts entered into by persons for purposes which may be considered extraneous to their professional or trade activities, those persons being designated "consumers."[48]

The government of the United Kingdom observed that the function of Article 13 in the Convention is to reserve protection to consumers: those buyers not engaged in commercial activities. It argued that the true test of whether a contract should be classified as a sale on instalment credit terms is in the relationship of the parties, the buyer being generally in a weaker economic position than the seller.[49]

The German government commented that under German law, rules relating to sales on instalment credit terms had credit policy objectives as well as those of consumer protection. These laws are not applicable to any trader whose name appears on a commercial register. The German government observed that there is, however, no indication in the Convention that professionals were to be excluded from Article 13: it believed that the grounds for application should be whether or not the buyer is in need of protection. This is difficult to determine merely on the basis of professional or non-professional standing. It agreed that an independent concept was called for but argued that the contract in question should be classified as a sale on instalment credit terms within the meaning of Article 13.[50]

The Italian government agreed that the concept must be given an independent meaning because the Convention itself is derived not from any national laws but from Community law.[51] It also agreed that the objective of Section 4 is the protection of an economically weaker contracting party, but argued that a sale on instalment credit terms should be defined purely on the basis of a payment arrangement providing for payment after delivery.[52]

Advocate General Capotorti believed that the Convention and the case law indicated the adoption of a uniform Community con-

[47] Convention of Accession, *supra* note 37.
[48] *Id. See.* [1978] ECR 1431, at 1439-40, 42.
[49] [1978] ECR 1431, at 1440-41..
[50] [1978] ECR 1431, at 1441-42.
[51] Treaty of Rome, *supra* note 13, at Art. 221.
[52] [1978] ECR 1431, at 1442.

cept of sale on instalment credit terms. Reference to national law is to be made only when no independent meaning of a concept can be found in the Convention. Article 14 presents an exception to the general rule of jurisdiction set out in Article 2. Because Article 14 represents a derogation from the general rule it must be interpreted restrictively. The Advocate General approved of the remarks made by the government of the United Kingdom in restricting application of Article 14 to consumers and suggested that the concept be defined as a sale by a commercial undertaking to a consumer with payments spread over a period of time. He further commented on the proposed amendments to the Convention which would restrict application of Section 4 to contracts which are concluded by a person for a purpose which can be regarded as being outside of his trade or profession.[53] In conclusion, he remarked that the solution he suggested coincided with the foreseeable course of development of the Convention.[54]

The Court of Justice agreed with all parties and observed that it was necessary to adopt an independent and common definition of the concept of sale on instalment credit terms.[55] It observed that the harmonious operation of Article 13 *et seq.* of the Convention could not be guaranteed if this concept were to be given different meanings in the different Member States. The Court stated that the compulsory jurisdiction provided for in the second paragraph of Article 14 must be strictly limited to the objectives proper to Section 4 because it derogates from the general principles laid down by the Convention. Those objectives were inspired solely by a desire to protect certain categories of buyers who are in need of protection due to the fact that their economic position is one of relative weakness compared to that of the seller. The Court followed the rationales suggested by the United Kingdom and the Advocate General and reasoned that a restrictive interpretation of the second paragraph of Article 14 entailed the limitation of the jurisdictional advantage to only those buyers who are private, final consumers and who are not engaged, when buying on instalment credit terms, in trade or professional activities.

Having established the criteria of uniform and independent interpretation of the Convention, the Court then could determine

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[53] Convention of Accession, *supra* note 37.

[54] [1978] ECR 1431, at 1452.

[55] [1978] ECR 1431, at 1445, para. 14.

the objectives of Section 4 contemplated by the drafters without the possibility of contradiction by any national legal source. It concluded that the concept of the sale of goods on instalment credit terms within the meaning of the Convention could not extend to the sale of a machine which one company makes to another, regardless of the arrangement to discharge the purchase price by way of payments spread over a period of time.[56]

In reaching this decision, the Court was following the analytical precedents which had been set down in the *Tessili*, *LTU* and *Riva* cases. These decisions reflect the Court's assessment of the evolution of Community law, from different and often contradictory national rules toward an integrated Community scheme. When the Convention was drafted in 1968, the notion of consumer protection was not of great concern to the Member States individually. Only one, Belgium, had enacted any legislation to protect an economically weak buyer from an unfairly worded contract.[57] The Convention, therefore, dealt with this topic within the limited context of instalment sales and loans, since this was the only field where an awareness of the need to protect a weaker party was present.[58] Since 1968, however, the Member States have become far more concerned with consumer protection. Legislation adopted for the general purpose of protecting the consumer is presently in force in all the Member States.[59] It was likely that tension would develop between the Member States and the Convention if the Convention did not provide at least as much protection to the consumer in a transfrontier contract as he could expect to receive under his national rules.[60] Consequently, the Court in *Bertrand* adopted an independent interpretation of the phrase "sale of goods on instalment credit terms" in order to protect the private final consumer to the same extent that the laws of the Member States did and to guarantee the restriction of the jurisdictional advantage to only those buyers in need of protection.

In his report to the Commission of October 9, 1978, on the accession of the three new Member States to the Convention,[61] Professor Dr. Peter Schlosser wrote that the working party on the Convention of Accession had made proposals which would expand Section

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[56] [1978] ECR 1431, at 1447.

[57] [1978] ECR 1431, at 1437.

[58] Schlosser Report, O.J. 1979, No. C 59, 117.

[59] [1978] ECR 1431, at 1450.

[60] Schlosser Report, *supra* note 58.

[61] *See* note 37, *supra*.

4 of the 1968 Convention to provide jurisdiction over consumer contracts, limiting the applicability of that section to private, final consumers and establishing, for future purposes, that only final consumers acting in a private capacity and not in the normal course of business should be given special protection.[62] He further stated that the Working Party had been influenced on this point by the proceedings in the Court of Justice of the *Bertrand* case.[63] The revised Convention offers a legal definition of the word "consumer"[64] and Section 4 is retitled "Jurisdiction Over Consumer Contracts."[65]

If the *Tessili* question were to be put to the Court today, there is a good chance that the Court would give a Community definition to the expression "place of performance" rather than return the question to the national courts and their traditional rules of conflict of laws. It is unlikely that the Court in the future will allow national law to prevail where the possibility of achieving further integration through the fabrication of a Community concept exists. The present climate of the Community is very favorable to integration and uniformity. In addition to the Convention on Jurisdiction and the Enforcement of Judgments, conventions are being negotiated between the Member States to bring uniformity into the fields of contractual and non-contractual obligations[66] and a proposal for a European corporate charter is being studied,[67] to mention only two areas where work leading to further unification is being conducted presently.

Greater uniformity of the substantive law within the EEC means that there will be more power vested in the supra-national bodies than perhaps was contemplated by the drafters of the Treaty of Rome in 1957. Although we are far from being able to predict the ultimate consequences of this trend, we cannot dispute its presence. The Court's decision in *Bertrand* seems to indicate that in the future there will be little, if any, resistance to its adoption of uniform and independent Community definitions when

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[62] Schlosser Report, *supra* note 58.

[63] *Id.*

[64] "In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer'. . . ." Convention of Accession, *supra* note 37, at Art. 13.

[65] *Id.*

[66] Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. [1977 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 6311.

[67] 1975 Proposal to the European Economic Communities for a Statute for the European Company, 8 BULLETIN OF THE EUROPEAN COMMUNITIES SUPP. NO. 4 (1975).

called upon to interpret concepts from conventions or agreements between the Member States. Perhaps this decision can be viewed as an example of the Court exercising its increasing power as a unifier of the Community and a creator of the growing body of Community law.

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