OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 29 November 2007 [1]

I — Introduction

1. The present case concerns the interpretation of Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('Regulation No 1348/2000') [2] and the specific question whether an addressee may refuse to accept the foreign document to be served if the application to be served in foreign civil proceedings has been translated into the official language of the Member State addressed, but the annexes to that application have not been translated into that official language, and the addressee claims not to understand the language of the Member State of transmission even if he concluded a contract in the course of his business in which it was agreed to use the language of the Member State of transmission for correspondence between the parties on the one hand and the authorities and public institutions on the other.

2. This reference for a preliminary ruling from the Bundesgerichtshof (German Federal Court of Justice) has been made in an action for damages brought by the Industrie- und Handelskammer Berlin ('IHK Berlin') against the architects Nicholas Grimshaw & Partners Ltd, a company governed by English law ('Grimshaw Architects'), for defective design of a building. IHK Berlin brought an action against Grimshaw Architects for breach of warranty. The parties disagree, in interlocutory proceedings, on whether the application was effectively served on Grimshaw Architects. Ingenieurbüro Weiss und Partner GbR, which is established in Aachen ('Büro Weiss'), was joined as a party to the dispute.

1 — Original language: German.

2 — OJ 2000 L 160, p. 37.

II — Legal framework

3. Recitals 8 and 10 in the preamble to Regulation No 1348/2000 state:

'(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

…

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.'

4. Article 8(1) of Regulation No 1348/2000 provides:

'Refusal to accept a document

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected;

or

(b) a language of the Member State of transmission which the addressee understands.'

III — Main facts of the case, main proceedings, questions referred and proceedings before the Court of Justice

5. IHK Berlin is pursuing an action for damages against Grimshaw Architects, a company established in London and governed by English law, for defective design on the basis of an architect's contract of 16 February 1994. In the contract Grimshaw Architects had undertaken to draw up plans for a construction project in Berlin. Paragraph 3.2.6 of the architect's contract stipulates:

'The services shall be provided in German. Correspondence between [IHK Berlin] and

[Grimshaw Architects] and the authorities and public institutions shall be in German.'

Paragraph 10.2 of the architect's contract stipulates:

'The place of jurisdiction in the event of disputes shall be Berlin.'

Paragraph 10.4 of the architect's contract stipulates:

'This contract shall be subject to German law.'

6. For the purposes of service on Grimshaw Architects, IHK Berlin lodged with German courts copies of the application and all the annexes to which it referred in that application. Those annexes include the architect's contract concluded between the parties, addenda to the contract and the draft thereof, an extract from the contractual specifications and several letters, including some from Grimshaw Architects, which relate to the correspondence with the companies entrusted with ascertaining and repairing the defects complained of. According to the Bundesgerichtshof, however, Grimshaw Architects was not aware of all the annexes before the action was brought, in particular the documents on the ascertainment and repair of the defects, and the costs thereof. Furthermore, the content of the annexes to which IHK Berlin refers is partially reproduced in the application.

7. The application of 29 May 2002, by which IHK Berlin claimed damages against Grimshaw Architects under the architect's contract, was served on Grimshaw Architects in German on 20 December 2002. After Grimshaw Architects had initially refused to accept the application on the ground that there was no English translation, an English translation of the application, and the annexes written in German with no translation, were delivered to it in London on 23 May 2003.

8. By written pleading of 13 June 2003, Grimshaw Architects complained that the service was defective because the annexes had not been translated into English and, for that reason, relying on Article 8(1) of Regulation No 1348/2000, refused to accept the application, the service of which it regarded as ineffective. Grimshaw Architects also raised the objection that the application was time-barred and served a notice on Büro Weiss, joining it as a party in the proceedings before the German courts.

9. According to the order for reference, the Landgericht (Regional Court) Berlin held, by interlocutory decision, that the application was duly served on 23 May 2003. The Kammergericht (Higher Regional Court) Berlin dismissed the appeal lodged by Grimshaw Architects by a judgment. The joined party — Büro Weiss — appealed on a point of law against that judgment to the referring court, the Bundesgerichtshof.

10. The Bundesgerichtshof states that under the German Zivilprozessordnung (Code of Civil Procedure) an application which refers to enclosed annexes forms a whole with those annexes and that a defendant must receive all information cited by the applicant which he needs for his defence. It is not therefore appropriate to assess the effectiveness of the service of an application independently of the service of the annexes on the ground that the essential information is presumably already clear from the application and the right to a fair hearing remains protected by the fact that the defendant can still defend himself adequately in the course of the proceedings.

11. An exception to that principle is permissible if the defendant's need for information is not significantly prejudiced, for example because one of the annexes not enclosed with the application was sent at virtually the same time that the action was brought or because the defendant had already been aware of all the documents before the action was brought. The referring court points out that in the present case Grimshaw Architects was not aware of all the documents, in particular the documents on the ascertainment and repair of the defects, and the costs thereof. Such documents cannot be regarded as insignificant details as the decision on the submission of a reply may depend on their assessment.

12. The Bundesgerichtshof also explains that none of the bodies authorised to represent Grimshaw Architects understands German and takes the view that it is possible to interpret Regulation No 1348/2000 as meaning that acceptance cannot be refused on the ground that the annexes have not been translated since Article 8(1) of Regulation No 1348/2000 is silent on the refusal to accept annexes. Furthermore, the standard form provided for in the first sentence of Article 4(3) of Regulation No 1348/2000 for requests for service in the Member States of the European Union requires information in relation to the nature and language of the document only as regards the document to be served (Paragraphs 6.1 and 6.3 of the form) but not as regards the annexes, in respect of which it is only required that their

number be specified (Paragraph 6.4 of the form). In the view of the Bundesgerichtshof, however, the only decisive factor is whether the document in question is a document to be served within the meaning of Regulation No 1348/2000; the design of the standard form can have no bearing on this question.

13. In the event that it is not possible to refuse acceptance on the sole ground that the annexes have not been translated, the Bundesgerichtshof states that in its view the contract in which the applicant and the defendant stipulated that correspondence was to be conducted in German is not sufficient to deny the defendant's right to refuse acceptance pursuant to Article 8(1)(b) of Regulation No 1348/2000. The contractual clause does not imply that the defendant understands the language for the purposes of Regulation No 1348/2000.

14. In the event that a contractual clause cannot be regarded as a presumption that a language is understood, the Bundesgerichtshof asks, lastly, whether acceptance of an application can always be refused where the annexes have not been translated or whether there are exceptions, for example if the defendant already has a translation of the annexes or if the annex is reproduced word for word in the application and the application is translated. However, that can also be the case if documents transmitted as annexes are in the language effectively agreed by the parties in the contract. The Bundesgerichtshof mentions the case of weak parties who may require protection, such as consumers in cross-border contracts who have agreed by contract that correspondence is to be conducted in the language of the trader. In the present case, however, Grimshaw Architects concluded the contract in the course of its business. There is no special need to protect Grimshaw Architects and therefore no discernible need to recognise its right to refuse to accept service.

15. Since the Bundesgerichtshof has doubts as to the interpretation of Regulation No 1348/2000, it stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 8(1) of Regulation No 1348/2000 be interpreted as meaning that an addressee does not have the right to refuse to accept service where only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?

(2) If the answer to the first question is in the negative:

Must Article 8(1)(b) of Regulation No 1348/2000 be interpreted as meaning that the addressee is deemed to "understand" the language of a Member State of transmission within the meaning of that regulation where, in the course of his business, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?

(3) If the answer to the second question is in the negative:

Must Article 8(1) of Regulation No 1348/2000 be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of annexes to a document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?'

16. Grimshaw Architects, Büro Weiss, IHK Berlin, the Czech, French, Italian and Slovak Governments and the Commission took part in the proceedings.

17. At the hearing on 24 October 2007, Büro Weiss, Grimshaw Architects, the French Government and the Commission presented oral submissions and answered questions asked by the Court of Justice.

IV — Submissions of the parties

A — *The first question*

18. *Büro Weiss* takes the view that Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that an addressee also has the right to refuse to accept a document pursuant to Article 8(1) of that regulation if the annexes to a document to be served are not in the language of the Member State addressed or in a language

of the Member State of transmission which the addressee understands.

19. *Grimshaw Architects* considers that an addressee has the right to refuse to accept a document if solely the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands. According to the wording of Article 8 of Regulation No 1348/2000, documents are not only applications lodged by lawyers, but all letters and evidence communicated for the purpose of service. The spirit and purpose of Article 5(1) and Article 8(1) of Regulation No 1348/2000 strongly suggest that 'documents' must also include annexes to an application. Grimshaw Architects also refers to the Rules of Procedure of the Court of Justice (Article 29(3)) and of the Court of First Instance (Article 35(3)), under which the application and annexes thereto are regarded as forming a whole. Both must be in the same language, if necessary the language which the defendant understands. There is no criterion offering sufficient legal certainty to determine the need for a translation which is necessary for the defence of the defendant. Rather, it is necessary to translate all the annexes since cognisance of them will allow a decision to be taken not only on any defence, but also on the way it is conducted. Some grounds of defence will possibly be apparent only from the annexes and are not necessarily considerations cited by the applicant. Lastly, Grimshaw Architects takes the view that failure to translate all the annexes to an application breaches the principle of equal treatment since all annexes are available in German in purely national proceedings in Germany.

20. *IHK Berlin* points out that, together with the application, Grimshaw Architects also received the annexes referred to. IHK Berlin contends that the addressee's right to refuse acceptance under Article 8(1) of Regulation No 1348/2000 relates only to judicial documents according to the wording and scheme of that provision. Annexes are not documents in that sense. They constitute other documents to be transmitted. In order to fulfil the purpose of informing the defendant of the subject-matter and cause of action, it is not necessary to translate lengthy annexes in which only a single clause might be relevant. Evidence of the facts claimed must be produced in the course of the proceedings and it is possible at any time during that stage to arrange for the translation of certain documents which were not translated when the action was brought. Requiring the applicant

to translate all annexes could prove to be very expensive and contrary to the purpose of the regulation, which is to expedite the process.

21. The *French Government* states that the translation of all documents transmitted into a language which the addressee understands is a necessary precondition for protecting his interests and for guaranteeing the rights of the defence. It also takes the view that the same rules on transmission and in particular the same translation requirements apply to all documents affected by service irrespective of whether they are the documents to be served themselves or annexes. The annexes form an integral part of the document. Furthermore, Article 8(2) of Regulation No 1348/2000 provides that the receiving agency must return the documents of which a translation is requested to the transmitting agency if the addressee refuses to accept the document to be served. It thus follows from the wording of that article that the translation of all documents transmitted, and not only of the document to be served, may be required.

22. The *Italian Government* considers, with reference to the use of the plural noun 'documents', that Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee may refuse to accept the document to be served where the relevant annexes are in a language other than that of the Member State addressed or a language of the Member State of transmission which the addressee understands. The addressee for service must therefore be given the right to refuse the document even if the translation requirements laid down in Article 8(1) of Regulation No 1348/2000 are not met only in respect of one or two annexes.

23. The *Slovak Government* states, in the light of the system provided for in Regulation No 1348/2000, explained first and foremost in its recitals, that in the interest of a uniform interpretation and application of the regulation the expression 'document to be served' means not only the main document, but also the annexes which have been served on the addressee together with that document. In order for the addressee to be able to familiarise itself thoroughly with the document which was served on it in the present case and to be able effectively to assert its rights before the court of the Member State of transmission, it is necessary for it to know precisely the content of the entire document to be served. For that reason, the Slovak Government takes the view that Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that an addressee also has the right to refuse to accept a document to be served pursuant to Article 8(1) where only the annexes to the document to be served are not in a language of the Member State addressed or in the language of the Member State of transmission which the addressee understands.

24. The *Czech Government* takes the view that the annexes to the application are to be understood as forming a whole with the application, and the same language rules must be applied to those annexes. The main argument for this interpretation is the fact that the importance of the annexes to the application for the defendant and for the court during the proceedings justifies an interpretation of the right to correct procedure as covering the notification of the defendant of the content of the annexes. The annexes must be translated even where the applicant cites significant parts of those annexes in the application or elsewhere. A balance must be created between the parties, which implies equality of arms in legal proceedings. If the applicant encloses an annex with the application, it may be assumed that he is aware of its content and that opportunity must also be given to the defendant. Quoting the relevant parts in the application itself does not affect the defendant's right at all. Article 8(1) of Regulation No 1348/2000 is therefore to be interpreted as meaning that the addressee also has the right to refuse to accept a document where only the annexes to the document are in a language other than the official language or language which the addressee understands.

25. The *Commission* points out, first of all, that annexes to an application are generally intended to provide additional information to the application or to prove the accuracy of information contained in the application. Annexes therefore form an integral part of the application in principle. Furthermore, Article 8(1) of Regulation No 1348/2000 employs a generic expression, referring to 'a document to be served', which would suggest that the expression should be given a broad interpretation; it could cover both the application and the annexes thereto. The standard form in the annex to Regulation No 1348/2000 does not answer the question of what is meant by a document to be served.

26. Recital 10 in the preamble to Regulation No 1348/2000 contains a reason for the language regime set forth in Article 8(1) of Regulation No 1348/2000. The need for a translation of the annexes must be assessed with reference to the effect on the interests of the addressee of the application. Thus, it is not necessary to translate the annexes if their content is reproduced in the application itself. On the other hand, linguistic comprehension of the annexes is important for the protection of the addressee's interests if the application refers to annexes without quoting their content. If the annexes contain necessary information which is not contained in the application, the defendant may refuse to accept them if they are not translated.

B — *The second question*

27. *Büro Weiss* points out that it is not compatible with Regulation No 1348/2000 to make the right to refuse acceptance dependent on whether the addressee concluded a contract with the opposing party in which he agreed that correspondence was to be conducted in the language of the Member State of transmission. Such provision does not indicate that the addressee for service actually understands the language of the Member State of transmission. In particular, he could employ the services of a translation company in conducting correspondence. Agreeing on a contractual language cannot be treated in the same way as agreeing to conduct legal proceedings in the corresponding language of the court. Conducting legal proceedings typically places much higher demands on the addressee's knowledge of the foreign language than dealing with contractual relations in the addressee's own specialist area, in particular because of the specialist legal language used.

28. *Grimshaw Architects* takes the view that Article 8(1) of Regulation No 1348/2000 cannot be interpreted as meaning that an addressee 'understands' the language of a Member State of transmission because, in the course of his business, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission. The fact that in the course of his business the addressee of a document agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission is merely circumstantial evidence of linguistic knowledge. If service of the application were effected on the basis of circumstantial evidence, the right to a fair hearing would be infringed. That the addressee agreed in a contract that correspondence was to be conducted in the language of the State of transmission does not mean that he actually understands that language. Nor can it be justified, dogmatically, why a contractual agreement between persons governed by private law which the parties intended to apply only to the proper performance of the contract between those two parties should have a restrictive effect with regard to the public law right to a fair hearing enjoyed by the addressee vis-à-vis the courts having jurisdiction.

29. *IHK Berlin* takes the view that an agreement between the parties to use a certain language in the disputed legal relationship now the subject of litigation takes precedence over Article 8(1)(b) of Regulation No 1348/2000. Such an agreement establishes the factual presumption that the addressee understands a document if it concerns the specific legal relationship and is written in the agreed language. The fact that the parties had specified a language for their legal relationship was intended to serve the smooth performance of the contract and was also important if a conflict were to arise, including a legal action. By making such provision, the parties mutually waive the

right to rely on Article 8(1)(b) of Regulation No 1348/2000 when they receive a document written in the contractual language.

30. The *French Government* takes the view, first of all, that it is for the national courts to assess on the basis of the facts of the case whether the language of the Member State of transmission may be considered to be understood by the addressee for the purposes of Article 8(1)(b) of Regulation No 1348/2000. The fact that the language of the Member State of transmission was chosen by the contracting parties for correspondence may be taken into consideration as one factor.

31. However, that fact alone is not sufficient for it to be considered that the language of the Member State of transmission is understood by the addressee for the purposes of Article 8(1)(b) of Regulation No 1348/2000 and to release the national court from the need to make an assessment in the individual case. If the language of the Member State of transmission were considered to be understood by the addressee solely because a clause of the contract provided that correspondence was to be conducted in that language, a legal presumption would be introduced which went far beyond the provision made in the regulation.

32. The *Italian Government* takes the view that Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee has the right to refuse to accept a document to be served or the annexes to that document which are not in the official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands; the contractual language chosen by the parties for their correspondence is not significant, including the case where the annexes to the document were served on the addressee in that contractually agreed language. The entitlement to refuse service of a document which is in a language other than the language known to the addressee cannot cease to apply solely because the parties agreed to use that language in their correspondence. There may well be doubts as to whether agreements on the contractual choice of a language can bind a contracting party to use that language as well should difficulties arise in the contractual relationship, in particular where the dispute between the parties is brought before a court.

33. In the view of the *Slovak Government*, Article 8(1)(b) of Regulation No 1348/2000 cannot be interpreted as meaning that the addressee 'understands' the language of a Member State of transmission solely because an agreement exists between him and the applicant to conduct their correspondence in the context of their business activities in the language of the Member State of transmission. According to the Slovak Republic, a private agreement between the addressee and the applicant to use the language of the Member State of transmission in correspondence in the context of their business

activities is not relevant for the purpose of ensuring due service within the meaning of the regulation.

34. The *Czech Government* takes the view that the agreement to use a certain language in the exercise of business activity does not necessarily imply knowledge of the language for the purposes of Article 8(1) of Regulation No 1348/2000. The agreement between the parties to use a certain language may be taken into consideration by the court in assessing whether a refusal to accept a document constitutes the misuse of a right, but does not give a clear answer itself. Agreement to use a certain language in correspondence between two undertakings does not in itself mean that both sides understand the language to such an extent that they can effectively defend their rights in proceedings in which the application and the annexes thereto are written in that particular language. The Czech Government therefore suggests that the second question be answered in the negative.

35. The *Commission* points out that nothing in Regulation No 1348/2000 in general or in Article 8(1) in particular indicates that the question whether the addressee 'understands' the language of the State of transmission should be assessed on the basis of a mere presumption and not on the basis of actual capacity. The word 'understands' points to a factual, objective situation and not to a mere assumption, even if that assumption might be based on certain circumstantial evidence, such as the contractual agreement regarding the language to be used in correspondence. Thus, the fact that in the present case the addressee agreed in a contract with the applicant, in the course of its business, that correspondence was to be conducted in the language of the Member State of transmission may be used only as an indication that that language is understood; that agreement in itself is not sufficient proof, however, that the addressee actually understands the language of the Member State of transmission.

C — The third question

36. *Büro Weiss* states that if the right to refuse to accept the untranslated annexes were to be made dependent on whether the annexes are written in an agreed contractual language and concern the subject-matter of the contract, the defendant would have to make a decision regarding its right to refuse acceptance within a short time without being able to assess on the basis of a translation whether those requirements were satisfied, in particular whether there was a connection with the contractual relationship. It cannot be assumed solely because the defendant undertook to carry out the contract in a certain language that it intended to restrict its right to a fair hearing to such an extent that it waived its right to be notified of the subject-matter of legal proceedings in a language which is (by definition) understood by it.

37. *Grimshaw Architects* states that if Article 8(1) of Regulation No 1348/2000 were to be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of the application if the addressee concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language, a value judgment as to whether there was bad faith on the part of the defendant would be introduced into the application of Article 8(1) of Regulation No 1348/2000. Article 8(1) of Regulation No 1348/2000 cannot be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands if the addressee concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language.

38. *IHK Berlin* considers that the addressee may not rely on Article 8(1) of Regulation No 1348/2000 in order to refuse acceptance of annexes to a document if he has agreed by contract with the sender in the course of his business that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language. In that case there would be misuse of the right to refuse acceptance.

39. The *French Government* takes the view, relying on the wording of Article 8(1) of Regulation No 1348/2000, that the addressee has the right to refuse to accept a document and the annexes thereto if they are written in the language agreed by the parties for correspondence and that language is not a language of the Member State addressed or a language of the Member State of transmission which the addressee understands. No exception should therefore be made either directly or indirectly to the right to refuse to accept a document which is in a language other than the languages provided for in Article 8 of Regulation No 1348/2000. Any other interpretation would impair the full effectiveness of the regulation.

40. The *Italian Government* claims that refusal to accept a document may be regarded as a misuse of rights only if the annexes are reproduced in full in the court document translated into the language of the addressee or if the addressee already has cognisance of those annexes in their entirety irrespective of service because they are contained in full in the correspondence between the parties conducted in the language of the State of transmission as intended by the parties. However, those two conditions have not been

examined in the present case. The addressee's refusal to accept the document must be regarded as legitimate. From this point of view, the second part of the third question referred, which presupposes factual circumstances ruled out by the referring court, must be regarded as inadmissible because it is irrelevant to the decision.

41. The *Slovak Government* takes the view that Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee has the right to refuse to accept a document to be served or the annexes to that document which are not in the official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands; the contractual language chosen by the parties for their correspondence is not significant, even where the annexes to the document were served on the addressee in that contractually agreed language.

42. With regard to the third question, the *Czech Government* refers to the arguments on the second question and considers that the answer to the third question is already contained in the answer to the second question.

43. The *Commission* relies on the wording of recital 10 in the preamble to Regulation No 1348/2000 and also takes the position that the interests of the addressee of a document are sufficiently protected if the addressee has or is able to have cognisance of the content of the untranslated annexes. In the case in the main proceedings the contractual clause on the use of a language concerns not only correspondence between the parties, but also correspondence with the authorities and public institutions. This covers correspondence in the event of a difference of opinion over contractual obligations and correspondence in connection with court proceedings. However, the Commission makes clear that it may be appropriate to give a different interpretation to a clause in a contract between a weak party and a strong party, such as a consumer contract.

V — Advocate General's assessment

A — *Introductory remarks*

44. The primary objective of Regulation No 1348/2000 is to improve and expedite the transmission between the Member States of judicial and extrajudicial documents in civil or commercial matters for service in another Member State. This improved and expedited transmission of documents is intended to serve directly the 'proper functioning of the

internal market'. [3] This statement applies to all disputes in civil and commercial matters, for example disputes stemming from contracts between traders, from consumer contracts and from tortuous acts. It must be stressed that the notion of civil and commercial matters within the meaning of Regulation No 1348/2000 does not correspond with that under national law. [4]

45. Three questions have been asked in this case. The first question is of general importance for service effected in all civil and commercial matters. The second and third questions, on the other hand, are confined to the specific area of service concerning contracts concluded between traders.

46. According to academic legal opinion, in an effort to strike a balance between the interests of the applicant in quick and low-cost service and the interests of the defendant in being able to take cognisance of the content of an action brought against him, Regulation No 1348/2000 dispenses with time-consuming and expensive translations where the addressee understands the language of the State of transmission. [5]

47. It must be borne in mind that the transmission and service of documents lie within a triangle of conflicting priorities concerning access to the administration of justice, the protection of defendants and procedural economy. Realisation of the abovementioned objectives therefore appears problematic in that prejudicial effects on the protection of defendants may be inherent in the expedition of the transmission of documents, for example if it is no longer guaranteed that the defendant will be able to prepare his defence effectively, whether for linguistic, temporal or other reasons. Protection of the defendant cannot, in turn, cause the claimant to be deprived of his right to a lawful judge, for example because the defendant is able to

3 — Opinion of Advocate General Stix-Hackl in Case C-443/03 *Leffler* [2005] ECR I-9611, point 19.

4 — See Rijavec, 'Pomen sodb Sodišča ES za opredelitev pojma civilne ali gospodarske zadeve z mednarodnim elementom', *Podjetje in Delo — PiD* 32 (2007), p. 1147 (1151 et seq.), Mayr and Czernich, *Europäisches Zivilprozessrecht, eine Einführung*, 2006, p. 55 et seq. The meaning of civil and commercial matters is defined by the Court of Justice autonomously for the purposes of the regulation. The concept of civil and commercial matters must therefore be regarded as an independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention on Jurisdiction and the Enforcement of Judgments and, secondly, to the general principles which stem from the national legal systems as a whole (Case C-271/00 *Gemeente Steenbergen* [2002] ECR I-1489, paragraph 28), which means that the law of one of the Member States is irrelevant to its interpretation. The case-law of the Court of Justice on the Convention on Jurisdiction and the Enforcement of Judgments and on Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) may be relied on with regard to the question whether a case concerns a civil or commercial matter within the meaning of Regulation No 1348/2000 (Jastrow, 'Europäische Zustellungsverordnung', in Gebauer and Wiedmann, *Zivilrecht unter europäischem Einfluss*, 2005. p. 1284, and Heiderhoff, 'Verordnung (EG) Nr. 1348/2000 des Rates vom 29. Mai 2000 über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke in Zivil- oder Handelssachen in den Mitgliedstaaten', in Rauscher (ed.), *Europäisches Zivilprozessrechts, Kommentar*, Vol. 2, 2nd edition, 2006, p. 1185).

5 — Stadler, 'Neues europäisches Zustellungsrecht', *IPRax*, 21 (2001), p. 514 (517). That provision represents an important development in European law on service. The requirement to translate foreign-language documents into the official language of the Member State addressed can be explained in classical international law by the sovereignty of the State in which service is to be effected (Bajons, 'Internationale Zustellung und Recht auf Verteidigung', in *Wege zur Globalisierung des Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag*, 1999, p. 49 (71)).

frustrate service. [6] It must be made clear that the protection of defendants and their right to a fair hearing take precedence over procedural economy. The choice of a simplified international form of service in Regulation No 1348/2000 must not affect the legal guarantees to be afforded to the defendant, in this case the addressee. [7]

48. The present case also relates to the problem of the knowledge of the language of the Member State of transmission on the part of the addressee in the Member State addressed. The Commission has already drawn attention to the problem of ascertaining linguistic knowledge in a study, stating that reliance on lack of knowledge of the language of the Member State of transmission is the basic problem in relation to the refusal of service. [8]

49. Under Regulation No 1348/2000 the service of untranslated documents is not ineffective. [9] The lack of a translation can be remedied. [10] The Court has ruled that, on a proper construction of Article 8(1) of Regulation No 1348/2000, 'when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy that by sending the translation requested'. [11]

50. In the view of the Court, on a proper construction of Article 8 of Regulation No 1348/2000, 'when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, that situation may be remedied by sending the translation of the document in accordance with the procedure laid down by the Regulation and as soon as possible; in order to resolve problems

6 — Opinion of Advocate General Stix-Hackl in *Leffler* (cited in footnote 3 above), point 20.

7 — See Bajons, loc. cit. (footnote 5), p. 49 (67). The author stresses that the principle that both parties have a right to a fair hearing also includes, as far as the defendant is concerned, the possibility of taking cognisance of the content of the documents transmitted to him. This means that he must at least be able to determine the nature of the documents.

8 — Commission, *Study on the application of Council Regulation 1348/2000 on the service of judicial and extrajudicial documents in civil or commercial matters*, 2000, p. 41 et seq.

9 — Sujecki, 'Das Übersetzungserfordernis und dessen Heilung nach der Europäischen Zustellungsverordnung: Entscheidung des Europäischen Gerichtshofes vom 8. November 2005', *ZEuP*, 15 (2007), p. 353 (359), with reference to the Opinion of Advocate General Stix-Hackl in *Leffler* (cited in footnote 3 above), point 36. See also Rösler and Siepmann, 'Zum Sprachenproblem im Europäischen Zustellungsrecht', *NJW*, 2006, p. 475 (476), and de Leval and Lebois, 'Signifier en Europe sur la base du Règlement 1348/2000; bilan après un an et demi d'application', in *Imperat lex: liber amicorum Pierre Marchal*, 2003, p. 261 (274).

10 — Case C-443/03 *Leffler* [2005] ECR I-9611, paragraphs 38, 39 and 53. With regard to service under the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, see also Gaudemet-Tallon, *Compétence et exécution des jugements en Europe: règlement no. 44/2001: Conventions de Bruxelles et de Lugano*, 3rd edition, 2003, p. 338.

11 — *Leffler* (cited in footnote 10 above), paragraph 53. That case is one of the few that concerns Article 8 of Regulation No 1348/2000. In legal literature it has rightly been stated that the exercise of the right to refuse acceptance does not make service ineffective (Rösler and Siepmann, loc. cit. (footnote 9), p. 475 (476)).

connected with the way in which the lack of translation should be remedied that are not envisaged by the Regulation as interpreted by the Court, it is incumbent on the national court to apply national procedural law while taking care to ensure the full effectiveness of the Regulation, in compliance with its objective'. [12]

51. The Bundesgerichtshof states that under German law the application itself and the attached annexes to which it refers form a whole with the result that the annexes are also part of the application. [13] In order to ensure that the defendant's right to a hearing is protected, he must receive with the service of the application the information which he needs for his decision whether and how to defend himself against the application. [14]

B — *The first question*

52. With its first question, the referring court is essentially seeking to ascertain whether the right to refuse to accept a 'document' pursuant to Article 8(1) of Regulation No 1348/2000 relates solely to the application or also extends to the annexes thereto.

53. The first question is worded in general terms and concerns all disputes in civil and commercial matters. As stated in point 44 above, the notion of civil and commercial matters within the meaning of Regulation No 1348/2000 does not correspond with that under national law. [15]

54. All the parties with the exception of IHK Berlin consider that Article 8(1) of Regulation No 1348/2000 should be interpreted as meaning that the term 'document' also covers the annexes where an action is served in civil proceedings.

55. The generic term (*genus*) 'document' is not defined in the regulation. In the light of the order for reference, commentary in legal literature, [16] and the submissions made by

12 — *Leffler* (cited in footnote 10 above), paragraph 71. See also the comments regarding the ineffectiveness of service and the remedying of service in Eckelmans, 'Signification et notification', *Revue de droit commercial belge*, RDC, 2006, p. 362 (367).

13 — See also Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', *EuZW*, 18 (2007), p. 363 (364).

14 — Order for reference from the Bundesgerichtshof, Ref. VII ZR 164/05, paragraph 13 et seq., available at www.bundesgerichtshof.de. In that order reference is made to Paragraphs 131 and 253 of the ZPO.

15 — See Rijavec, loc. cit. (footnote 4), p. 1151 et seq.; Mayr and Czernich, loc. cit. (footnote 4), p. 55 et seq.; Jastrow, loc. cit. (footnote 4), p. 1284; and Heiderhoff, loc. cit. (footnote 4), p. 1185.

16 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 364, and Lebois, 'L'amorce d'un droit procédural européen: les règlements 1348/2000 et 1206/2001 en matière de signification, notification et de preuves face au procès social', in de Leval and Hubin, *Espace judiciaire et social européen: actes du colloque des 5 et 6 novembre 2001*, p. 327 (339 et seq.). In the latter paper it is pointed out that in the national law of civil procedure of many Member States (Spain, United Kingdom, Belgium, Netherlands) there are differences in civil procedure before general and labour courts as regards the content and size of documents and annexes by which proceedings are brought.

the Commission and by the Slovak Government, from which it is clear that procedural law is not uniform in the Member States, the term 'document' for the purposes of Regulation No 1348/2000 must be given a uniform, autonomous definition under Community law. The Community legal order does not, in principle, define concepts of primary and secondary law on the basis of one or more national legal systems unless there is express provision to that effect. [17] Article 8 of Regulation No 1348/2000 does not, however, contain any reference to the national procedural law of the Member States. The Court has consistently held that the terms of a provision of Community law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation which must take into account the context of the provision and the purpose of the relevant rules. [18]

56. Arguments relating to the wording and scheme of the regulation would suggest a broad interpretation of the term 'document' in national civil procedure and indicate that the addressee also has a right to refuse acceptance under Article 8(1) of Regulation No 1348/2000 if only the annexes to a pleading to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

57. In view of the fact that the regulation employs the generic term 'document' in a general sense without any restrictive connotation, it must be inferred — and on this point I find myself in agreement with the observations of Büro Weiss, Grimshaw Architects, and the Czech, French, Italian and Slovak Governments — that the term should be interpreted widely in civil proceedings, that is to say in favour of the argument that, at least in principle, the scope of the regulation was intended to cover all the annexes to the application in civil proceedings, not only pleadings. [19] Furthermore, the term 'pleading' is not mentioned in the regulation.

17 — Case 64/81 *Corman* [1982] ECR 13, paragraph 8, and Case C-296/95 *EMU Tabac* [1998] ECR I-1605, paragraph 30. Community law terms may not be defined by reference to the national laws of the Member States (Case 53/81 *Levin* [1982] ECR 1035, paragraph 10 et seq., and Schütz, Bruha and König, *Casebook Europarecht*, 2004, p. 451 et seq.).

18 — See my Opinion in Case C-62/06 *Zefeser*, pending before the Court, point 32.

19 — See also the Opinion of Advocate General Tizzano in Case C-168/00 *Leitner* [2002] ECR I-2631, point 29, which reached a similar conclusion with regard to the interpretation of Article 5(2) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59). In that case it was necessary to interpret the term 'damage'. In point 29 of his Opinion the Advocate General stated: 'In view of the fact that the Directive employs the term "damage" in a general sense without any restrictive connotation, it must be inferred — and on this point I find myself in agreement with the observations of the Commission and the Belgian Government — that the concept should be interpreted widely, that is to say in favour of the argument that, at least in principle, the scope of the directive was intended to cover all types of damage which have any causal link with the non-performance or improper performance of the contract.'

58. The purpose of service in civil proceedings is to ensure that the addressee for service is aware of the content of a document in the interests of a fair hearing. This means that he must be able to understand the document. [20] However, since there is no modern *lingua franca* in international commercial and legal relations, despite the dominance of English, formal service of an application and its annexes must be accompanied by a translation which gives the addressee for service the necessary information on the content of the document to be served. [21] With this in mind, annexes to an application are accessories to that application and follow the general legal principle of *accessio cedit principali*. [22]

59. Nor can this be precluded by the reference to the standard form in the annex to Regulation No 1348/2000. The standard form in the annex to Regulation No 1348/2000 also refers, under point 6 'Document to be served', in point 6.4 to the 'Number of enclosures'. As the Commission rightly notes, this can serve to indicate a broad interpretation of the term 'document' because the enclosures here are closely connected with the way in which the 'document to be served' is dealt with in practice. Büro Weiss rightly points out that in practice the annexes are not reproduced in full in the application in civil proceedings, but their essential content is simply outlined and merely referred to. For that reason, the principle of the right to a fair hearing also requires the annexes to be translated, otherwise the full arguments made by a party in civil proceedings would not be comprehensible.

60. The Court of First Instance of the European Communities has already taken the view that in a direct action 'all documents annexed to the pleadings of the other parties, including the interveners, must, in principle, be translated into the language of the case. Those provisions are intended inter alia to protect the position of a party wishing to contest the legality of an administrative act adopted by the Community institutions, whatever the language used in that connection by the institution concerned, in particular during the pre-litigation procedure'. [23]

61. Through the translation of documents, which in civil proceedings are the application and its annexes, protection is given

20 — Heß, 'Neue Formen der Rechtshilfe in Zivilsachen im europäischen Justizraum', in *Recht der Wirtschaft und der Arbeit in Europa: Gedächtnisschrift für Wolfgang Blomeyer*, 2004, p. 617 (629), even refers to mandatory translation of documents and accompanying information in the language of the place of service.

21 — See Schütze, 'Übersetzungen im europäischen und internationalen Zivilprozessrecht — Probleme der Zustellung', *RIW*, 2006, p. 352 (355).

22 — In many legal orders the maxim *accessorium sequitur principale* is used rather than the maxim *accessio cedit principali*. Both maxims mean that an addition to the principal thing becomes part of it (Benke and Meissel, *Juristenlatein*, 2nd edition, 2002, Vienna, p. 4).

23 — Order in Case T-11/95 *BP Chemicals* v *Commission* [1996] ECR II-599, paragraph 9. The Court of First Instance dismissed a request submitted by two Italian interveners for a derogation from the requirement that the annexes to their statement in intervention be translated into the language of the case, English.

to defendants. However, annexes can be extremely long and it might not be appropriate to require the translation of lengthy annexes to an application. The third subparagraph of Article 29(3) of the Rules of Procedure of the Court of Justice makes provision for cases in which lengthy annexes or documents are enclosed with the application: 'In the case of lengthy documents, translations may be confined to extracts. However, the Court or Chamber may, of its own motion or at the request of a party, at any time call for a complete or fuller translation'.

62. Such a solution could also be acceptable in the case of cross-border service in civil and commercial matters. Where there are lengthy annexes which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, the translation could be confined to extracts to which the pleadings refer. A similar solution can also be found in Article 52(2) of the Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. [24] I consider that such a solution might not be appropriate on account of the defendant's right to a fair hearing and the protection of defendants in general as regards service in civil and commercial matters. It is easy to imagine the everyday case of a consumer who concludes a consumer contract in another European country with an agreement on jurisdiction that is not improper [25] and on whom the language of the trader is imposed. An average consumer cannot be expected to master the language of the foreign Member State.

63. However, the addressee's right to a translation of the documents may under no circumstances be interpreted in such a way that it is contrary to the purpose of Regulation No 1348/2000, which is primarily to improve and expedite the transmission between the Member States of judicial and extrajudicial documents in civil or commercial matters. [26]

64. As has already been mentioned, the lack of a translation of the document, which

24 — OJ 1985 L 239, p. 19. Article 52(2) of that convention provides: 'Where there is reason to believe that the addressee does not understand the language in which the document is written, the document — or at least the important passages thereof — must be translated into (one of) the language(s) of the Contracting Party in whose territory the addressee is staying. If the authority forwarding the document knows that the addressee understands only some other language, the document — or at least the important passages thereof — must be translated into that other language.'

25 — With regard to an improper agreement on jurisdiction, see Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* [2000] ECR I-4941.

26 — See point 44 of this Opinion.

actually covers both the application and its annexes in German civil procedure, may be remedied by subsequent service of the translation of the annexes or, in the case of more lengthy annexes, by subsequent service of a translation of the extracts to which the application expressly refers in order to substantiate the arguments therein. [27]

65. On these grounds I propose that the first question be answered as follows: Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that in the case of service of a document and the annexes thereto an addressee also has the right to refuse acceptance pursuant to Article 8(1) if only the annexes to the document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

C — *The second question*

66. With its second question, the referring court is essentially seeking to ascertain whether it may be presumed that the addressee 'understands' the language of the Member State of transmission within the meaning of Article 8(1)(b) of Regulation No 1348/2000 where it was agreed in a contract which was concluded in the course of business that that language was to be used for mutual correspondence and for correspondence with the authorities and public institutions.

67. According to German legal literature, the wording of Article 8(1)(b) of Regulation No 1348/2000, under which the addressee may refuse to accept the document to be served if it is not in a language of the Member State of transmission which the addressee understands, does not greatly assist in its interpretation. [28]

68. Service of documents lies within a triangle of conflicting priorities concerning access to the administration of justice, the protection of defendants and procedural economy. In civil proceedings it opens the way to a legal remedy for the applicant. In many legal orders service of the application can mean that proceedings are now pending and ensures that time-limits are observed. For his part, the defendant learns

27 — See *Leffler* (cited in footnote 10 above), paragraphs 38 to 53, and also Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 364, who does not, however, consider the problems of lengthy annexes and the associated question of procedural economy (translation time and translation costs).

28 — Lindacher, 'Europäisches Zustellungsrecht — die VO (EG) Nr. 1348/2000: Fortschritt, Auslegungsbedarf, Problemausblendung', *Zeitschrift für Zivilprozeß*, Vol. 114 (2001), p. 179 (187). The author suggests that the interpretation of Article 8(1)(b) of Regulation No 1348/2000 should not be based on individual linguistic knowledge, in order to make the criterion manageable and predictable. Instead, fixed general criteria should be developed. According to this view, a language of the Member State of transmission which the addressee understands should be taken to exist at least if the addressee himself is a national of the Member State of transmission. The same should apply if he is national of a State with the same official language.

through the transmission of the application that proceedings have been initiated and his right to a fair hearing is thereby protected. [29] In the context of the rules on service, these basic procedural rights must be in a balanced relationship. [30] It is therefore necessary on the one hand that the rules on service do not give rise to disproportionate prejudicial effects on the protection of defendants and, at the same time, allow the proceedings to be conducted quickly. On the other hand, the protection of defendants may not extend so far that it becomes impossible for the applicant to conduct the court proceedings so that his access to judicial process is ultimately barred. [31]

69. In the present case, two contrasting arguments are put forward. IHK Berlin takes the view that the contractual agreement on the German language, that is the language of the State of transmission, also establishes the factual presumption that the addressee understands such a document if it concerns the specific legal relationship and is written in the agreed language. On the other hand, according to the French Government, that fact alone is not sufficient to consider the language of the Member State of transmission to be understood by the addressee for the purposes of Article 8(1)(b) of Regulation No 1348/2000. If the language of the Member State of transmission were considered to be understood by the addressee solely because a clause of the contract provided that correspondence was to be conducted in that language, a legal presumption would be introduced which went far beyond the provision made in the regulation.

70. The view is taken in legal literature that Article 8(1) of Regulation No 1348/2000 combines objective and subjective criteria in ascertaining linguistic knowledge in the event of service abroad. [32] According to that view, the objective criterion should be the official language of the Member State addressed and the subjective criterion should be the addressee's linguistic knowledge of the language of the Member State of transmission. [33]

71. The Bundesgerichtshof stated in its order for reference that none of the bodies authorised to represent Grimshaw Architects

29 — See Heß, 'Die Zustellung von Schriftstücken im europäischen Justizraum', *NJW*, 2001, p. 15.

30 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 365.

31 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 365.

32 — See Malan, 'La langue de la signification des actes judiciaires ou les incertitudes du règlement sur la signification et la notification des actes judiciaires et extrajudiciaires', *Les petites affiches — LPA 392*(2003), No 77, p. 6, and Sladič, 'Vročanje v civilnih in gospodarskih zadevah', *Podjetje in Delo — PiD*, 31 (2005), p. 1131 (1147).

33 — The nationality of a natural person is ruled out as an objective criterion. If the addressee for service is a national of the State of transmission, but does not have a command of its language, he may refuse to accept the document to be served. It is possible, for example, to imagine cases where nationality is acquired through marriage or through naturalisation in the case of sportspeople (Schütze, *'§ 1068'*, in Wieczorek and Schütze, *Zivilprozessordnung und Nebengesetze, Großkommentar*, p. 9, paragraph 12). However, other opinions are also put forward. It is to be accepted that the addressee understands the language of the Member State of transmission if the addressee is a national of a State with the same official language (Heiderhoff, loc. cit. (footnote 4), p. 1221).

understands German. However, it is undisputed that the contract which is the subject-matter of these proceedings and the correspondence are in German and that Berlin was agreed as a place of jurisdiction.

72. It is pointed out in the legal literature that Article 8(1) of Regulation No 1348/2000 does not make clear whose linguistic knowledge is to be taken into account where a document is to be served on a legal person. [34] At present, the only practicable solution by which it is possible to answer this question would seem to be by reference to the registered office of the legal person as the relevant connecting factor for the linguistic knowledge of the legal person. [35] Because Grimshaw Architects has its registered office in London, the relevant language would be English. In fact, however, German was agreed on for correspondence in the architect's contract of 16 February 1994.

73. It must also be examined whether specifying a certain language in a contract means that it can be assumed that the parties know that language and that the right to refuse acceptance may therefore be ruled out. [36]

74. It is difficult to ascertain whether the addressee is in a position, on the basis of his individual linguistic knowledge, to understand a document which is not written in the language of the Member State addressed. The question whether or not a person understands a foreign language ultimately depends on his own judgment. [37] Rudimentary linguistic knowledge is probably not sufficient to understand judicial documents. The linguistic knowledge must therefore be good enough for even legal documents to be essentially understood from a linguistic point of view. [38] This may be assumed, for example, where the addressee agreed by contract for correspondence between that State's authorities and public institutions to be conducted in the language of the State of transmission, as in this case. 'Public institutions' suggests that the language of correspondence between the parties was agreed for all the State's organs, including the courts, and not only the executive. [39]

34 — Sujecki, *Das Übersetzungserfordernis und dessen Heilung nach der Europäischen Zustellungsverordnung: Entscheidung des Europäischen Gerichtshofes vom 8. November 2005*, p. 359, and Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 364.

35 — Sujecki, *Das Übersetzungserfordernis und dessen Heilung nach der Europäischen Zustellungsverordnung: Entscheidung des Europäischen Gerichtshofes vom 8. November 2005*, p. 359.

36 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 364.

37 — See Mayr and Czernich, loc. cit. (footnote 4), p. 182. The difficulties in ascertaining individual linguistic knowledge apply to both the transmitting and the receiving agency.

38 — See Jastrow, loc. cit. (footnote 4), p. 1306.

39 — See Badura, *Staatsrecht*, 3rd edition, 2003, p. 658, and Maurer, *Staatsrecht I*, 4th edition, 2005, p. 6. Badura states that the State organ which performs the functions of the administration of justice is the court.

75. For that reason, where possible only general, objective criteria should be employed, including business transactions and written correspondence in the relevant language of the Member State of transmission. Verification of individual linguistic knowledge presents enormous difficulties for all the parties to the proceedings, with the exception of the addressee. [40] If it is disputed whether the addressee understands the language of the Member State of transmission, this can be clarified only by means of measures of inquiry before the national court hearing the case. Thus it can be established that the addressee of the document understands the language of the Member State of transmission in which the document is written. [41]

76. Deciding on a contractual language helps to avoid or reduce problems of comprehension which might arise between parties who do not speak the same language. [42] If the parties to a contract in an international legal relationship agree on a contractual language, that is evidence that both parties have a command of that language. If, in an international legal relationship, the jurisdiction of the courts of the State of transmission or the law of the State of transmission as the applicable law is determined, [43] such contractual agreement to conduct proceedings in the language of the State of transmission may be regarded as further evidence of linguistic knowledge. In this specific case, Berlin was agreed on as the place of jurisdiction in Paragraph 10.2 of the architect's contract.

77. A situation may well arise where one of the parties to the contract does not actually understand the contractual language. However, by the valid agreement on the contractual language, that party, who is relying on insufficient linguistic knowledge with regard to the attempted service, has indicated to everyone that he has sufficient linguistic knowledge. [44] He has objectively created the impression, from the point of view of an honest participant in a legal relationship, that he understands the language of the Member State of transmission.

78. By deciding in a contract on the contractual language, the applicable law and above all the place of jurisdiction, the expectation

40 — Heiderhoff, loc. cit. (footnote 4), p. 1222.

41 — *Leffler* (cited in footnote 10 above), paragraph 52.

42 — I would also refer to Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraphs 48 to 55. In that judgment the Court of First Instance stated that under the Community rules, where there is no express provision for an official language of the Community to be used in relations between the Commission and an undertaking established in a third country, the Commission is entitled, in an infringement procedure pursuant to the Community's competition law, to choose, as the language for the statement of objections and for the decision, that used by the undertaking in its correspondence with its own sales subsidiaries in the Member States of the Community and not the language of the Member State in which its agent lives.

43 — Such a clause might read as follows: 'This contract and its interpretation shall be subject to the law of the Federal Republic of Germany. The courts of Berlin shall have exclusive jurisdiction.'

44 — See Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 365 et seq. In the comments made in the order for reference in this case, the author does not address the issue of the place of jurisdiction and the applicable law.

is also created on the part of the other party that there exists sufficient linguistic knowledge of the language of the Member State of transmission.[45] This applies above all where the language of the Member State of transmission has been laid down by contract for correspondence between the parties to the contract and the authorities and public institutions.[46]

79. With such a contractual agreement, a party to a contract indicates that he has sufficient linguistic knowledge in respect of correspondence with authorities and other public institutions. In such a case, it must therefore be assumed that a rebuttable presumption (*praesumptio iuris tantum*) is justified to the effect that the addressee has sufficient linguistic knowledge for the purposes of Article 8(1)(b) of Regulation No 1348/2000 to understand even official language, which includes court language in procedural law. The exercise of the right to refuse acceptance under Article 8(1) of Regulation No 1348/2000 could be precluded in such a case.[47] Since there is only a rebuttable presumption, however, it is open to the addressee to rebut it in accordance with the rules on evidence of the Member State in which the civil proceedings are conducted.

80. At this point I would like to draw attention to an order of the Court of First Instance. In *Hensotherm* v *OHIM*[48] the Court answered, in the case of a Swedish undertaking which chose English as the language of the case in the administrative procedure before OHIM and had itself drafted documents in that language, in response to its objection that as a Swedish undertaking operating in international trade it did not have a good command of English, that that objection could not be upheld.

81. Therefore, Article 8(1)(b) of Regulation No 1348/2000 must be interpreted as meaning that there is a rebuttable presumption that the addressee of a document understands the language of a Member State of transmission within the meaning of that

45 — See Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 366. An analogy can also be found in the theory of legal transactions in which *Willenstheorie* (will theory — theory of subjective intention) and *Erklärungstheorie* (theory of declaration — objective reliance) determine the basis of validity of a declaration of intent.

46 — See point 5 of this Opinion, in which the relevant contractual clauses are reproduced.

47 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 366. A different conclusion would give the addressee of the document too much latitude to frustrate service. In addition, a contrary conclusion would mean that the document would ultimately also have to be translated into the language of the Member State addressed in these cases. The author also stresses that the translation requirement would run counter to the aims of Regulation No 1348/2000 which, having regard to the need to protect the addressee for service, seeks to restrict the translation requirement on account of the high costs and time taken and thus to simplify and expedite service on the whole.

48 — Order in Case T-366/04 [2006] ECR II-65, paragraphs 43 and 44.

regulation if, in the course of his business, he agreed in a contract that correspondence between the parties to the contract on the one hand and the authorities and public institutions of the Member State of transmission on the other was to be conducted in the language of that Member State of transmission. Since it is only a rebuttable presumption, however, it is open to the addressee to rebut that presumption in accordance with the rules on evidence of the Member State in which the court proceedings are conducted.

82. Such a conclusion cannot apply in general to consumer contracts, since, according to objective criteria, the correspondence of a consumer who is not familiar with specialist and legal fields cannot be treated in the same way as the transactions and correspondence of a trader. For that reason, the answer to the second question must be confined only to the specific case where a trader agrees in a contract, in the course of his business, that correspondence between the parties to the contract on the one hand and the authorities and public institutions of the Member State of transmission on the other is to be conducted in the language of that Member State of transmission.

D — *The third question*

83. With the third question, the Bundesgerichtshof wishes essentially to ascertain whether the addressee may not rely on Article 8(1) of Regulation No 1348/2000 on account of the lack of a translation of the annexes if he concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the Member State of transmission.

84. Recital 8 in the preamble to Regulation No 1348/2000 states that 'to secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations'. In Community law exceptions are to be given a narrow interpretation (*singularia non sunt extendenda*). [49]

85. In its observations on the second question, Grimshaw Architects refers to the dogmatic impossibility of justifying why a contractual agreement between private individuals which, according to the intention of the parties, is to apply only to the performance of the contract should have restrictive effect with regard to the public law right to a fair hearing.

49 — Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 89. In that case the Court held that, since they are exceptions to the Community system for the organisation of working time put in place by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), the derogations provided for in Article 17 of that regulation must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected.

86. Doubts over such a broad interpretation of Article 8(1) of Regulation No 1348/2000 are raised above all by Paragraphs 10.2 and 10.4 of the architect's contract, in which it is stipulated that '[t]he place of jurisdiction in the event of disputes shall be Berlin' and that the architect's contract shall be subject to German law. Those clauses of the contract, combined with the language clause in which the language of the Member State of transmission was agreed on for correspondence with authorities and public institutions [50] of the Member State of transmission, represent an effective specific relinquishment of basic rights. [51] In practical terms this means in the present case that acceptance of the jurisdiction of the courts of the Member State of transmission also entails recognition of the language of the court applicable in specific civil proceedings. The same also applies to arbitration agreements where the parties to an international contract decide in advance and at their complete discretion the language of the arbitration procedure.

87. As the Commission rightly points out, [52] the agreement concluded between Grimshaw Architects and IHK Berlin to use German forms an integral part of the contract, which is significant for the performance of the contract. However, that part of the contract relates not only to the correspondence relevant to the performance of the contract, but also extends to correspondence in the event of differences of opinion over contractual obligations and to correspondence in connection with judicial proceedings brought in that regard.

88. In such a case the need for a document to be translated from the language of the Member State of transmission into the language of the Member State addressed can no longer be justified by the protection of the addressee's interests. Anyone who voluntarily agrees with the other party in a contract concluded between traders on a certain language regime for correspondence cannot later claim that his legitimate interests would not be protected if that language regime were followed. Such a claim would come under the heading '*venire contra factum proprium*'. [53] In such a case the demand for a translation of annexes in the language of the Member State of transmission departs from the protective purpose of the right to refuse acceptance established in Article 8(1) of Regulation No 1348/2000; by accepting such a contractual regime, the interest in a translation in

50 — I refer to the similarity between the concepts of public institution and State organ. See also footnote 39 of this Opinion.

51 — According to Fischinger, P., 'Der Grundrechtsverzicht', *JuS*, 2007, p. 808, relinquishment of a basic right means the agreement by the holder of a basic right to specific interference with and impairments of basic rights.

52 — Commission's observations, paragraphs 31 and 32.

53 — In Romanist legal orders in particular, the expression '*nemo auditur propriam turpitudinem allegans*' is preferred.

the language of the Member State addressed is negated, as a result of which the right to refuse acceptance under Article 8(1) of Regulation No 1348/2000 loses its justification.

89. Otherwise the document would have to be translated into the language of the Member State addressed [54] even where there was, first, a contract concluded between the parties in the course of their business in which the language of the Member State of transmission was laid down for correspondence with the authorities and public institutions of that Member State of transmission, second, a jurisdiction clause in favour of the courts of the Member State of transmission and, third, a choice of law clause in favour of the law of the Member State of transmission. Such a result would run counter to the purpose of Regulation No 1348/2000, however. [55]

90. Lastly, I would like to mention that such a solution would not be appropriate in the case of cross-border consumer contracts. In such a case a stronger party, an undertaking for example, could impose its language on a weaker party, a consumer for example, where the consumer does not understand that language. In the case of a consumer who did not understand the language 'imposed' by the undertaking, the right to refuse to accept the untranslated documents would be justified. [56]

91. For that reason, the answer to the third question should be that Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee may not rely on that provision in order to refuse acceptance of the annexes to an application which are not in the language of the Member State addressed, but in the language of the Member State of transmission contractually agreed between the parties in the course of their business for correspondence with the authorities and public institutions of the Member State of transmission, if the addressee concludes a contract in the course of his business in which he agrees that correspondence with the authorities and public institutions of the Member State of transmission is to be conducted in the language of that Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language.

54 — Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 366.

55 — See point 44 of this Opinion.

56 — See also Sujecki, 'Das Annahmeverweigerungsrecht im europäischen Zustellungsrecht', p. 366, who sees a specific need to protect the addressee/consumer in such cases, which does not exist, however, in the case of a contract concluded between the parties in the course of their business.

VI — Conclusion

92. In the light of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesgerichtshof as follows:

'(1) Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters must be interpreted as meaning that in the case of service of a document and the annexes thereto an addressee also has the right to refuse acceptance pursuant to Article 8(1) if only the annexes to the document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

(2) Article 8(1)(b) of Regulation No 1348/2000 must be interpreted as meaning that there is a rebuttable presumption that the addressee of a document understands the language of a Member State of transmission within the meaning of that regulation if, in the course of his business, he agreed in a contract that correspondence between the parties to the contract on the one hand and the authorities and public institutions of the Member State of transmission on the other was to be conducted in the language of that Member State of transmission. Since it is only a rebuttable presumption, however, it is open to the addressee to rebut that presumption in accordance with the rules on evidence of the Member State in which the court proceedings are conducted.

(3) Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee may not rely on that provision in order to refuse acceptance of the

annexes to an application which are not in the language of the Member State addressed, but in the language of the Member State of transmission contractually agreed between the parties in the course of their business for correspondence with the authorities and public institutions of the Member State of transmission, if the addressee concludes a contract in the course of his business in which he agrees that correspondence with the authorities and public institutions of the Member State of transmission is to be conducted in the language of that Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language.'