Brussels I Review – Choice of Court Agreements

Among the issues raised by the Green Paper, those concerning the treatment of choice of court agreements raises are, almost certainly, the most difficult and controversial. In considering possible reforms, a balance must be struck between the advantages, both commercial and in terms of promoting legal certainty, of supporting party autonomy in matters of jurisdiction, and the wish to ensure that weaker parties (particularly consumers) are protected and that the procedural rights generated by the Brussels I Regulation are not abused.

In the Commission's view in its Green Paper:

> *Agreements on jurisdiction by the parties should be given the fullest effect, not the least because of their practical relevance in international commerce. It should therefore be considered to what extent and in which way the effect of such agreements under the Regulation may be strengthened, in particular in the event of parallel proceedings.*
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> *One solution might be to release the court designated in an exclusive choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule. A drawback of this solution is that parallel proceedings leading to irreconcilable judgments are possible.*
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> *Another solution might be to reverse the priority rule insofar as exclusive choice of court agreements are concerned. In this option, the court designated by the agreement would have priority to determine its jurisdiction and any other court seised would stay proceedings until the jurisdiction of the chosen court is established. This solution already applies in the context of the Regulation with respect to parties none of whom is domiciled in a Member State. Such a solution would align to a large extent the internal Community rules with the international rules. A drawback of this solution may be that if the agreement is invalid, a party must seek first to establish the invalidity before the court designated in the agreement before being able to seize the otherwise competent courts.*
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> *Alternatively, the existing lis pendens rule may be maintained, but a direct*

communication and cooperation between the two courts could be envisaged, combined, for instance, with a deadline for the court first seized to decide on the question of jurisdiction and an obligation to regularly report to the court second seized on the progress of the proceedings. In this option, it should be ensured that the claimant does not lose a legitimate forum for reasons outside his/her control.

The efficiency of jurisdiction agreements could also be strengthened by the granting of damages for breach of such agreements, arising for instance from the delay or the exercise of default clauses in loan agreements.

Another solution might also be to exclude the application of the lis pendens rule in situations where the parallel proceedings are proceedings on the merits on the one hand and proceedings for (negative) declaratory relief on the other hand or at least to ensure a suspension of the running of limitation periods with respect to the claim on the merits in case the declaratory relief fails.

Finally, the uncertainty surrounding the validity of the agreement could be addressed, for instance, by prescribing a standard choice of court clause, which could at the same time expedite the decision on the jurisdiction question by the courts . This option could be combined with some of the solutions suggested above: the acceptance of parallel proceedings or the reversal of the priority rule could be limited to those situations where the choice-of-court agreement takes the standard form prescribed by the Regulation.

As the Commission appears to acknowledge in the Report accompanying its Green Paper, the overwhelming priority in the review of the Brussels I Regulation must be to address the genuine concerns raised by business and the legal profession following the ECJ's decision in Case C-116/02, *Erich Gasser GmbH v. MISAT Srl* , confirming that the *lis alibi pendens* provisions in the Brussels I regime cannot be excluded or overridden by a choice of court agreement. In particular, as the English High Court decision in the *Primacom* case demonstrates, *Gasser* has crystallised a legal framework within which tactical, protective and (in some cases) abusive litigation within the EC, by parties wishing to take advantage of the priority conferred by Art. 27 of the Regulation, is a regular occurrence. This state of affairs has adverse and unintended consequences not only for the parties (as the example given in the Commission's report of protective litigation

triggering cross-default provisions in loan documentation demonstrates), but also for the reputation of the EC and its constituent legal systems as a venue for commercial dispute resolution.

There is also a wider international aspect to the problem, and the analysis of possible solutions, in that the Council has approved the signing on behalf of the European Community of the Convention on Choice of Court Agreementsconcluded at The Hague on 20 June 2005. It must be noted that the Convention contains provisions governing its relationship with other international instruments, which give priority to the Regulation's rules in certain cases (including the recognition and enforcement of judgments between Member States). Moreover, even if adopted by the EC, the Convention would exclude choice of court agreements in several situations falling within the Regulation's scope (Hague Convention, Art. 2(1)(f)-(p)) and would not (save by reciprocal declarations – Art. 22) cover non-exclusive choice of court agreements. Nevertheless, the Convention promises significant benefits for business in the EC by creating the basis for an international framework supporting the consensual judicial resolution of disputes comparable to that established for arbitral processes by the 1958 New York Convention, thereby offering greater flexibility and opportunities for Member State entities trading with their counterparts in other Contracting States.

It is to be hoped that the Community will take the opportunity to accede to the Convention at the earliest possible opportunity, and will make a declaration extending its application in the Member States to non-exclusive jurisdiction agreements. If that view is accepted then, in considering possible reform of the Brussels I Regulation, it would appear desirable to promote a solution in which, so far as possible, the rules to be applied by Member State courts to determine the validity and effect of a choice of court agreement in "Convention cases" are compatible with those to be applied under the Regulation in "non-Convention cases".

Accordingly, the following proposals are designed to ensure greater consistency between the two regimes:

a. The law of the court (putatively) chosen should be expressed to apply in all cases to determine questions of consent to a choice of court agreement under Art. 23 of the Regulation, as well as questions whether the dispute falls within the scope of the clause. This solution should be preferred to attempts, by legislation

or jurisprudence, to develop an autonomous EC law concept of "agreement" or to treat the presence of a written, or other instrument, which on its face meets the formal requirements in Art. 23(1) as conclusive. The provisions of Regulation should, however, continue to govern questions of formal validity, and – to preserve its effectiveness – to exclude the application of any national rule restricting the ability of contracting parties, one or more of whom is domiciled in a Member State, to make a choice of court agreement having effect Art. 23. Finally, and consistently with the decision in Case C-269/95, *Benincasa v. Dentalkit*, the Regulation should be amended to make clear that choice of court agreements must, for the purposes of Art. 23, be treated as separate from any contract arising from the instrument in which they are contained and that their validity must be considered independently of any allegation as to the validity of that contract.

b. The *lis alibi pendens* rules in Arts. 27-28 should play only a subordinate role in circumstances in which there is, or is claimed to be, a choice of court agreement satisfying the formal requirements in Art. 3(c) of the Hague Convention. Under new rules, priority would be given to the court (putatively) chosen by the parties, as follows:

i. rules no less favourable to party autonomy than those in Arts. 5 and 6 of the Hague Convention should govern Member State courts' obligations to accept or, as the case may be, decline jurisdiction based on a choice of court agreement;

ii. if one of the parties contests the validity of the choice of court agreement or denies that the claim falls within its scope, a Member State court not chosen should be required to suspend (rather than dismiss) the proceedings until the jurisdiction of the court chosen is established, unless one of the grounds set out in Art. 6 of the Hague Convention (if applicable) is established to its satisfaction;

iii. any decision by a Member State court not chosen to refuse to suspend or dismiss proceedings, including a decision based on one of the Art. 6 grounds (if applicable), should not be a "judgment" entitled to recognition under the Regulation but should have effect only within the legal order of that State;

iv. any judgment on the merits by a Member State court not chosen should be capable of being recognised and enforced under the Regulation, subject to an obligation upon Member State courts to refuse enforcement in terms

corresponding to the obligation to suspend or dismiss proceedings if another court has exclusive jurisdiction under a choice of court agreement; and

v. the *lis alibi pendens* provisions in Arts. 27-28 should continue to apply, in addition to the rules set out above, in situations in which the court chosen is first seised.

Of the other options for reform suggested in the Green Paper, the possibility of enhanced communication between the court chosen and a court not chosen but seised first of proceedings, and a specific obligation for the latter to decide on the question of jurisdiction as a preliminary matter and within a specific timeframe merit consideration as additional or alternative measures, although improved communication on its own will not address the problems raised by the *Gasser* decision. On the other hand, the proposal to grant an EC law remedy for "breach" of choice of court agreements strays into the realm of substantive contract law and would appear outside the Community's competence under Title IV of the Treaty. It would also promote satellite litigation, increasing costs and the potential for conflict between Member State judgments.

As to the proposal to develop "standard wording" for choice of court agreements, this option may merit further consideration outside the legislative framework of the Regulation, in order to promote an increased awareness among Member State courts of these clauses and to facilitate the use of different languages in commercial contracts. However, the use of such standard wording should not attract a different jurisdictional regime from other choice of court agreements that fulfil the requirements of Art. 23, as amended. Such a distinction would unduly increase the complexity of the Regulation's rules in this area, be out of line with the Hague Convention and would encourage ancillary disputes, for example in situations in which the wording actually agreed varied slightly from the "standard". Parties who wish to confer jurisdiction on a Member State court under Art. 23 should be able to make their intention clear using their own choice of words, and they should not be required to jump through additional hoops in order for their agreement to be given full legal effect.

Finally, choice of court agreements should, under Art. 23, be put on a basis that is not less favourable than that for arbitration agreements, whether within or outside the Regulation. This point will be developed in a later post on the Regulation's approach to arbitration.

In summary, the answer to Question 3 could be that the problems raised in the functioning of the Regulation with respect to choice of court agreements should be addressed, primarily, by the Community acceding to the Hague Choice of Court Convention and by the adoption of new Regulation rules concerning the law applicable, *lis pendens* and the recognition and enforcement of judgments that are compatible with that Convention and take priority over the existing *lis pendens* regime.