Brussels I Review – Loose Ends

The final question in the Commission's Green Paper (which, incidentally, deserves praise for its concise and focussed presentation of the issues), covers other suggestions for reform of the Regulation's rules not falling under any of the previous headings. It is divided into three headings: Scope, Jurisdiction and Recognition and enforcement, as follows:

> *8.1. Scope*
>
> *As far as scope is concerned, maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance. With respect to the operation of Article 71 on the relation between the Regulation and conventions on particular matters, it has been proposed to reduce its scope as far as possible.*
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> *8.2. Jurisdiction*
>
> *In the light of the importance of domicile as the main connecting factor to define jurisdiction, it should be considered whether an autonomous concept could be developed.*
>
> *Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights in rem or possession with respect to such assets are concerned. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged.With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national*

procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

In maritime matters, it should be reflected to what extent a consolidation of proceedings aimed at setting up a liability fund and individual liability proceedings on the basis of the Regulation might be appropriate. With respect to the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading, stakeholders have suggested that a carrier under a bill of lading should be bound by and at the same token allowed to invoke a jurisdiction clause against the regular third-party holder, unless the bill is not sufficiently clear in determining jurisdiction.

With respect to consumer credit, it should be reflected whether it might be appropriate to align the wording of Articles 15(1)(a) and (b) of the Regulation to the definition of consumer credit of Directive 2008/48/EC .

With respect to the ongoing work in the Commission on collective redress , it should be reflected whether specific jurisdiction rules are necessary for collective actions.

8.3. Recognition and enforcement

As far as recognition and enforcement is concerned, it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments. In family matters (Regulations (EC) No 2201/2003 and (EC) No 4/2009), the settlement of a dispute in an authentic instrument is automatically recognised in the other Member States. The question arises to what extent a "recognition" might be appropriate in all or some civil or commercial matters, taking into account the specific legal effects of authentic instruments.

Further, the free circulation of judgments ordering payments by way of penalties might be improved by ensuring that the amount fixing the penalty is set, either by the court of origin or by an authority in the Member State of enforcement. It should also be considered to what extent the Regulation should not only permit the recovery of penalties by the creditor, but also those which

are collected by the court or fiscal authorities.

Finally, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment . Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the requirement to designate an address for service of process or to appoint a representative ad litem . In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters , such a requirement does indeed seem obsolete today.

The Commission asks whether the operation of the Regulation could be improved in the ways suggested above. While different respondents will, no doubt, pick out different elements of these proposals as being significant and deserving of attention, the following conclusions could be drawn:

1. Domicile of individuals (Art. 59)

In terms of the objective of the Regulation in promoting clear and uniform solutions to problems concerning the jurisdiction of Member State courts, it makes no sense for the key concept of "domicile" to be defined, in the case of individuals, by reference to national law, particularly as an autonomous definition has been provided for bodies corporate and unincorporated (Art. 60). A uniform approach should be adopted for individuals as well. This could refer to the concept of "habitual residence", consistently with the Rome I and Rome II Regulations, with the possible alternative of "main place of residence". These two factors would, broadly speaking, correlate to the second and third factors for bodies corporate etc. ("central administration" , "principal place of business"). Nationality, however, should not be adopted as a factor corresponding to the first factor for bodies corporate etc. ("statutory seat"), as the prospect of being brought before the courts of a country of origin, with which a person may no longer have a close connection, may act as a deterrent to the free movement of persons within the EC.

2. "Seat" of companies (Art. 22(2))

It would, in principle, appear equally desirable to develop a uniform approach to determining the "seat" of a company etc. for the purposes of Art. 22(2). If such a provision is to be adopted, the "statutory seat" (cf. Art. 60(1)(a), 60(2)) should be favoured over the "real seat" as being more certain and consistent with EC law principles of freedom of establishment. Continuing differences between the Member States as to the private international law rules to be applied to questions of corporate status and internal management – despite the intervention of the ECJ on more than one occasion – may, however, make agreement on this point difficult, if not impossible at this stage in the development of private international law in the Community.

3. Rules of special jurisdiction

An additional rule of special jurisdiction for cases concerning title, possession or control of *tangible* moveable assets (favouring the courts of the place where the asset is physically located at the time that the court becomes seised) would potentially be valuable, particularly in cases involving ships and aircraft. There may, however, be a risk that the rule could be abused by moving assets so as to create, or remove, jurisdiction of a particular Member State's courts. In particular, a party in possession or control of assets may move them to a particular jurisdiction with laws favourable to him and immediately issue proceedings for positive or negative declaratory relief, thereby blocking proceedings in other Member States to claim the asset. Such tactics may hinder, for example, efforts to recover artworks or cultural artefacts. As a consequence there would appear a strong argument for limiting any new rule to claims that include a claim to recover possession or control of tangible moveable assets. The rule should not, in any event, be extended to intangible assets, for which any "location" or situs is artificial and does not demonstrate the necessary close connection.

The special provision in Art. 65 for Germany, Austria and Hungary, excluding the application of Arts. 6(2) and 11 for third party proceedings and substituting certain national rules of jurisdiction, should be deleted, as being incompatible with an EC Regulation intended to have uniform effect.

4. Rules for employment cases

As the Commission suggests, the *Glaxosmithkline* decision should be partially

reversed by allowing an employee who sues two or more employers (whether joint or several) in the same proceedings to bring those proceedings before the courts of the domicile of one of them, provided that the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcileable judgments resulting from separate proceedings.

5. Collective redress

The possible development of specific jurisdiction rules for collective redress cases should be considered (outside the present review of the Brussels I Regulation) as part of an overall package of measures designed to improve protection for consumers and, possibly, other categories of claimants in particular situations (e.g. in anti-trust cases).

6. Recognition and enforcement

The recognition of authentic instruments and court settlements should be addressed, alongside their enforcement, in Chapter IV of the Regulation, as the Commission suggests.

More generally, and importantly, consideration should be given to elaborating in the Regulation what is required of Member States by the obligation in Art. 33 to "recognise" a judgment. In its judgment in *Hoffmann v. Krieg*, the ECJ suggested (citing a passage in the Jenard Report) that "[r]ecognition must therefore 'have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given'" (paras. 10-11). More recently in *Apostolides v. Orams*, albeit in the context of proceedings relating to the enforcement of a judgment, the ECJ appeared to qualify that proposition by applying a "correspondence of effects" test (para. 66):

> *Accordingly, the enforceability of the judgment in the Member State of origin is a precondition for its enforcement in the State in which enforcement is sought (see Case C-267/97 Coursier [1999] ECR I-2543, paragraph 23). In that connection, although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given (see Hoffmann, paragraphs 10 and 11), there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin (see the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in*

Civil and Commercial Matters (OJ 1979 C 59, p. 0048) or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have.

Despite these dicta, it remains unclear whether "recognition" under the Regulation consists only of "formal recognition" of the judgment as an instrument generating or discharging obligations, or having other constitutive effects, or whether it extends (for example) to the effect of a judgment in precluding the re-litigation of claims or issues. A recent study led by Jacob van de Velden and Justine Stefanelli of the British Institute of International and Comparative Law has confirmed that Member States currently take widely diverging views on these questions. Accordingly, further development of the Regulation's understanding of the concept of recognition deserves closer attention as part of the present review of the Regulation.

Finally, as to enforcement (see also the earlier post on the proposed abolition of "*exequatur*"), the Commission's proposed improvements to the enforcement regime (i.e. creation of a standard form containing all relevant information as to the nature and terms of the judgment) and removal of the requirement (Art. 40(2)) to have an address for service within the jurisdiction) appear sensible.

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This is the last of my posts on the current Brussels I review, the initial consultation period for which closes on 30 June 2009. Even after that date, I would encourage conflictoflaws.net users who take an interest in the Regulation and its application in the Member States to comment here on the issues raised by the Commission's Green Paper.

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Question 8:

Do you believe that the operation of the Regulation could be improved in the ways suggested above32