European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementenation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

> *2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the*

earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full

translation should be required in the event that an application is made for the exceptional procedure;

Full text of the resolution after the break.

Many thanks to Jan von Hein for the tip-off.

European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

The European Parliament ,– having regard to Article 81 of the Treaty on the Functioning of the European Union,– having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter "the Brussels I Regulation" or "the Regulation"),– having regard to the Commission's report on the application of that regulation (COM(2009)0174),– having regard to the Commission's Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175),

– having regard to the Heidelberg Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission's Green Paper,

– having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme(2) , specifically the sections "Greater access to civil justice for citizens and business" and "Building a European judicial culture",

– having regard to the Union's accession to the Hague Conference on private international law on 3 April 2007,

– having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

– having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3) , the Lugano opinion(4) , West Tankers (5) , Gasser v. MISAT (6) , Owusu v. Jackson (7) , Shevill (8) ,Owens Bank v. Bracco (9) , Denilauer (10) , St Paul Dairy Industries (11) and Van Uden (12) ;

– having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13) , Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14) , Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15) , Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16) , Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18) ,

– having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19) ,

– having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

– having regard to Rules 48 and 119(2) of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules – supplemented by a substantial body of case-law,– and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of exequatur – the Commission's main objective – would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions,

E. whereas there is no requirement for exequatur in several EU instruments: the European enforcement order, the European payment order, the European small claims procedure and the maintenance obligations regulation(20) ,

F. whereas abolition of exequatur should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the 'Kompetenz-Kompetenz principle', etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in West Tankers ,

N. whereas party autonomy is of key importance and the application of the lis pendens rule as endorsed by the Court of Justice (e.g. in Gasser) enables choice-of-court clauses to be undermined by abusive "torpedo" actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture though training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denilauer case-law should be clarified by making it clear that ex parte measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

Comprehensive concept for private international law

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. lis pendens , jurisdiction clauses, etc .) and the final aim might be a comprehensive codification of private international law;

Abolition of exequatur

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Authentic instruments

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

Scope of the Regulation

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

Choice of court

12. Advocates, as a solution to the problem of "torpedo actions", releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

Forum non conveniens

14. Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson , a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seised to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21) ;

Operation of the Regulation in the international legal order

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States" courts;

18. Takes the view that the question of a rule overturning Owens Bank v. Bracco should be the subject of a separate review;

Definition of domicile of natural and legal persons

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

Interest rates

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

Industrial property

22. Considers that, in order to overcome the problem of "torpedo actions", the court second seised should be relieved from the obligation to stay proceedings under the lis pendens rule where the court first seised evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 ("Rome I")(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of "professional" incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

Jurisdiction over individual contracts of employment

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g . long distance lorry drivers, flight attendants);

Rights of the personality

25. Believes that the rule in Shevill needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

Provisional measures

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that "provisional, including protective measures" should be defined in a recital in the terms used in the St Paul Dairy case;

29. Considers that the distinction drawn in Van Uden, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in Van Uden for a "real connecting link" to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure granted in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seised of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission's idea that the court seised of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

Collective redress

32. Stresses that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

Other questions

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

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34. Instructs its President to forward this resolution to the Council and the Commission.