Brussels I Review – The Wider International Picture

The second topic discussed in the Commission's Green Paper raises more fundamental questions concerning the treatment under EC law of situations having a material connection with one or more States outside the EC (excluding, for these purposes, the other Contracting States to the Lugano Convention) , including questions of (1) jurisdiction of a Member State court over defendants not domiciled in a Brussels I/Lugano State, and (2) the effects within the Member States of proceedings and judgments of a court in a non-Brussels I/Lugano State.

At present, the Brussels I Regulation, following the framework of its predecessor Convention, (a) largely delegates questions of jurisdiction over non-domiciled defendants to the national rules of the court seised (Art. 4 and Recital (9)), (b) provides for the recognition and enforcement of judgments against such defendants on the same terms as those against domiciled defendants (Recital (10)), and (c) recognises the possibility of conflict between Member and non-Member State judgments (Art. 34(4)), but (d) does not provide for the recognition or enforcement of judgments from outside the EC (Case C-129/02, *Owens Bank v. Bracco*) or (at least expressly) for the resolution of conflicts of jurisdiction between Member State and third country courts (cf. Case C-281/02, *Owusu v. Jackson*).

According to the Commission in its Green Paper:

> *The good functioning of an internal market and the Community's commercial policy both on the internal and on the international level require that equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the Community. The jurisdictional needs of persons in the Community in their relations with third States' parties are similar. The reply to these needs should not vary from one Member State to another, taking into account, in particular, that subsidiary jurisdiction rules do not exist in all the Member States. A common approach would strengthen the legal protection of Community citizens and economic operators and guarantee the application of mandatory Community legislation.*

In order to extend the personal scope of the jurisdiction rules to defendants domiciled in third States, it should be considered to what extent the special jurisdiction rules of the Regulation, with the current connecting factors, could be applied to third State defendants.

In addition, it should be reflected to what extent it is necessary and appropriate to create additional jurisdiction grounds for disputes involving third State defendants ("subsidiary jurisdiction"). The existing rules at national level pursue an important objective of ensuring access to justice; it should be reflected which uniform rules might be appropriate. In this respect, a balance should be found between ensuring access to justice on the one hand and international courtesy on the other hand. Three grounds might be considered in this respect: jurisdiction based on the carrying out of activities, provided that the dispute relates to such activities; the location of assets, provided that the claim relates to such assets; and a forum necessitatis, which would allow proceedings to be brought when there would otherwise be no access to justice .

Further, if uniform rules for claims against third State defendants are established, the risk of parallel proceedings before Member State and third State courts will increase. It must therefore be considered in which situations access to the courts of the Member States must be ensured irrespective of proceedings ongoing elsewhere and in which situations and under which conditions it may be appropriate to allow the courts to decline jurisdiction in favour of the courts of third States. This could be the case, for instance, when parties have concluded an exclusive choice of court agreement in favour of the courts of third States, when the dispute otherwise falls under the exclusive jurisdiction of third State courts, or when parallel proceedings have already been brought in a third State .

Finally, it should be considered to what extent an extension of the scope of the jurisdiction rules should be accompanied by common rules on the effect of third State judgments. A harmonisation of the effect of third State judgments would enhance legal certainty, in particular for Community defendants who are involved in proceedings before the courts of third States. A common regime of recognition and enforcement of third State judgments would permit them to foresee under which circumstances a third State judgment could be enforced in any Member State of the Community, in particular when the judgment is in breach of mandatory Community law or Community law provides for exclusive

jurisdiction of Member States' courts .

The Commission asks the following questions:

Question 2:

Do you think that the special jurisdiction rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or exclusive jurisdiction lays with the courts of the Member States?

In considering possible reforms in this area, it is vital that the possible impact on relations with the EC's trading partners should be assessed and taken fully into account in the development of new rules. If there is any lesson to be learned from the failed negotiations at the Hague Conference for a generally applicable international convention on jurisdiction and the recognition and enforcement of judgments, it is that the grounds for asserting jurisdiction over foreign nationals are a matter of great sensitivity. It must also be borne in mind that existing bilateral Conventions with third States, particularly those concerned with the mutual recognition and enforcement of judgments, may significantly undermine the objective of creating common rules across the Member States. In light of these considerations, the approach to reform in this area should be incremental, rather than revolutionary.

Further, proposals of the kind suggested by the Commission in the Green Paper also raise questions concerning the Community's legislative competence in this area. Even if, in situations involving claimants or third State judgment creditors or debtors domiciled in Member States, the extension of the harmonised framework established by the Brussels I Regulation can be considered as "necessary for the proper functioning of the internal market" (EC Treaty, Art. 65), it seems legitimate to raise the question whether harmonisation would not be

better pursued by other means, for example by efforts to revive the Hague Conference project or negotiations with a view to concluding bilateral agreements with key trading partners or even (with the support of the EFTA contracting states) widening the territorial reach of the Lugano Convention.

In situations in which both the claimant and defendant are domiciled outside the EC, the required link to the functioning of the internal market would appear to be entirely lacking. Indeed, if the Regulation is to be justified as an instrument supporting the internal market (as it must be), there would appear to be a strong case for limiting its application (including the rules on recognition and enforcement) to cases in which at least one of the parties is domiciled (or habitually resident) in a Member State (cf. Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (OJ L199,1 [31.7.2007]), Art. 3; Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (OJ L136, 3 [24.5.2008]), Art. 2). It must, of course, be acknowledged that such a retrenchment in the Regulation's scope at this stage is almost inconceivable, and that the ECJ could well take a more generous view of the Community's internal competence under Title IV. Even so, the limits of that competence, and the potential effects of its exercise on relations with third States, must be taken into account in deciding whether and, if so, how to proceed with reform in this area.

If, taking into account the foregoing considerations, such reform is to be attempted, the following changes to the Brussels I Regulation could be considered as the first tentative steps on a long and difficult journey:

a. Changing the requirement of domicile in Art. 4(2) of the Regulation, so that any person domiciled in an EC Member State can invoke the jurisdiction of another Member State's court on the same terms as nationals of, or persons domiciled in, that Member State.

b. Extending the rules of special jurisdiction in Arts. 5 and 6 of the Regulation to claims brought against a person not domiciled in a Member State, without prejudice to any rule of jurisdiction applicable under Art. 4(1).

c. Reversing the ECJ's decision in *Owens Bank v. Bracco* (above) so that a Member State judgment recognising a judgment of a third country may freely circulate in the EC. The case for this change would be strengthened if, as the

Commission suggests elsewhere in its Green Paper, the enforceability of Member State judgments confirming arbitral awards is to be expressly acknowledged as part of reforms addressing the interface between the Regulation and arbitration (a topic to be considered in a future post).

On this view, the answer to Question 2 would be that any reform with respect to the rules concerning non-Member State courts and parties should be incremental and not overly ambitious and should take full account of the limits on Community competence in this area and the interests of third States.