Commission Proposal on the Review of Brussels I

The long awaited Commission proposal (COM(2010) 748/3) on the review of Brussels I has been published today. The proposed amendments are numerous and require more detailed study, but here are some of the highlights.

1) **Abolition of the exequatur.** Following the argumentation in the Green Paper on the costs, time and trouble of obtaining a declaration of enforceability in another Member State, and the abolition of the exequatur in recent specific instruments, the Commission proposal indeed provides for the abolition of the exequatur (Art. 38). However, exceptions are made for defamation cases – also excluded from Rome II – and, most interestingly, compensatory collective redress cases – at least on a transitional basis. The 'necessary safeguards' are: 1) a review procedure at the court of origin in exceptional cases where the defendant was not properly informed, similar to the review clause in specific instruments abolishing the exequatur; 2) an extraordinary remedy at the Member State of enforcement to contest any other procedural defects which may have infringed the defendant's right to a fair trial; 3) a remedy in case the judgment is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country. The proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the *exequatur* procedure as well as the application for a review.

2) **Extension of the Regulation to defendant's domiciled in third States.** The special grounds of jurisdiction will enable businesses and citizens to sue a non EU defendant in, amongst others, the place of contractual performance, or the place where the harmful event occurred. It further aims to ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. Two additional fora are created: under certain conditions a non-EU defendant can be sued at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). Further, the proposal introduces a discretionary *lis pendens* rule for disputes on the same subject matter and between the same

parties which are pending before the courts in the EU and in a third country.

3) **Enhanced effectiveness of choice of court clauses.** Another anchor is the improvement of the effectiveness of choice of court clauses, by: a) giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised, meaning that any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction; b) introducing a harmonised conflict of law rule on the substantive validity, referring to the law of the chosen court. As the explanatory memorandum states, both modifications reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.

4) **Improvement of the interface between the regulation and arbitration.** One of the most controversial issues giving rise to heated debates is whether the arbitration exception should be maintained. Art. 1 of the proposal still contains the arbitration exclusion, but adds 'save as provided for in Articles 29, paragraph 4 and 33, paragraph 3'. The proposed Article 29 includes a specific rule on the relation between arbitration and court proceedings, which obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

5) **Provisional and protective measures.** The proposal adds several articles concerning provisional, including protective measures. It provides that the court where proceedings on the substance are pending and the court that is addressed in relation to provisional measures, should cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted. Further, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte* (!). However, contrary to the Mietz decision, the proposal provides that provisional measures ordered by a court other than the one having jurisdiction on the substance cannot at all be enforced in another Member State, in view of the wide divergence of national law on this issue and to prevent the risk of abusive forum-shopping.

There are many more interesting proposed amendments. This proposal certainly is ambitious, but also controversial on some points. Let the negotiations and the scholarly debate begin!