Brussels I Review – Provisional Measures

The next topic considered in the Green Paper is the treatment of provisional and protective measures under the Regulation. In the Commission's view:

> *The report describes several difficulties with respect to the free circulation of provisional measures.*
>
> *With respect to ex parte measures, it might be appropriate to clarify that such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently, particularly in the light of Article 9(4) of Directive 2004/48/EC.*
>
> *Further, the allocation of jurisdiction for provisional measures ordered by a court which does not have jurisdiction on the substance of the matter may be approached differently than it is today under the existing case law of the Court of Justice. In particular, if the Member State whose courts have jurisdiction as to the substance of the matter were empowered to discharge, modify or adapt a provisional measure granted by the courts of a Member State having jurisdiction on the basis of Article 31, the "real connecting link" requirement could be abandoned. The role of the court seized of the request would be to assist the proceedings on the merits by "lending remedies", particularly when effective protection is not available in all the Member States, without interfering with the jurisdiction of the court having jurisdiction on the substance. When such assistance is no longer needed, the court having jurisdiction on the substance may set aside the foreign measure. Again, a communication between the courts involved may be helpful. This would allow applicants to seek efficient provisional protection where this is available in Europe.*
>
> *With respect to the required guarantee of repayment of an interim payment, it might be desirable to specify that the guarantee should not necessarily consist of a provisional payment or bank guarantee. Alternatively, it might be considered that this difficulty will be adequately resolved through case law in the future.*

> *Finally, if exequatur is abolished, Article 47 of the Regulation should be adapted. In this respect, inspiration may be drawn from Article 18 of Regulation (EC) No 4/2009.*

The Commission asks:

> *Question 6:*
>
> *Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?*

The significance of provisional measures in cross-border, commercial litigation must not be underestimated. The grant of such measures, even if "provisional" in the sense in which that term has been defined by the ECJ in its case law, may create an irresistible imperative for a defendant to settle a case. Equally, their refusal may compel the claimant to consider settlement on less advantageous terms, or abandon his claim entirely.

It is, therefore, essential that the limits on the application of Art. 31 of the Brussels I Regulation, and its place within the framework of the Regulation, should be clear. The ECJ's decisions in *Denilauler*, *Van Uden* and *Mietz* create traps for the unwary and it would be useful, therefore, to amend the Regulation to confirm (or, as appropriate, reject) the principles established in those cases. The following amendments, in particular, are suggested:

a. "Provisional, including protective, measures" should be defined in the Regulation (perhaps in a Recital) along the lines of the definition favoured by the ECJ, i.e. "measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from" another court (*Van Uden*, para. 37). Further elaboration of that definition with respect to particular measures (e.g. interim payments) should be left to Member State courts and the ECJ.

b. The distinction drawn in *Van Uden*, influenced by the language of what is now Art. 31 of the Regulation, between cases in which the court granting the measure *has jurisdiction over* the substance of the case, and cases in which it does not, is unhelpful and should be rejected in favour of a test based on the question

whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (Art. 31 restrictions should not apply) or in support of proceedings in another Member State (Art. 31 restrictions should apply).

c. The requirement of a "real connecting link" to the territorial jurisdiction of the Member State court granting the measure (*Van Uden*, para. 40) does not appear on the face of Art. 31, is difficult to apply and may be argued to be unnecessary. It should either be incorporated into the text of Art. 31 or, preferably, removed. A Recital could be introduced, emphasising that (a) the definition (above) of "provisional, including protective, measures" does not necessarily require the existence of such a link, and (b) in deciding whether to grant, renew, modify or discharge a provisional measure 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.

d. The effect of the decision in *Denilauler* should be clarified by expressly bringing provisional measures within the definition of judgment in Art. 32, at least in situations in which it has been possible for the defendant to challenge the measure (whether or not he has done so).

The Commission's suggestion that the court seised of the main dispute should have the power to revoke a provisional measure granted by another Member State court is objectionable on proportionality grounds, as it unduly impinges upon national judicial sovereignty, and has constitutional implications. Greater co-ordination of "primary" and "secondary" proceedings relating to the same subject matter in two Member States could, however, be improved by facilitating communication between Member State courts and by a Recital (such as that suggested above) requiring a court dealing with provisional measures to take into account the views of the court dealing with the substance of the case.

Accordingly, the answer to be given to Question 6 should be that, in view of the significance of provisional measures in cross-border commercial litigation, the limits on the application of Art. 31 and its place within the Regulation should be

clarified, having regard to (but not necessarily following) the reasoning of the ECJ in Van Uden and other cases.

Brussels I Review – Intellectual Property

The Commission's fourth question concerns the Regulations treatment of litigation concerning intellectual (industrial) property rights.

In its Green Paper, the Commission comments:

> *The possibility to effectively enforce or challenge industrial property rights in the Community is of fundamental importance for the good functioning of the internal market. Substantive law on intellectual property is already largely part of the acquis communautaire . Directive 2004/48/EC on the enforcement of intellectual property rights aims at approximating certain procedural questions relating to enforcement. . In order to address the lack of legal certainty and the high costs caused by duplication of proceedings before national courts, the Commission has proposed the creation of an integrated jurisdictional system through the establishment of a unified European patent litigation system which would be entitled to deliver judgments on the validity and the infringement of European and future Community patents for the entire territory of the internal market . In addition, on 20 March 2009, the Commission adopted a Recommendation to the Council concerning the negotiating directives for the conclusion of an international agreement involving the Community, its Member States and other Contracting States of the European Patent Convention . Pending the creation of the unified patent litigation system, certain shortcomings of the current system may be identified and addressed in the context of Regulation (EC) No 44/2001.*
>
> *With respect to the coordination of parallel infringement proceedings, it could be envisaged to strengthen the communication and interaction between the courts seized in parallel proceedings and/or to exclude the application of the*

rule in the case of negative declaratory relief (cf. supra, point 3).

With respect to the coordination of infringement and invalidity proceedings, several solutions to counter "torpedo" practices have been proposed in the general study. It is hereby referred to the study for those solutions. However, the problems may be dealt with by the creation of the unified patent litigation system, in which case modifications of the Regulation would not be necessary.

If it is considered opportune to provide for a consolidation of proceedings against several infringers of the European patent where the infringers belong to a group of companies acting in accordance with a coordinated policy, a solution might be to establish a specific rule allowing infringement proceedings concerning certain industrial property rights against several defendants to be brought before the courts of the Member State where the defendant coordinating the activities or otherwise having the closest connection with the infringement is domiciled. A drawback of such a rule might be, as the Court of Justice suggested, that the strong factual basis of the rule may lead to a multiplication of the potential heads of jurisdiction, thereby undermining the predictability of the jurisdiction rules of the Regulation and the principle of legal certainty. In addition, such a rule may lead to forum shopping. Alternatively, a re-formulation of the rule on plurality of defendants might be envisaged in order to enhance the role of the courts of the Member State where the primary responsible defendant is domiciled.

Question 4: What are the shortcomings in the current system of patent litigation you would consider to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

This is a specialised area of litigation and it seems sensible to leave it to experienced and expert practitioners, commentators and judges to identify, and suggest solutions, to the jurisdictional conflicts that actually arise in the enforcement of IP rights in the Member States. Suffice it to say that the current framework, as applied by the ECJ in its decisions in the *GAT* and *Roche Nederlands* cases, appears unsuitable. As the English Court of Appeal noted in its

2008 judgment in *Research in Motion UK Ltd v. Visto Corporation* (paras. 5-14):

> *The [Brussels I] Regulation is substantially the same as that which it replaced, the Brussels Convention of 1968. Unfortunately neither document fully considered the problems posed by intellectual property rights. This is because at present such rights are national rather than EU rights. They are not only limited territorially, but exist in parallel. Neither the Convention nor the Regulation specifically considered how parallel claims are to be dealt with. They were constructed for the simpler and more ordinary case of a single claim (e.g. of a breach of contract or a single tort or delict) and provide a system for allocating where that single claim is to be litigated. Parallel rights cannot give rise to single claims: only a cluster of parallel, although similar, claims.*
>
> *Intellectual property also adds three further complications. Firstly there is a range of potential defendants extending from the source of the allegedly infringing goods (manufacturer or importer) right down to the ultimate users. Each will generally infringe and the right holder can elect whom to sue. One crude way to achieve forum selection is to sue a consumer or dealer domiciled in the country of the IP holder's choice (jurisdiction conferred by Art. 2.1) and then to join in his supplier – the ultimate EU manufacturer or importer into the EU if the product comes from outside. Jurisdiction for this is conferred by Art. 6. Thus there is considerable scope for forum shopping – the very thing the scheme of the Regulation is basically intended to avoid.*
>
> *The second complication is that caused by a claim for a declaration of non-infringement. This remedy is necessary – a practical and sensible way for a potential defendant who wishes to ensure (normally before significant investment) that he is in the clear, is to seek a declaration that his proposed (or actual) activity does not fall within the scope of someone's rights. It is a way of making a potential patentee "put up or shut up".*
>
> *The third complication is that the ultimate court for deciding the validity of a registered national right (most importantly a patent), is only the national court of the country of registration. Those responsible for the Convention/Regulation did consider registered intellectual property rights, providing, in what is now Art. 22:*
>
> *The following courts shall have exclusive jurisdiction, regardless of domicile:*

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State

This provision is an incomplete way of dealing with IP: it does not cater for most of the common situations. Liability for patent infringement (we will confine our example to patents) depends on two things: the scope of the protection claimed and the validity of the patent: you can't infringe an invalid patent. The nature of a defence involves a spectrum of possibilities. At one end the defendant may simply say "What I do is outside the scope of the patent". If that is all, then the dispute is simply about the scope of the patent and what the defendant does. At the other he may say: "yes, I accept that what I do is within the scope of the patent. But the patent is invalid." Then the dispute is only about validity. Or the position may be a mixture of both. The defendant may run two defences, denying that what he does is within the scope of the patent and also contending that the patent is invalid. A particular (and often important) version of this intermediate position is where the defendant says "if the scope is wide enough to cover what I do, then the patent is invalid." …

Where a potential defendant takes this last kind of position he may well go on the offensive in two, combined ways. He will seek both revocation of the patent and a declaration of non-infringement.

Art.22 confers exclusive jurisdiction on a national court where validity is challenged. Difficult questions arose about this and were referred to the ECJ; see the ruling in Roche v Primus case, C-539/03 [2007] FSR 5. They still do, despite that decision, see the ruling of the Hoge Raad (Dutch Supreme Court) on 30th November 2007 in Roche v Primus following the ruling of the ECJ.

There is also a potential fourth complication for IP rights, particularly patents,

arising or possibly arising from the Convention, now Regulation. It is known as the "Italian torpedo" – a graphic name invented (we think) by the well-known distinguished scholar Prof. Mario Franzosi ("Worldwide Patent Litigation and the Italian Torpedo" [1997] 7 EIPR 382).

It works in this way: suppose a potential defendant is worried about being sued for infringement. To prevent any immediate effective action against him he starts an action against the patent holder for a declaration of non-infringement in a country whose legal system runs very slowly. (When Prof. Franzosi wrote his article, Italy was notoriously slow, though it is our understanding that things have improved since then and are continuing to improve.) The putative defendant claims such a declaration not only in relation to the Italian patent, but also in relation to all the corresponding patents in other European countries. If sued in any of these countries he raises Art 27 of the Regulation saying: the issue of infringement and that of non-infringement are the same cause of action expressed differently. The courts of the slow member state are first seised of the action. So the courts of all other member states must, pursuant to Reg. 27, stay its proceedings.

The effectiveness of the Italian torpedo (and Belgian, for the courts of that country were once also slow) has been blunted by a number of decisions, particularly the Roche Primus case at European level, the decision of the Italian Supreme Court in Macchine Automasche v Windmoller & Holscher, 6th November 2003 and some decisions of the Belgian courts, particularly Roche v Wellcome 20 February 2001. But the torpedo is not completely spent. It still has some possibilities (or is thought to have some) in it, as this case shows. …

The Court added (paras. 15-16)

Much ingenuity is expended on all this elaborate game playing. Despite the temptation to do otherwise, it is not easy to criticise the parties or their lawyers for this. They have to take the current system as it is and are entitled (and can only be expected) to jockey for what they conceive to be the best position from their or their client's point of view. Of course parties could, if they agreed, decide to abide by the result in a single jurisdiction (or perhaps take best out of three). Or they could arbitrate instead of plunging their dispute into the chaotic system which Europe offers them for patent disputes. But why should a party

do any of these things if it thinks it has a better prospect commercially from the chaos? In some industries for instance, a patentee with a weak patent would actually prefer to be able to litigate in a number of parallel countries in the hope that he wins in one. Winning in one member state may indeed be enough as a practical matter for the whole of Europe – some companies market products only Europe-wide. A hole, say in Germany, of a Europe-wide business in a particular product may make the whole of that business impractical.

Again a party who fires an Italian torpedo may stand to gain much commercially from it. It would be wrong to say that he is "abusing" the system just because he fires the torpedo or tries to. Things may be different if he oversteps the line (e.g. abuses the process of a court) but he cannot and should not be condemned unless he has gone that far.

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.

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.

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.

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.

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.

Brussels I Review – The Abolition of Exequatur?

This is the first of a series of posts soliciting comment on the proposals for reform of the Brussels I Regulation in the Commission's recent Report and Green Paper. It concerns the possible abolition of all intermediate measures to recognise and enforce judgments (*exequatur*).

According to the Commission in its Green Paper:

> *The existing exequatur procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad. If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the exequatur procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of exequatur should, however, be accompanied by the necessary safeguards.*
>
> *In the area of uncontested claims, intermediate measures have been abolished on the basis of a control, in the Member State of origin, of minimum standards relating to the service of the document instituting proceedings and to the provision of information about the claim and the procedure to the defendant. In addition, an exceptional review should remedy situations where the defendant was not served personally in a way to enable him/her to arrange for his/her defence or where he/she could not object to the claim by reason of force majeure or extraordinary circumstances ('special review'). Under this system, the claimant must still go through a certification procedure, be it that this*

procedure takes place in the Member State of origin rather than in the Member State of enforcement.

In the area of contested and uncontested claims, on the other hand, Regulation 4/2009 on maintenance obligations abolishes exequatur on the basis of harmonised rules on applicable law and the protection of the rights of the defence is ensured through the special review procedure which applies once the judgment has been issued. Regulation 4/2009 thus takes the view that, in the light of the low number of "problematic" judgments presented for recognition and enforcement, a free circulation is possible as long as the defendant has an effective redress a posteriori (special review). If a similar approach were followed in civil and commercial matters generally, the lack of harmonisation of such a special review procedure might introduce a certain degree of uncertainty in the few situations where the defendant was not able to defend him/herself in the foreign court. It should therefore be reflected whether a more harmonised review procedure might not be desirable.

In light of this analysis, the Commission asks the following questions:

Question 1:
Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

One may, without too much difficulty, accept the proposition that that abolition the requirement to obtain a declaration of enforceability of a judgment obtained in another Member State would represent the logical end of the process that began with the 1968 Brussels Convention, aimed at ensuring the free movement of judgments within the Member States.

Nevertheless, it may be questioned whether this step would, in fact, produce practical benefits for the Community and might, indeed, increase the complexity and cost of enforcement, and create additional legal and political difficulties.The object of any cross-border enforcement regime in the EC must be to assimilate a

judgment from one Member State as efficiently and effectively as possible into the legal order of one or more other Member States.

In this connection, it could well remain advantageous for the import of judgments initially to be channelled through a court or courts designated for this purpose (i.e. as specified in Annex II to the Regulation), rather than proceeding directly to measures of execution, which may take place in a local court with little or no experience of cross-border matters. It must be recalled that the Brussels I Regulation does not apply only to money judgments, and the process for obtaining (and challenging) a declaration of enforceability provides an opportunity for any queries as to the nature and content of the judgment to be addressed before time and expense have been incurred in attempts to enforce that judgment.

That is not to say that the present enforcement process cannot be improved with the object of reducing cost and delay. Information technology could play an important part, most obviously by creating an online, central "clearing system" through which applications to enforce in several Member States could be lodged simultaneously, transmitted to the Member States' responsible authorities, and their progress monitored, with standardised fees and communication between Member State courts and the judgment creditor by e-mail. Other posssible improvements to the enforcement regime put forward by the Commission elsewhere in the Green Paper (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 in Art. 40(2) of the Regulation to have an address for service within the jurisdiction) also appear sensible.

As to reform of the grounds for refusal of enforcement, it may be argued that (with the possible exception of the special treatment in Art. 34(2) of judgments in default of appearance, which could equally be dealt with as an aspect of public policy) the existing grounds should remain. As to the public policy ground, there appears no obvious reason why the "free movement of judgments" should be any the less open to qualification on the overriding grounds of national interest than any of the freedoms explicitly established by the EC Treaty. The circumstances in which this ground may be invoked have, in any event, been greatly circumscribed by the ECJ (see, recently, the judgments in *Gambazzi v. Daimler Chrysler* and *Apostolides v. Orams*). As to the effect of irreconcilability between judgments, it does not appear to be an adequate answer for the Commission to assert that "[i]rreconcileability between judgments is to a great extent avoided, at least at

European level, by the operation of the Regulation's rules on *lis pendens* and related actions". That may be so, but those rules cannot guarantee that there will be no irreconcileable decisions, and they do not apply to situations involving judgments from third countries.

Accordingly, and subject to the views of others, Question 1 could receive the following answer:

> *No, but the process for obtaining a declaration of enforceability should be streamlined, with the use of information technology where appropriate.*

Brussels I Review – Online Focus Group

Many will, by now, have had the opportunity to consider the Commission's Report and Green Paper on the review of the Brussels I Regulation, if not also the detailed Studies by Professors Hess, Pfeiffer and Schlosser and Nuyts, on which they were based. As the Commission's initial deadline for consultation concludes at the end of this month, this seems an appropriate time at which to invite conflictoflaws.net users to participate in an online discussion on the Report and Green Paper, with a view to debating some or all of the Commission's proposals.

Over the next few days, therefore, a series of posts will invite comments (see the Post a Comment box below) on particular aspects of the proposed reform of the Brussels I Regulation. These will follow the order of topics in the Green Paper, that is to say (links will be added to each topic as the relevant post is published):

- the abolition of intermediate measures to recognise and enforce foreign judgments (*exequatur*) (Question 1);
- the operation of the Regulation in the international legal order (Question 2);
- choice of court agreements (Question 3);

- industrial property (Question 4);
- *lis pendens* and related actions (Question 5);
- provisional measures (Question 6);
- the interface between the Regulation and arbitration (Question 7); and
- other issues (Question 8).

Responses (that are published as posts, rather than comments) to any or all of the initial posts:

- Jonathan Hill
- Illmer and Steinbrück on the Interface Between Brussels I and Arbitration

Each post will contain relevant extracts from the text of the Green Paper, together with a preliminary reaction and suggestions as to the way forward. This commentary (based on the author's personal views) is intended as a spur for debate of the Green Paper, rather than to define the areas for discussion or criticism of its proposals (or any counter-proposals). It is hoped that the debate will be as wide-ranging, in terms of subject matter and contributors, as possible. Comments from all site users, whether general or limited to a single point, are actively encouraged.

Before opening the discussion with the first of these posts, it seems appropriate to make a few introductory comments on the Green Paper and Report.

First, the response to the Green Paper and the Report should be only the start, and not the end, of consultation with stakeholders of these important matters. The Commission has had 18 months to consider the Studies referred to above, and to develop its own analysis and proposals. It is disappointing, therefore, that a period of only 2 months (up to 30 June 2009) has been allowed for responses to the Green Paper, especially as an extended period over the summer vacation could not conceivably have materially delayed progress in formulating a draft updating Regulation. Mechanisms must be found, whether directly or through the Member States, to ensure that the views of individuals, interest groups and academic and practising lawyers are fully taken into account at all stages of the legislative process.

Secondly, it is vital that consideration should also be given as a matter of priority to structural changes within the European Court of Justice, so far as compatible with the EC Treaty, that will enable the Court to deal with preliminary references

concerning the Regulation and other EC private international law instruments in a manner befitting their significance for the parties and the Member States' systems for dispensing civil justice. As the content of the Commission's Report demonstrates, the ECJ has regularly provided answers to questions put by Member State courts that are unsatisfactory in their reasoning or practical application, or both. In particular, the Court, particularly in its recent case law, has shown a worrying disregard of arguments founded on the commercial consequences or justice of a particular interpretation in favour of an approach driven, apparently, solely by considerations of legal certainty and the exclusion of other considerations by the text of the Regulation.

As a result, there is (whether justified or not) a perception among legal practitioners that the ECJ in its current constitution lacks the all-round expertise to deal with references in the area of civil justice and, at least in England and Wales, that it is insensitive to the traditions and methods of the common law. It is, of course, a matter of fundamental importance that the citizens and courts of the Member States should have trust and confidence in the ECJ to exercise its overriding interpretive power responsibly. Against this background, and mindful of the possible expansion of the ECJ's caseload if the Lisbon Treaty is ratified, the creation of a specialist chamber (with its own Judges and Advocates-General) to deal with references relating to the several instruments adopted under Title IV of the EC Treaty would be a significant advance, and would appear to be within the powers conferred on the Community legislature by Art 225a of the Treaty. If this, or equivalent steps, are not taken at this stage, reform of the Brussels I Regulation in isolation is likely to be a case of "swallowing a spider to catch a fly" and to lead to further complications (and the need for further reform) as a result of the ECJ's future jurisprudence interpreting any new rules.

Thirdly, to increase the accessibility of the Regulation to non-experts, deregulation (i.e. reduction in the complexity or number of jurisdictional rules) should be preferred to increased regulation in the Brussels I reform process. Any modification of an existing instrument carries with it an inherent degree of legal uncertainty, by requiring existing case law and commentary to be re-appraised in light of the change. That effect must be taken into account in deciding which issues to tackle, and how, in the review process.

Finally, as to the Commission's comments in its Report on the functioning of the Brussels I Regulation, it seems fair to conclude that the Regulation, and its

predecessor convention, have offered significant advantages for business, by promoting the free circulation of judgments in the EC and (in many situations) increasing predictability and consistency as to the criteria to be applied by Member State courts in accepting jurisdiction. There is, however, no doubt that the Commission is also correct to conclude that functioning of the Regulation is open to improvement. It would be surprising if that were not the case. Further, it may be doubted whether (as the Commission suggests) the Regulation is "highly appreciated among practitioners". Many legal practitioners, whose practices concern only domestic matters, are untroubled by the Regulation. For others, the overall impression of the Regulation is, frequently, coloured by situations in which its operation is perceived as giving rise to inconvenient or uncommercial results. For example, in the United Kingdom, widespread (adverse) publicity in the legal profession followed the English High Court's decision in *J P Morgan v. Primacom* (following the earlier ECJ decision in *Gasser v. MISAT Srl*), that proceedings brought by a borrower in Mainz, Germany with the evident intention of frustrating proceedings to enforce a loan agreement in England (the jurisdiction chosen by the parties) must take priority under Art. 27 of the Regulation. One UK legal newspaper described the Primacom case "an intercreditor nightmare" that was "playing havoc with exclusive jurisdiction clauses and is threatening to derail cross-border restructurings in Europe". Criticism in UK legal circles has also followed the recent ECJ decision in *Allianz v. West Tankers*. Commenting on that decision, the Chief Executive of the Law Society, the representative body for solicitors in England and Wales, argued that the ruling "does Europe no favours as a place to do business" (see here).

Against this background, it is vital that any reform of the Brussels I Regulation should address, and be seen to address, the problems that EC litigants and their legal advisers actually face in practice, rather than pursuing the holy grails of "mutual recognition" and "legal certainty". Whether pragmatism will prevail over ideology remains, however, to be seen.

To conclude on a personal note, I should add that I was delighted to receive and accept an invitation to join conflictoflaws.net as a Consultant Editor. Through the breadth and quality of submissions by its editorial team and other contributors, the site has established itself as an essential point of reference for all practising and academic lawyers with an interest in private international law. I look forward to reading the reaction to this, and future posts on the site, concerning the

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The Results of the JHA Council (4-5 June 2009): Bilateral Agreements with Third Countries in PIL matters and Common Frame of Reference (CFR)

On 4 and 5 June the Justice and Home Affairs Council held its 2946th session in Luxembourg, the last one under the Czech Presidency. Among the "Justice" issues, discussed on Friday 5th, two main points are of particular importance as regards the development of European private law and private international law. Here's an excerpt of the press release (doc. n. 10551/09):

> ***Civil Law: Bilateral agreements with Third Countries***
>
> *The Council agreed on procedures for the negotiation and conclusion of bilateral agreements between member states and third countries concerning:*
>
> - *jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance; and*
> - *applicable law in contractual and non-contractual obligations.*
>
> *The aim of the agreed regulations is to authorise a member state to amend an existing agreement or to negotiate and conclude a new agreement with a third country in certain areas of civil justice through a functional and simplified arrangement, while ensuring that the "acquis communautaire" will be safeguarded.*

[The initial Commission's Proposals can be found in documents COM(2008) 893 fin. of 19 December 2008 (contractual and non-contractual obligations, subject to the codecision procedure) and COM(2008) 894 fin. of 19 December 2008 (family matters, subject to the consultation procedure). The latest available texts of the proposed regulations are those resulting from the Parliament's legislative resolutions at first reading, approved on 7 May 2009 (EP doc. n. T6-0380(2009) on contractual and non-contractual obligations, and EP doc. n. T6-0383(2009) on family matters): the amendments voted by the EP were agreed with the Council and the Commission, with a view to reaching an adoption of the dossiers at first reading (see Council doc. n. 9338/09 of 13 May 2009, and further statements by the Council and the Commission in doc. n. 10250/09 of 26 May 2009).

Ireland and the United Kingdom have formally notified their opt-in (see doc. n. 8529/09 of 7 April 2009 and doc. n. 8728/09 of 16 April 2009).

***The regulations will be formally adopted by the Council in a forthcoming session**. Further information can be found in press release n. 10697/09, currently available only in French.]*

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Common Frame of Reference for European Contract Law

The Council adopted the following guidelines:

I. Introduction

1. In April 2007, the JHA Council decided to mandate the Committee on Civil Law Matters to define a Council position on fundamental aspects of a future common frame of reference [doc. n. 8548/07 of 17 April 2007].

2. In accordance with that mandate, the JHA Council on 18 April 2008 approved a position on four fundamental aspects of the common frame of reference (i.e. purpose, scope, content and legal effect) [doc. n. 8286/08 of 11 April 2008].

3. Further to this position, the JHA Council on 28 November 2008 adopted a set of conclusions setting out some major guidelines for future work (covering structure, scope, respect for diversity and the involvement of the Council, the European Parliament and the Commission in the setting up of the Common

Frame of Reference) [doc. n. 15306/08 of 7 november 2008 and doc. n. 5784/09 of 27 January 2009, currently not available]. Both the position and the conclusions provide that the Committee on Civil Law Matters will follow the work of the Commission on the Common Frame of Reference (hereinafter "CFR") on a regular basis.

4. To ensure regular follow-up to the discussions and to enlarge on and clarify the guidelines previously adopted, the Presidency submitted a questionnaire to delegations on 8 January 2009 [doc. n. 5116/09 of 15 January 2009] and invited them to reply in writing.

5. In the light of the comments made and the discussions held, the Committee on Civil Law Matters invites Coreper to recommend to the Council that it approve the guidelines set out below and suggest that the Commission take them into account in its future work.

II. Points Considered

6. The Council indicated that it wished ***the CFR to have a three-part structure: one containing definitions of key concepts in contract law, one setting out common fundamental principles of contract law and one containing model rules****.*

7. The replies to the questionnaire and the subsequent discussions held within the Committee on Civil Law Matters consequently focused specifically on ***(a) the fundamental principles to be adopted, (b) the definitions which should be included and (c) the model rules to be provided for. The Committee also considered (d) the relationship that the CFR should have with the proposed Directive on consumer rights and (e) the form that the instrument establishing the CFR might take****.*

[The Council's position on each of these points can be found in the press release "Guidelines on the setting up of a Common Frame of Reference for European contract law", n. 108340 of 5 June 2009.]

Conference: Enlargement of the European Judicial Area to the CEFTA Countries

This year, the traditional private international law conference in the South Eastern Europe is hosted by the Faculty of Law of the University of Novi Sad, Serbia. Focusing primarily on the topics related to the enlargement of the European Judicial Area to the CEFTA countries, this conference will also address the newest developments in private international law in the region. The conference will be held on 25 September 2009 and the program as well as the list of participants are available here.
The most recent conference in this series was announced here.

Dickinson: Rome II Regulation Monograph Supplement, and our New Consultant Editor

Scholarly writings on the new Rome II Regulation have continued to pour in from all Member States, and the ECJ's recent case law on other civil justice instruments (particularly the Brussels I Regulation) has also addressed issues of relevance to Rome II. For the time being, national courts have had little opportunity to consider the Rome II Regulation, but that will no doubt soon change. Andrew Dickinson's monograph – The Rome II Regulation – The Law Applicable to Non-Contractual Obligations – was published on 18th December 2008, and will undoubtedly be a source of valuable guidance for practitioners and academics for some time to come. To ensure that it remains up to date, however, Andrew Dickinson has committed to publishing supplements to the work. The first supplement, which runs to some 54 pages, is available on the companion website

to the book and can be downloaded from **here (PDF)**. I would urge all those interested in Rome II to take advantage of it.

It will, following from the above, come as no surprise that I am delighted to announce that Andrew will be joining the Conflict of Laws .net team as a Consultant Editor, posting primarily on developments in European civil and commercial matters. A short biography appears below, and I am sure everyone who uses this site will be pleased that he will be contributing to the website on a regular basis.

Biography

Andrew Dickinson is a solicitor advocate (qualified 1997; higher rights 2002), consultant to Clifford Chance LLP and visiting fellow at the British Institute of International and Comparative Law.

Andrew is a member of the North Committee (the Ministry of Justice's advisory committee on private international law) and of the editorial board of the Journal of Private International Law. He has recently joined the editorial team of Dicey, Morris and Collins on the Conflict of Laws.

Andrew's main area of legal practice and research interest is private international law, but his practice also covers civil litigation, commercial and banking law and public international law. He is the author of The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (OUP, 2008) (romeii.eu), co-author of State Immunity: Selected Materials and Commentary (OUP, 2004) and an editor of the International Commercial Litigation Handbook (LexisNexis, 2006). His published papers include "European Private International Law: Embracing New Horizons or Mourning the Past? " (2005) 1 J Priv Int L 197 and "Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J Priv Int L 53.

The New Solicitor General and Private International Law Cases: 2008 Term Round-Up

Elena Kagan, the new Solicitor General of the United States, had a few notable private international law cases on her desk when she arrived at her new job this past March. By then, the Court had invited the views of the Solicitor General in the first Hague Convention case to garner serious attention since *Schlunk* and *Aerospatialle* in the late 1980's, and had done the same regarding a case which sought to clarify the scope of specific personal jurisdiction over foreign nationals for their tortuous acts abroad. Just this week, she presented the views of the United States regarding those petitions.

In *Abbott v. Abbott*, the Hague Convention case which was previously discussed at length on this site, the United States recommended the Court grant the petition. In very plain terms, the Solicitor General concludes that the court of appeals erred in concluding that a ne exeat right is not a right of custody under the Convention; that there is disagreement among states party to this Convention, as well as among domestic circuits on this issue; and that it is an important question that merits the Supreme Court's review. The Court will decide whether to take the Solicitor General's advice at its June 25 conference. As the SCOTUSBlog aptly notes, if the Court takes this case, it will indirectly be reviewing the work of its newest (proposed) member in Judge Sonia Sotomayor. The Second Circuit was the first court of appeals to consider this question, in *Croll v. Croll*, 229 F.3d 133 (2000), cert. denied, 534 U.S. 949 (2001), where the panel majority held that a ne exeat clause was not a right of custody for purposes of the Hague Convention. Judge Sotomayor wrote a dissenting opinion indicating that she would have held – as the Solicitor General now argues – that the ne exeat clause constitutes a right of custody. The full brief of the United States is available here.

Nearly contemporaneously, the Solicitor General recommended the Court deny the petition in *Federal Ins. Co. v. Kingdom of Saudi Arabia*. This case, which was also previewed on this site in the past, presented not only some important issues regarding the Foreign Sovereign Immunities Act, but also the very open question

of when U.S. courts may exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals engaged in acts abroad which had foreseeable consequences in the United States. The Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." The Solicitor General, however, thought it was "unclear precisely what legal standard the court of appeals" was applying. Br. at 19. Here is why she sees the issue as not worthy of the Court's attention (and how the Unites States views foreseeability as a function of personal jurisdiction):

> *To the extent that the court of appeals language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient that a defendant took "intentional . . . tortuous actions" and "knew that the brunt of the injury would be felt" in the foreign forum. Calder, 465 U.S. at 789-90. The court of appeals decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that the petitioners' claims were based on the "the [defendants] alleged indirect funding of al Quaeda." Where the connection between the defendant and the direct tortfeasor is separated by intervening actors, the requirement of showing an "intentional . . . tortuous act[]" on the part of the defendant demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge. See Ashcroft v. Iqbal, No. 07-1015 (May 18, 2009, slip op. 16-19 [(previewed here)]. . . . . The court's case-specific holdings [that these allegations were not sufficiently plead] do not warrant review by this Court.*

Br. at 19-20. On similar grounds, the Solicitor General also downplays the circuit conflict alleged in the Petition, saying that the "in each of the three appellate cases cited by petitioners evidencing a conflict, the defendant was a primary wrongdoer—not, as here, a person whose alleged tortuous act consisted of providing material support to another party engaged in tortuous activity." Br. at 20-21. The full brief of the United States is available here. Again, we'll likely know whether the Court takes this advice by June 29.

And, just as she was clearing her desk of private international law matters, the Court sent her another invitation: it asked for the views of the United States regarding a new Petition which asks whether the antifraud provisions of the U.S. securities laws extends to transnational frauds. The case is *Morrison v. National Australia Bank, Ltd.*, which presents the deep and long-running split of federal authority over the application of the "conduct and effects test," which courts typically use to determine the scope of their jurisdiction not only in federal securities fraud cases, but in cases that implicate other federal statutes (like civil RICO) as well. The Petition is available here. We'll see this brief from the Solicitor General over the summer, or early next Term, which could shape-up to be an interesting one for private international law matters.