Brussels I Review – Jonathan Hill

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Comments on the Review of the Brussels I Regulation

Those who have an interest in private international law (PIL) in Europe have been presented with a valuable opportunity to offer their thoughts on how the Brussels I Regulation should evolve. It has been obvious for many years (indeed, in relation to certain issues, for decades) that the Brussels system is subject to certain weaknesses. At last, there is a chance that (some of) these weaknesses may be addressed.

I have read Andrew Dickinson's posts with interest and I do not intend to comment on every point which he makes or to offer my own personal answer to every question which the Commission has posed in its Green Paper. Before turning to some of the specific questions on which the Commission is consulting, I have a couple of general observations.

First, Andrew has drawn attention to the unsatisfactory nature of the some of the ECJ's jurisprudence in the context of the Brussels Convention/ Brussels I Regulation and the need for institutional reform. I suspect that even the ECJ's greatest supporters would not try to argue that the ECJ has always covered itself in glory when considering the provisions of the Convention/Regulation. My own feeling is that some criticism has been somewhat exaggerated and has not sufficiently acknowledged that the Court's room for manoeuvre is restricted by a legal text which does not say (and, frequently, cannot plausibly be twisted to say) what one wants it to say. Nevertheless, the PIL community is entitled to better than the fare which has been served up by the ECJ in recent years. The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such

reform is seriously overdue.

Secondly, the goal of promoting the 'good functioning of the internal market' inevitably provides the backdrop to much of the Commission's discussion. From the perspective of PIL, this focus runs the risk of distorting priorities. What I would like to see is a principled system of PIL rules which will serve the collective interests of the international litigation community; whether or not this advances the internal market is not my primary concern. So, from my perspective, a rule which arguably has the effect of strengthening the internal market (for example, by simplifying the enforcement of judgments granted against defendants domiciled in a third state) is still a bad rule if it unjustifiably discriminates against non-EU defendants.

The wider international picture

1. One of the most unattractive features of the Regulation is the fact that a judgment granted in one member state against a third state defendant is entitled to recognition and enforcement in other member states, regardless of the basis on which the court of origin assumed jurisdiction. In terms of principle, this approach is indefensible. At the jurisdictional stage, the protection against exorbitant jurisdiction rules which the Regulation offers to EU defendants is not extended to third state defendants; but, at the enforcement stage, non-EU defendants are, nevertheless, exposed to the principle of full faith and credit.

One possible solution is to extend the rules of special jurisdiction in arts 5 and 6 to defendants not domiciled in a member state. Andrew suggests that such extension should not, however, prejudice the application of art 4(1). I am not opposed to Andrew's suggestion – but I think that any retention of art 4(1) should be subject to a qualification. As regards a defendant not domiciled in a member state, recognition and enforcement under Chapter 3 should depend on the court of origin having assumed jurisdiction on a Regulation basis – or in circumstances in which, had the defendant been domiciled in a member state, the court of origin would have been entitled to assume jurisdiction under the Regulation.

2. Should the Brussels I Regulation be extended to cover the recognition/enforcement of third state judgments? I do not think that there is a compelling case for it to do so. There is no obvious community interest in seeking to determine the circumstances in which a New York judgment is enforceable in

England (or France or any other member state). It is imperative that the Community legislator takes seriously the limits of its legislative competence.

3. There is one area involving the relationship between member states and non-member states which needs attention. Whereas art 34(4) deals with the potential problems of conflicting judgments, the Regulation's silence on potential jurisdictional conflicts between member states and third states is a significant omission. Whatever solution the ECJ might come to in the Goshawk reference, and notwithstanding the arguments surrounding the theory (or theories) of the 'reflexive effect' of arts 22, 23, 27 and 28, there is a good case for including within the Brussels I Regulation rules which make provision for proceedings to be stayed or jurisdiction to be declined in cases involving a relevant connection with a non-member state (such as cases where there is a jurisdiction clause in favour of a third state). Some indication of what such rules might look like has been suggested by the European Group for Private International Law (EGPIL). (See arts 22bis, 23bis and 30bis of EGPIL's Proposed Amendment of Regulation 44/2001 in Order to Apply it to External Situations. While I would not necessarily want to commit myself to EGPIL's proposed text, EGPIL's basic approach strikes me as the most plausible solution to the problems posed by the Court of Appeal's second question in Owusu (ie, the question that the ECJ declined to answer in that case).

Arbitration

In principle, there is a lot to be said for Article 1(2)(d) in its current version. The idea that 'arbitration' should be excluded in its entirety from the Brussels I Regulation is intuitively attractive as it marks out arbitration as a field of dispute resolution which is separate from litigation. Of course, there is an interface (court proceedings which relate to arbitration) and the ECJ's rulings in Van Uden and West Tankers muddy the waters to such an extent that it is essential that the whole question of the relationship between the Regulation and arbitration is revisited. Doing nothing in this area is not a realistic option.

From the jurisdictional point of view, various elements are required. First, the arbitration exception should be removed. Secondly, there needs to be a new rule in Article 22 which, as regards court proceedings relating to arbitration, confers exclusive jurisdiction on the courts of the (putative) seat of arbitration. Thirdly, there is a good case for extending the approach of art 27 to arbitration

proceedings. So, if C refers a dispute to arbitration and D initiates court proceedings, the court (which is second seised) should automatically stay its proceedings (without embarking on an investigation of whether the alleged arbitration agreement is valid or not) and, then, if the arbitral tribunal determines that it does have jurisdiction under the arbitration agreement, decline jurisdiction.

In terms of the recognition/enforcement of judgments, a provision dealing with the potential conflict between judgments and awards – along the lines of art 34(4) – would be beneficial. The problem posed by cases where the court of origin wrongly assumes jurisdiction notwithstanding a binding dispute resolution agreement should be addressed. Art 35(1) needs to be amended to allow a defence to recognition/enforcement along the lines of section 32 of the Civil Jurisdiction and Judgments Act 1982. Where the court of origin wrongly assumes jurisdiction in defiance of a valid arbitration clause, the ensuing judgment should not normally be given effect outside the country of origin. In terms of PIL's priorities, upholding the integrity of dispute resolution agreements (by denying cross-border recognition/enforcement of judgments granted by a non-contractual forum) should be a higher priority than promoting the free flow of judgments regardless of the legitimacy of the assumption of jurisdiction by the court of origin.

Choice of court agreements, lis pendens and related actions

The foregoing paragraph runs in parallel with Andrew's succinct summary of what is currently wrong under the Brussels I Regulation (as interpreted by the ECJ) with regard to choice of court agreements. The problems surrounding the Gasser decision are well known and there seems to be widespread agreement that its effects need to be reversed. Giving priority to the (putative) contractual forum (and strengthening the effect of jurisdiction agreements by amending the defences to recognition/enforcement) seems the most sensible way forward.

Provisional measures

I agree with the majority of Andrew's post on this topic. A court seised of substantive proceedings has jurisdiction to grant, in the context of those

proceedings, whatever provisional measures are available under its procedural law and art 31 is irrelevant. Where, however, under art 31 court B is acting in support of substantive proceedings brought (or to be brought) in another member state (in court A), one has to accept that court A is the primary court and court B is the secondary court. The 'real connecting link' requirement of Van Uden has to be understood in that context. While I agree that the Van Uden requirement is not easy to interpret and apply, there must be limits on what court B can do by way of granting provisional measures of support and some mechanism is required to enable those limits to be set.

In view of the fact that the purpose of art 31 is to allow the granting of measures of support, it makes sense to allow the primary court to decide whether or not the measures granted by the secondary court really are supportive or not. In a situation where the rationale for the grant of a provisional measure is to assist the primary court, how can it be said that it would unduly impinge on national judicial sovereignty to allow the primary court to modify or discharge such a measure if the primary court considers it unhelpful? As things currently stand, a court which, although well-intentioned, is insensitive to (or ignorant of) the system of civil procedure adopted by the primary court may grant provisional measures under art 31 which the primary court considers inappropriate or unduly intrusive. The simplest and most efficient way of counteracting such 'unhelpful' support – and promoting better cross-border judicial co-ordination – is to allow the primary court to 'correct' the situation by modifying such measures. If this solution were adopted, there would be no need for the 'real connecting link' requirement: the secondary court could grant whatever measures it thought would be helpful; the primary court could modify or discharge those measures which it did not consider to be so.

Second Issue of 2009's Journal du

Droit International

The second issue of French *Journal du Droit International* (also known as *Clunet*) has just been released. It contains seevral articles dealing with conflict issues.

The author of the first is Anne-Sylvie Courdier-Cuisinier, who lectures at the University of Burgundy. This is a study of Assignment of Contracts in Private International Law (*La cession conventionnelle de contrat en matière internationale*). The English abstract reads:

> *Assignment of contract is a current circulation mode of contract. The actual study is suggesting to make an international state of place of this three-persons legal operation which focuses on two main topics : the determination of the international dimension of the assignment of contract and its effects. For this purpose, on one hand the studies deals with the international right rules aimed at the assignment of rights without any specific rules regarding assignment of contract. On the other hand, the article deals mainly on the UNIDROIT principles of commercial contracts and principles of European contract law, both dealing with this type of assignment.*

The second article explores whether U.S. class actions could be recognized in France (*Les "class actions" americaines et leur éventuelle reconnaissance en France*). The authors are Jacques Lemontey, the former president of the chamber of the *Cour de cassation* specialised in private international law matters, and Nicolas Michon, a French lawyer.

> *While there has been some public discussion in France regarding whether a US style class action mechanism should be adopted, the increasing number of US class actions purporting to bind French class members has gone largely unnoticed, yet it raises a number of serious legal issues.*
>
> *Indeed, US style class actions are based upon a utilitarian economic and legal model alien to the French one, and which raises very significant issues, chief among which the conflict of interests between the lawyer for the class and class members – issues which various attempts at reform have not been able to solve.*

> *In the authors' opinion, it is therefore clear that a French court would not recognize the preclusive effect of a US class action judgment or settlement over a claim made by French Absent Class Members, as this would offend French conceptions of due process and individual freedom (notably the freedom to bring, or refrain from bringing, a claim) as established inter alia by the French Conseil constitutionnel and the cour d'appel de Paris.*

Finally, another article discusses alternative modes of dispute resolution in the context of the return of cultural goods (*Le renouveau des restitutions de biens culturels : les modes alternatifs de règlement des litiges*). Authors are French scholar Marie Cornu (Poitiers) and Swiss Professor Marc André Renold (Geneva).

> *The alternative methods of dispute resolution in cultural heritage matters are an important resource enabling to deal with the issues relating to the return, restitution and repatriation of cultural goods. The purpose of this article is to analyse the situations which can lead to the use of such methods rather than the classical judicial means and to examine problems which might arise.*
>
> *The article is divided in two parts. The first part deals with the actors as well as with current methods used for the restitution and the return of cultural goods. The second part of the article underlines the type of goods which can be subject to alternative dispute resolutions and proposes a list of the substantive solutions, often original, which have been proposed in practice.*
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> *The alternative methods of dispute resolution enables to take into consideration of non legal elements, sometimes of emotional nature or linked to « doing the right thing », which can help the parties to find a way leading to a consensus.*

Articles of the *Journal* can be downloaded by suscribers to LexisNexis JurisClasseur.

Brussels I Review – Loose Ends

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

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

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

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

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

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

8.3. Recognition and enforcement

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

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

are collected by the court or fiscal authorities.

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

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

1. Domicile of individuals (Art. 59)

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

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

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

3. Rules of special jurisdiction

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

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

4. Rules for employment cases

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

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

5. Collective redress

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

6. Recognition and enforcement

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

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

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

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

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

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

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

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Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights in rem or possession with respect to such assets are concerned. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged.With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

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Finally, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment . Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the requirement to designate an address for service of process or to appoint a representative ad litem . In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters , such a requirement does indeed seem obsolete today.
Question 8:

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

Brussels I Review – Interface with Arbitration

The Brussels I Regulation's interface with arbitration vies with choice of court agreements as the topic within the Commission's review having the greatest potential impact on the negotiation and efficient implementation of commercial transactions.

According to the Commission:

Arbitration is a matter of great importance to international commerce.

Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .

Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award . This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for

the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).

The Commission seeks responses to the following questions:

Question 7:

Which action do you consider appropriate at Community level:

• To strengthen the effectiveness of arbitration agreements;

• To ensure a good coordination between judicial and arbitration proceedings;

• To enhance the effectiveness of arbitration awards?

The Commission observes, correctly, that "arbitration is a matter of great importance to international commerce" and that "[t]he 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners". Any solution to the problems described in the Report and the Green Paper must, therefore, be without prejudice to the functioning of the New York Convention in the Member States. Further, Art. 71 of the Brussels I Regulation (which, inexplicably, does not presently concern itself with obligations

to decline jurisdiction) should be amended to make clear that the Regulation shall not prevent a court from declining jurisdiction, or from recognising or enforcing a judgment or award, where it is required to do so by the New York Convention (or, equally, the Hague Choice of Court Convention).

That said, it is also important that the treatment of arbitration in the Regulation should not give more favourable treatment, or greater protection, to arbitration agreements or to arbitral processes and awards than that given to choice of court agreements or to the judicial determination of disputes in, and the recognition and enforcement of judgments from, Member State courts. Within the EC's "area of justice", private methods of dispute resolution should not be favoured over judicial determination. This proposition is supported, for example, not only by the need for equal and fair access to justice for all at reasonable cost, but also by the important position that national courts hold in the Member States' constitutional orders and the need to protect the vital role those courts play in developing and declaring civil and commercial law. Arbitration tribunals, given their self-regulatory and confidential character, are not well suited to performing the latter role. One (perhaps the only) positive consequence of the ECJ's decision in the West Tankers case is that it removed the anomaly whereby an anti-suit injunction could be sought to restrain proceedings in another Member State brought contrary to an agreement for arbitration with its seat in a Member State, but not an exclusive jurisdiction agreement designating the courts of a Member State.

Against this background, a strong case can be made for removal of the arbitration exception in Art. 1(2)(d) of the Regulation as the first step in the process of reform. As the Study of Professors Hess, Schlosser and Pfeiffer (Study JLS/C4/2005/03, paras. 106-136) affirms, however, that change alone will not be sufficient to ensure the effective co-ordination of judicial and arbitration proceedings, including regulation of jurisdiction with respect to ancillary court proceedings and the inter-relationship between judgments and arbitral awards, and will indeed create fresh problems.

Accordingly, in addition to the adjustment of Art. 71 to confirm the overriding effect of the New York Convention (above), further adjustments to the Regulation will be necessary. The proposals in the Study, emphasising the key role of the courts of "place of the arbitration" (which must be understood as referring to the seat of the arbitration and not the venue for any hearing) seem as good a starting point for discussion as any. Further work will, however, be required on the detail

of the proposals, including the proposed definition of "place of the arbitration", with input from practitioners specialising in arbitration as well as international arbitration bodies such as the ICC and LCIA, and (if possible) UNCITRAL as the custodian of the New York Convention. In particular, it will be necessary to ensure that the existing allocation of competence between national courts and arbitral tribunals (e.g. as to determination of questions of the tribunal's jurisdiction) is not upset. Thus, recognition that the courts of the "place of arbitration" have jurisdiction under the Regulation, whether exclusive or not, to determine certain matters should be expressed to be without prejudice to rules in that place concerning the relationship between courts and arbitral tribunals. Further, in defining the "place of arbitration" in cases where the parties have not made an express choice of seat from the outset, care must be taken not to open up fresh opportunities for tactical litigation to undermine arbitration proceedings by designating as competent the courts of a place that is unlikely to have any close connection to the arbitration.

For the reasons given above, if, as a consequence of these discussions, additional protection is given to arbitration agreements over and above that recognised in the New York Convention (e.g. by giving exclusive jurisdiction to the courts of the "place of the arbitration" to determine the validity of an arbitration agreement), equivalent protection should also be given to choice of court agreements.

Accordingly, the answer to be given to Question 7 could be that the arbitration exception in Art. 1(2)(d) ought to be deleted and appropriate adjustments made to the Regulation to ensure the effective co-ordination of judicial and arbitration proceedings. Arbitration agreements, proceedings and awards should not, however, be given more favourable treatment than choice of court agreements, judicial proceedings and judgments.

> *Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .

Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award . This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate

Community instrument).
Question 7:
Which action do you consider appropriate at Community level:
• To strengthen the effectiveness of arbitration agreements;
• To ensure a good coordination between judicial and arbitration proceedings;
• To enhance the effectiveness of arbitration awards?

Brussels I Review – Lis Pendens and Related Actions

The fifth topic considered in the Green Paper concerns possible adjustments to the lis pendens rules in Arts. 27 and following of the Brussels I Regulation (excluding aspects specifically related to choice of court agreements).

In the Commission's view:

> *With respect to the general operation of the lis pendens rule, it should be reflected whether the current problems might not be addressed by strengthening the communication and interaction between the courts seized in parallel proceedings and/or the exclusion of the application of the rule in the case of negative declaratory relief (cfr. supra, point 3).*
>
> *Concerning the rule on related actions, it should be reflected to what extent it may be appropriate to permit a grouping of actions by and/or against several partieson the basis of uniform rules. The risk of negative conflicts of jurisdiction could be addressed by a cooperation and communication mechanism between the courts involved and by an obligation on the part of the court which declined jurisdiction to re-open the case if the court first seized declines jurisdiction. In Article 30(2), it should be clarified that the authority responsible for service is the first authority receiving the documents to be served. Also, in the light of the importance of the date and time of receipt, the authorities responsible for service and the courts, as appropriate, should note when exactly they receive the documents for purposes of service or when exactly the document instituting*

proceedings is lodged with the court.

One other possibility could be to provide for a limited extension of the rule in Article 6(1), allowing for a consolidation if the court has jurisdiction over a certain quorum of defendants.

The Commission asks the following questions:

Question 5:

How do you think that the coordination of parallel proceedings (lis pendens) before the courts of different Member States may be improved?

Do you think that a consolidation of proceedings by and/or against several parties should be provided for at Community level on the basis of uniform rules?

Outside cases involving choice of court agreements, the *lis pendens* rules are one of the key features, and should remain a central element, of the Brussels I Regulation framework. With the adoption in 2001 of the uniform date of seisin rule (Art. 30), these rules set out a clear priority system and work reasonably well in practice, although they are not always straightforward to apply to the facts of particular cases. Significant changes would appear unnecessary and, perhaps, undesirable.

That said, the proposed clarification of Art. 30(2), to confirm the date of seisin where more than one authority is responsible for service, seems sensible, as does a requirement to stamp or indorse the claim document with the date and time of receipt for issue/service (as applicable). There would, however, at least outside the specific area of consumer redress, appear no imperative to adopt uniform procedural rules on the consolidation of actions. Finally, the Commission's suggested modification of Art. 6(1) in cases in which the court has jurisdiction "over a certain quorum of defendants" appears arbitrary, and may be difficult to apply in practice.

Claims for negative declaratory relief should continue, at least as a starting point, to be given equal treatment, in accordance with the principle confirmed in *The Tatry*. As the Advocate-General Tesauro observed in *The Tatry* (para. 23 of

Opinion):

> *It should also be borne in mind that the bringing of proceedings to obtain a negative finding, which is generally allowed under the various national procedural laws and is entirely legitimate in every respect, is an appropriate way of dealing with genuine needs on the part of the person who brings them. For example, he may have an interest, where the other party is temporising, in securing a prompt judicial determination—if doubts exist or objections are raised—of the rights, obligations or responsibilities deriving from a given contractual relationship.*

In some cases, it will be advantageous in practical terms for a party against whom proceedings for negative declaratory relief are brought to counterclaim for a positive remedy in the court chosen by his opponent (particularly if it is the court of the defendant's domicile). The current effect of the Brussels I Regulation, however, is to put the negative declaration defendant in a position in which, if he does not wish to take that course, his only option is to defend the action for a negative declaration and to forego any change of obtaining a positive remedy elsewhere in the EC unless and until the action concludes with a verdict in his favour, when he may seek recognition of that judgment in support of a new claim. At this stage, as the Green Paper points out in its discussion of choice of court agreements, he may be faced with time bar difficulties, having been precluded by Art. 27 from issuing a claim in his chosen court to protect his position. One possible solution to the time bar problem would be to amend Art. 27 of the Regulation so as to require the court second seised merely to *stay* its proceedings (rather than to *decline* jurisdiction) while the action before the court first seised is pending, if the latter action is for negative declaratory relief. In such a case, it might also be possible to develop a limited exception to the Art. 27 priority rule so as to entitle (but not require) the court first seised to decline jurisdiction over all or part of the proceedings in favour of the court second seised, on such terms (e.g. as to costs) as it may consider appropriate, if it would be manifestly more appropriate for the matters in issue to be determined by the court second seised having regard to the nature of the relief sought.

Accordingly, the answer to this question could be that, although improvements can be made to the *lis pendens* rules in Arts. 27-30 of the Regulation, major changes should be avoided and there is no imperative for generally applicable, uniform procedural rules on the consolidation of proceedings.

European Commission: Evaluation of the Hague Programme (and Priorities for the Future Stockholm Programme)

On 10 June 2009 the European Commission presented two communications to the Parliament and the Council, evaluating the 2005 Hague Programme and Action Plan (the second multi-annual policy framework for the Area of Justice, Freedom and Security, after the one adopted in 1999 in Tampere) and setting out the priorities for the future Stockholm Programme, to be debated by the European Parliament and adopted by the European Council (under the Swedish presidency) before the end of the year, which will provide a framework for EU action on the questions of citizenship, justice, security, asylum and immigration for the next five years (2010 – 2014).

As stated in the introduction of the basic document on the evaluation of the Hague Programme – "**Justice, Freedom and Security in Europe since 2005: An Evaluation of the Hague Programme and Action Plan**" – doc. COM(2009) 263 fin. of 10 June 2009:

> *The Hague Programme has been the EU's blueprint for realising its vision in the areas of access to justice, international protection, migration and border control, terrorism and organised crime, police and judicial cooperation and mutual recognition.*
>
> *The Commission has carefully monitored the implementation of the Programme at EU and Member State level. Individual instruments have been evaluated by the Commission or by Member States through peer reviews. Drawing from these exercises, this communication highlights the principal themes which have emerged, and looks ahead to how the EU should respond to the challenges of the future. Three longer documents accompany the*

communication: first, a report on the implementation of the programme which details, policy-by-policy, objectives, significant developments and future challenges; second, an 'institutional scoreboard' which provides an overview of the programme's stated instruments and targets; and third, an 'implementation scoreboard' on implementation at national level.

The references of the accompanying documents are the following:

- **An extended report on the evaluation of the Hague Programme**, doc. n. SEC(2009) 766 fin. of 10 June 2009 *[see p. 97 ff. as regards judicial cooperation in civil matters, and p. 118 ff. for the overall conclusions]*;
- General overview of instruments and deadlines provided in the Hague Programme and Action Plan in the fields of justice, freedom and security – **Institutional Scoreboard**, doc. SEC(2009) 767 fin. of 10 June 2009 *[on judicial cooperation in civil matters, see p. 108 ff.]*.
- Follow-up of the implementation of legal instruments in the fields of justice, freedom and security at national level – **Implementation Scoreboard**, doc. SEC(2009) 765 fin. of 10 June 2009 *[on judicial cooperation in civil matters, see p. 40 ff.]*;

According to the website of the incoming Swedish presidency, the future "Stockholm programme" will be discussed at the informal ministerial meeting in July 2009 and ultimately adopted by EU Heads of State and Government at the Summit in December 2009.

The Commission has already carried on a **public consultation ("FSJ: What will be the Future?")** on the priorities in the field of Freedom, Security and Justice for the next five years, which ended in December 2008 (see the consultation's webpage, with background papers, contributions and results).

Apparently, the Commission has released another preparatory document on the guidelines of the future programme in the Area of Freedom, Security and Justice: in the basic document on the evaluation of the Hague programme – COM(2009) 263 fin., fn. 3 on p. 2 – reference is made in this respect to doc. COM(2009) 262, but on the EUR-Lex database there is currently no document matching these criteria.

Four major (and very broad) priorities are outlined in press release n. IP/09/894, along with a number of examples of specific measures proposed: among them, the complete abolition of exequatur for enforcing judgments issued in another Member State.

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.