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*
>
> *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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Question 8:

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

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2009)

Recently, the March/April issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Robert Freitag***: "Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art.9 Abs. 3 Rom I-VO" – the English abstract reads as follows:

The article examines the conditions under which foreign mandatory rules "may be given effect" under article 9 par. 3 of the Rome I-Regulation. Freitag argues that the application of foreign mandatory rules is in theory itself mandatory but that the national judge has a discretion as to the evaluation of the compatibility of the relevant foreign law with domestic values. Another strong emphasis is put on the definition of "the country in which the contract is to be performed". The author favors an interpretation of art. 9 par. 3 Rome I-Regulation according to which the place of performance is to be determined by the proper law of the contract, resulting in the possibility of a plurality of relevant foreign mandatory rules. Furthermore, Freitag considers the rule to be of a strict and limiting nature so that the national judge may not give effect (in the meaning of the Regulation) to the mandatory provisions of foreign laws other than the one(s) determined pursuant to art. 9 par. 3 Rome I-Regulation. The article concludes with a criticism of the inapt formulation and adverse effects of art. 9 par. 3 of the Regulation.

- ***Karsten Kühnle/Dirk Otto***: "'Neues' zur kollisionsrechtlichen Qualifikation Gläubiger schützender Materien in der Insolvenz der Scheinauslandsgesellschaft – Drei Fragen, ein Gesetz, ein Referentenentwurf und ein höchstrichterliches Urteil" – the English abstract reads as follows:

Is a director of a pseudo-foreign company (e.g. a British private company limited by shares) having its centre of main interest in Germany obliged to file a petition for insolvency pursuant to German laws? Which law governs shareholder loans granted to such a company becoming insolvent? Are shareholders of such a company subject to the rules on piercing of the corporate veil developed by German courts if they cause the company's insolvency by unlawful actions? These three questions have dominated legal discussions in the past five years not only for their practical importance but also for the complexity of issues involved in a pseudo-foreign company's insolvency, e.g. determination of the company's COMI and avoidance of forum shopping, qualification of issues which are a matter of company law (lex fori societas) rather than a matter of insolvency law (lex fori concursus) against the background of Article 4 of the European Insolvency Regulation and the impact of the ECJ's judicature on freedom of establishment. From today's perspective, it appears that three events have clarified the legal position: (i) The German Reform Act to the Limited Liability Company Act (MoMiG), which came into force on 1st November 2008, explicitly addresses the question whether a pseudo-foreign company's director's duty to file for insolvency is governed by the lex fori concursus rather than the lex fori societas. (ii) In January 2008, the German Federal Ministry of Justice has produced a bill on Rules on Conflict of Laws pertaining to Companies, which deals with shareholder loans and their legal classification from a conflict of laws perspective. (iii) The German Supreme Court has reshaped the legal fundament of piercing of the corporate veil in 2007 in the "Trihotel"-

case. This case law needs to be considered when deciding whether shareholders of a pseudo-foreign company can be held personally liable for the company's insolvency.

- ***Jochen Glöckner***: "Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung" – the English abstract reads as follows:

Pursuant to its Art. 31 the Rome II-Regulation shall apply to events giving rise to damage which occur after its entry into force, while Art. 32 Rome II-Reg. determines that the regulation shall apply from 11 January 2009, except for Art. 29, which shall apply from 11 July 2008. Mostly, both provisions are simply paraphrased in a sense that the Regulation has to be applied by the courts from 11 January 2009 to events that occurred after its entry into force. Some scholars, however, tend to equate the entry into force referred to in Art. 31 with the date of application as determined in Art. 32 Rome II-Reg. requiring courts to apply the regulation only to events occurring after 11 January 2009. The wording of the various language versions of the Regulation, the drafting technique of the European legislator as exemplified in Art. 24 Reg. No. 1206/2001 (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 No L 174/1), Art. 29 Reg. No. 861/2007 (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 No L 199/1), Art. 26 Reg. No. 1393/2007 (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ 2007 No L 324/79) or Art. 29 Reg. No. 593/2008 (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 No L 177/6) as well as the legislative history and the purpose of both provisions however indicate, quite to the contrary, that entry into force must not be confused with applicability. That is why the provision in Art. 32 Rome II-Reg. does not amount to a specification of the date of entry into force under Art. 254 para. 1 EC and the Rome II-Regulation consequently entered into force on the twentieth day following the day of its publication. So, from 11 January 2009 on Member States Courts are under a duty to apply the Rome II-Regulation not only to all events giving rise to damage, which occur after the same day, but to all events which occur or have occurred since 20 August 2007.

- ***Alexander Bücken***: "Intertemporaler Anwendungsbereich der Rom II-VO" – the English abstract reads as follows:

According to its Article 32 the essential provisions of the Rome II-Regulation apply from 11 January 2009. Article 31 provides that the Regulation applies to events giving rise to damage which occur after its entry into force. There is uncertainty about the date of the entry into force, because there is no provision concerning it in the Regulation. The prevailing opinion states that the Regulation enters into force as from 11 January 2009. The following observations

examine, why this opinion is right and which negative effects it would have if the Rome II-Regulation would enter into force as from an earlier date as the date of its application.

- ***Andreas Spickhoff*** on recent decisions of the Federal Court of Justice, the Court of Appeal Koblenz and the Court of Appeal Stuttgart concerning the concurrence of contractual claims and claims based on tort on the level of international jurisdiction and choice of law: "Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht"
- ***Stefan Huber***: "Ausländische Broker vor deutschen Gerichten – Zur Frage der Handlungszurechnung im internationalen Zuständigkeits- und Kollisionsrecht" – the English abstract which has been kindly provided by the author reads as follows:

The author analyses a judgment of the Court of Appeal of Düsseldorf which granted a claim for damages brought by German investors against a broker situated in New York. Dealing with the questions of jurisdiction and conflict of laws, he agrees with the outcome of the decision but criticises the reasoning of the appellate court. The court assumed jurisdiction because the securities transactions in question had been arranged by a German financial service provider. In the author's view such a reasoning would lead to an exorbitant jurisdiction of German courts under certain circumstances. He proposes a different line of reasoning based on the place where the damage occured.

- ***Gregor Bachmann***: "Internationale Zuständigkeit bei Konzernsachverhalten" – the English abstract reads as follows:

The number of foreign investors in German stock corporations is rising. If they use their influence for the detriment of the company, the question arises where those investors can be sued. In a case to be decided by the Landgericht Kiel (Trial Court), a German shareholder sued a large French company (France Telecom S.A.) who supposedly had deprived the company of a valuable corporate opportunity and thus diminished the value of the shares. The claim was brought at the seat of the claimant. In applying the rules of the Brussels I Regulation, the court found that it was competent to decide the case. It based its decision on Art. 5 Nr. 3 of this regulation, according to which in matters relating to tort, delict or quasi-delict the defendant may be sued at the place "where the harmful event occurred". While the court was right to interpret „tort" or „delict" in a broad sense encompassing detrimental shareholder influence, it cannot be followed in its result. Although the European Court of Justice does not give clear guidance as to where the place of

occurrence must be located, it clearly holds that it cannot be generally identified with the place where the claimant resides. Therefore, in cases such as the one at hand the place of occurrence must be either the seat of the company or the place where the shares are stored. Since the latter is just a matter of chance, it must be rejected. The proper place to sue foreign shareholders rather is the place where the company's seat is located. This is in accordance with the general aim of the Brussels Regulation to avoid a splitting-up of jurisdictions and not to unduly favour the claimant.

- ***Stefan Kröll*** on a decision of the German Federal Court of Justice dealing with the principle of venire contra factum proprium in the context of the declaration of enforceability of foreign arbitral awards: "Treu und Glauben bei der Vollstreckbarerklärung ausländischer Schiedssprüche"
- ***Jan von Hein*** on a decision of the Austrian Supreme Court of Justice dealing with the ordering of protective measures with regard to German adults: "Zur Anordnung von Maßnahmen zum Schutz deutscher Erwachsener durch österreichische Gerichte"
- ***Peter Mankowski*** on the final decision of the Dutch Hoge Raad in the "Leffler-case": Übersetzungserfordernisse und Zurückweisungsrecht des Empfängers im europäischen Zustellungsrecht – Zugleich ein Lehrstück zur Formulierung von Vorlagefragen"

Personal Property Securities in Australia

The Commonwealth Attorney-General has recently released a Consultation Draft of the Personal Property Securities Bill 2008 and an accompanying commentary. The Bill aims to provide a national system to regulate security interests in all property other than land, and would replace over 70 Commonwealth, State and Territory enactments.

As one can imagine, the Bill contains substantial provisions relating to choice of law (Part 2 Div 7) and jurisdiction (Part 11 Div 5).

In general, Australian law will apply to security over property located in Australia (s 45), and in other circumstances the law of the place where the grantor is located will apply (s 46). Specific rules are proposed regarding foreign intellectual property (s 47), minerals (s 48), investment instruments and non-negotiable documents of title (s 49), investment entitlements (s 50), and bank accounts (s 51). Rules will also cover circumstances where property is brought into or taken out of Australia (ss 52-33), or where the grantor relocates to another jurisdiction (s 54).

The Bill appears to envisage that foreign law may govern some aspects of personal property securities that are otherwise regulated by the Bill. If foreign law applies, the Bill only picks up the relevant foreign law governing the rights, obligations and duties of debtor (or grantor of security) against the secured party in relation to collateral (i.e. the property that is subject to the security) (s 43). This would, it seems, exclude aspects of the debtor-creditor relationship unrelated to security, and may also exclude foreign choice of law rules. However, the operation of these provisions is not entirely clear.

So far as jurisdiction is concerned, the Bill is unusual among Commonwealth enactment in excluding the operation of s 39B of the *Judiciary Act 1903*, and the *Jurisdiction of the Courts (Cross-Vesting) Act 1987*. Rather, the Bill contains its own provisions investing Australian state and federal courts with jurisdiction (s 261) and providing for the transfer of proceedings between courts (s 263).

The Attorney-General is seeking public comment on the Bill as a whole, and there are also specific questions raised for discussion. Questions relating to private international law include:

- Does the common law [relating to jurisdiction of Australian courts] provide a sufficient jurisdiction for courts to act in relation to security interests?
- To what extent should the Bill implement rules consistent with the Hague Securities Convention?
- Are there any aspects of the Hague Securities Convention that should be omitted from the Bill (Australia could not adopt the Convention unless Australia's domestic law was consistent with the convention).
- Should the Bill require a securities intermediary who, in Australia, offers investment entitlements governed by the law of another country to

operate an office in that other country of the kind contemplated by the Hague Securities Convention (and to comply with any licensing and other regulatory requirements that may exist in that other country concerning the operation of offices of that kind)?

The deadline for submissions is August 15th 2008. More information can be found here.

India to Join Hague Conference to Protect a Married Woman's Rights?

Reports today suggest that India may well sign up to the Hague Conference on Private International Law shortly. Overseas Indian Affairs Minister Vayalar Ravi, in a press conference on the eve of the *Pravasi Bharatiya Divas* (the global conference for overseas Indians) to announce a bill to grant voting rights to non-resident Indians (NRIs), also stated that,

> *Steps are also being taken by the ministry to ensure that Indian women getting married to NRIs are not exploited or abused.*

Mr Ravi said India was **likely** to join the Hague Conference on private international law, to:

> *protect the interests of Indian women.*

There were already rumblings at the Indian Society of International Law Conference a few weeks ago that India were considering it. The Indian Government's consultation on "failed and fraudulent marriages" between Indian women and overseas Indian men has proved controversial in recent past; the National Commission for Women [NCW] New Delhi proposed a draft Convention

for such marriages, which recommended, *inter alia*, that:

- Registration of marriage be made compulsory
- Bilateral agreements for protection of such marriages be concluded between India and such other countries where the Indian Diaspora is in large numbers.
- If the NRI husband has not become a citizen of the country, in which he resides, concerned Indian laws to apply irrespective of the place of the filling of the petition for dissolution of the marriage.
- Government monitored conciliation process of settlement of matrimonial disputes be initiated.
- Suppression of information regarding marital status by NRI grooms to be dealt with under criminal law and steps taken through extradition treaties wherever operational.

The matter was also discussed during *Pravasi Bharatiya Divas* 2005, with the general consensus being that:

- There should be comprehensive legislation so that there is legal remedy available to such girls. Special courts without legislation would be futile.
- Registration of marriages should be made compulsory in case of Overseas Indians. This will ensure compliance of conditions of a valid marriage. There will be complete proof of marriage and it would be a very strong deterrent for bigamous marriages.
- If a person abandons his wife, he should forfeit his property.
- Such instances may be made criminal offences.
- Overseas citizenship of such a person should be forfeited.

Joining the Hague Conference may well help matters, but it isn't exactly clear *which* Conventions will be adopted to alleviate the difficulties facing NRIs. The ISIL report suggests that the Child Abduction Convention is the focus, as it would help the "high incidence of child removal" to and from the UK, US and Canada, by "returning children to the country of their habitual residence by a mutually reciprocal international arrangement between countries." The report suggests that there could be more: "if India signs *some* of The Hague Conventions…Recognition of Indian marriages and divorces and reciprocally similar foreign instances would come to an International agreement." One wonders how much of that is sheer optimism, however.

Private International Law matters were discussed yesterday at the *Pravasi Bharatiya Divas* 2007, with representatives from the Indian Parliament, the Indian Society of International Law and the Minister for Law and Justice in attendance. It will be interesting to see what they make of it all.