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*Committee on Legal Affairs*

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## **WORKING DOCUMENT**

on Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

## Introduction

The rapporteur would start by saying that he proposes to take a somewhat conservative approach to the revision of Regulation (EC) No 44/2001. By and large the rules on jurisdiction, recognition and enforcement of judgments first enshrined in the 1968 Convention have served the citizen and business well, and the rapporteur is unwilling to risk the unintended consequences of proposing radical changes. Nevertheless, a number of problems have arisen in the application of the regulation, in particular as a result of the case-law of the Court of Justice, which has relied excessively on the principle of mutual trust. In this connection, the rapporteur would point to Parliament's resolution of 25 November 2009, which identifies concrete steps towards the shaping of a European judicial culture conducive to the attainment of greater mutual understanding, better communications between judges and hence a higher degree of mutual trust.

The rapporteur appreciates the open-mindedness of the Commission's Green Paper. He has been at pains to read the responses on the Commission's website<sup>1</sup> and the following observations draw on the vast experience which they reflect. He would also express his thanks to the participants in the hearing held on 5 October.

This working document is limited to expressing the rapporteur's very preliminary findings of principle with regard to a limited number of points covered by the Green Paper. They are designed in particular to elicit responses from his colleagues on the committee and from the wider world. As a result, they are not exhaustive and do not by any means represent his last word on the matters which he has elected to discuss in order to stimulate discussion.

## Abolition of exequatur

The abolition of exequatur is "the main objective" of the Commission's proposals for revision of the Regulation.

In the first place, it would seem that applications for orders of exequatur are rarely refused: only between 1% and 5% of them are appealed and these appeals are rarely successful. However, according to the Heidelberg Study, this is not the case, for instance, in Greece. Secondly, the considerable time and expense involved for claimants in getting a foreign judgment recognised and enforced is hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions.

Secondly, there is no requirement for exequatur in several Community instruments: the European enforcement order (Regulation No 850/2004), the European payment order (Regulation No 1896/2006), the European small claims procedure (Regulation No 861/2007) and the maintenance obligations regulation (Regulation No 4/2009). However, there were particular reasons justifying not requiring exequatur in those cases: uncontested pecuniary claims, small claims and a need for urgency to provide for parties in a vulnerable position.

However, the minimum safeguards (service of process, public policy (which boils down to Article 6 ECHR) and the absence of contrary decisions) provided for in the existing regulation

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<sup>1</sup> [http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm).

need to be maintained. The rapporteur considers that, if the only appeal were to be before the court of origin, this would – in the present state of Community law – weigh heavily and unfairly against the defendant, who, it must be remembered, is in another Member State and would have to bear the costs and difficulties of bringing any proceedings in the State of origin. In his view, it would be premature to abolish the requirement for *exequatur* – although this should be the long-term goal – until sufficient experience has been acquired with the regulations which already do without this requirement and minimum procedural standards have been established at Community level. What could be done to accelerate the procedure for obtaining an enforcement order could be to lay down time-limits for the declaration of enforceability and for any appeal on the lines of Article 30 and Article 34(2) of Regulation No 4/2009 as regards Member States not applying the Hague Protocol. Consideration might also be given to specifying that that translation of only the final order (operative part and summary grounds) is required, except where the order for enforcement is challenged when a full translation would be required. The regulation could also specify that the court where enforcement is sought should limit itself to an examination "on the papers", except of course where there is an appeal.

In order to facilitate his consideration of the need for safeguards (particularly in the light of the judgment of 2 April 2009 Case C-394/07 *Gambazzi v. DaimlerChrysler Canada*, not yet reported in the ECR), the rapporteur would ask the committee to agree to its policy unit commissioning a study of the public policy/*ordre public* ground for non-recognition in a representative sample of Member States.

### Interest rates

The rapporteur has had his attention drawn to difficulties that have arisen as a result of Member States' having often differing national rules relating to the interest rates applicable to money judgments. An enforcing court may decline to give effect to the automatic rules of the court of the State of origin, instead applying its national interest rate only from the date of the grant of the order for enforcement. A rule clarifying matters would be productive of greater legal certainty for litigants.

### The scope of the regulation

#### *(a) Maintenance obligations*

Your rapporteur considers that maintenance obligations should be excluded in view of the adoption of Regulation No 4/2009.

#### *(b) Arbitration*

Your rapporteur does not favour (even partial) abolition of the exclusion of arbitration from the scope of the regulation.

He tends to endorse to consider that the implications of extending the regulation to cover arbitration would lead to a regionalisation of the law of arbitration in the EU which is at odds with its universal nature. It could also result in the acquisition by the EU of exclusive competence, which, in view of the difficulties brought about by the Court's opinion in *Lugano*, should not be brought about except by a deliberate legislative act. Moreover, the

ideas set out in the Commission's Green Paper would seem incompatible both with the 1958 New York Convention and with the 1961 Geneva Convention on International Commercial Arbitration. It is pointed out that all Member States are parties to both conventions. It must also be borne in mind that Switzerland is a major centre for arbitration and that the Lugano Convention excludes arbitration from its scope. The rapporteur therefore considers that the safest course of action and to avoid any interference the Member States' rights and obligations under the New York and Geneva Conventions, it is best to continue to exclude arbitration from the scope of the regulation.

By the same token, the rapporteur considers that there is no need for a harmonised mandatory rule providing for exclusive jurisdiction for State proceedings in support of arbitration. Such a rule could give rise to problems with cross-border assistance in the taking of evidence. The rapporteur has read a large number of submissions pleading for and against giving a key role to the courts of the place of arbitration and takes the view that this sort of question, together with the vexed question of interim relief in this context, should not be the subject of new rules as a result of the present review. In his view, this question needs separate study and a deeper consultation with practitioners specialising in arbitration and international arbitration bodies.

As for the *West Tankers*<sup>1</sup> question, the rapporteur takes the view, at least provisionally, that the arbitration exclusion should be clarified so as to make it clear that judgments brought in breach of arbitration clauses and judgments holding that arbitration clauses are invalid fall outside of the scope of the regulation. They would therefore not be enforceable in other Member States under the regulation.

It might also be possible to contemplate adding a recital, couched in appropriate terms, endorsing the *Kompetenz-Kompetenz* principle.

The rapporteur would be delighted to hear the views of colleagues on this issue and indeed on all the matters raised in this paper.

### Choice of court

Having regard to the importance which this House has attached to party autonomy, even in the context of the legislative procedure which led to the adoption of the Rome II regulation on the law applicable to non-contractual obligations, the rapporteur cannot but endorse this position, which he shares out of conviction.

The present interpretation of the *lis pendens* rule (as exemplified by the judgment in *Gasser v. MISAT*<sup>2</sup>) enables choice-of-court clauses to be undermined by abusive "torpedo" actions.

The rapporteur considers that the most straightforward solution to this problem would be to release the court designated in a choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule. This should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court. This would act as a deterrent to parallel proceedings and the risk of some parallel proceedings would be worth running as a result.

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<sup>1</sup> Judgment of 10 February 2009 in Case C-185/07 *Allianz SpA v. West Tankers Inc.*, not yet reported in the ECR.

<sup>2</sup> Judgment in Case C-185/07 *Gasser GmbH v. MISAT Srl* [2003] ECR I-14693.

This could be backed up by a recital stressing the primary importance to be attached to party autonomy.

The rapporteur is studying the paper submitted by Professor Muir-Watt on the transmission of choice-of-forum clauses to third parties, since this raises a genuine problem which should if possible be resolved in the course of the review of the regulation.

### Forum non conveniens<sup>1</sup>

In order to avoid the problem which came to the fore in *Owusu v. Jackson*<sup>2</sup>, the rapporteur tentatively suggests a solution on the lines of Article 15 of Regulation No 2201/2003<sup>3</sup>. Such an article could allow the courts of a Member State having jurisdiction as to the substance of the matter, to stay proceedings if they considered that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, so as to enable the parties to bring an application before that court or to enable the court seised to transfer the case to that court. Again, the rapporteur would welcome comments and suggestions

### Operation of the regulation in the international legal order

The rapporteur considers that the Commission's suggestions in the Green Paper are so radical and ambitious as to go beyond a mere review. It would in fact be a mammoth task and fails to take into account the various bilateral and multilateral agreements to which Member States are parties.

A possible limited reform might consist in an extension of the Community rules on exclusive jurisdiction (in particular with regard to rights in rem in immovable property or tenancies of immovable property) to proceedings brought in a third State. It is also difficult to see why proceedings cannot be brought in a third State where one of the parties is domiciled in the Union where all the activities complained of in the proceedings took place in that State and all the damage was suffered there. A provision of the type discussed under the heading *forum non conveniens* could help in this regard.

The rapporteur remains to be convinced as to the desirability of introducing provisions allowing for the exorbitant jurisdiction of the courts of Union Member States.

### Definition of domicile of natural and legal persons

The rapporteur considers that an autonomous definition of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more

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<sup>1</sup> Interestingly, although the doctrine of *forum non conveniens* is regarded as a creature of the common law, it was introduced into the common law from Scotland, a civil law country, whose lawyers found it in Roman Dutch law (see *Lis Pendens* in International Litigation, Campbell McLachlan, Hague Academy of International Law, Martinus Nijhoff Publishers, 2009).

<sup>2</sup> Case C-281/02 *Owusu v. Jackson* [2005] ECR I-1383.

<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

than one domicile. However, he has not seen a suitable solution to this problem put forward.

He would also favour a single definition of the domicile of companies, but fears that this problem is intractable as matters stand.

The rapporteur proposes to follow up this working document with another in January.