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WORKING DOCUMENT

on the 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 – PART TWO

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

Introduction

This document follows on from the rapporteur's first working document (DT/797844EN.doc). The idea of proceeding in this manner is to enable colleagues and interested parties, including the Commission, to react to the rapporteur's initial ideas in advance of the draft report. The rapporteur would thank the numerous persons who have submitted observations, including those posted on the Commission's website.

Timetable

The rapporteur intends to submit his draft report to the Committee on Legal Affairs at its meeting on 28-29 April 2010. He would envisage holding the vote on 1 or 23 June.

Further thoughts on the proposed abolition of exequatur

Whilst the rapporteur has not altered his views about the proposed abolition of exequatur, which he considers to be premature, he would say something about this eventuality before outlining a possible compromise.

First of all, since the Commission's chief problem with exequatur seems to be its cost, a comparative study should be carried out of the cost of exequatur in the Member States and then time taken to obtain it.

Secondly, if there is to be no order for enforcement against which an appeal can be brought, provision will have to be made for a special review procedure conducted *a posteriori*. The rapporteur wonders whether this will not add complications, and not only where the judgment debtor wishes to contest enforcement. Indeed, whilst judgment debtors must be guaranteed an adequate right of recourse to the courts of the Member State of enforcement and the grounds on which exception may be taken to enforcement must be no less than those set out in Articles 34 and 35 of the Regulation, it is self-evident that the steps which may be taken by way of enforcement until such time as the time-limit for applying for special review has expired or the special review has been concluded must not be irreversible. It also would seem essential to provide for a harmonised procedural time-frame for the conduct of such review.

Thirdly, if exequatur is abolished, it will be essential for officials and bailiffs in the receiving Member State to be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court. The rapporteur is therefore against abolishing the requirement for a translation, although as he mentioned in his first working document, the translation could be limited to the final order (operative part and summary grounds). The requirement for a certificate of authenticity must be maintained, whilst there should be a standard form for that certificate.

Consequently and in view of the strong reservations of certain Member States about the immediate abolition of exequatur, the rapporteur suggests that the Commission might include in its proposal provisions allowing Member States to abolish the requirement for exequatur (and providing for a special review procedure). This would allow those States willing to abolish exequatur do so and it would enable the Commission to monitor and report on how well the new system worked with a view to making the abolition universal at a later stage.

Authentic instruments

Whether or not the requirement for exequatur is abolished, the rapporteur doubts whether authentic instruments should be directly enforceable without review by the judicial authorities in the State in which enforcement is sought. Moreover, the existing anomaly whereby a declaration of enforceability can be refused or revoked only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed must be rectified. It is perfectly possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment. Moreover, given that the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the Member State of origin on the grounds of mistake, misrepresentation, etc. even during the course of enforcement, express provision for refusal or revocation of a declaration of enforcement is necessary to cover such an eventuality.

Further thoughts on arbitration

The rapporteur has read with considerable interest and attention the guest editorial posted on <http://conflictoflaws.net> by Professor Burkhardt Hess on 14 February 2010 in which he argues for an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States and the corresponding obligation of the courts in all other Member States to transfer parallel litigation to the courts of the Member State where the arbitration takes place (as proposed in the Heidelberg report). This would involve the deletion of the “arbitration exception” in Article 1(2)(d) of the regulation. Professor Hess is therefore critical of the provisional view taken by the rapporteur, which is avowedly conservative and based on a reading of all the submissions made to the Commission.

As against this, the *Revue de l'arbitrage* has published an article by Professor Catherine Kessedjian, *Le Règlement 44/2001 et l'arbitrage*, in which it is argued that the arbitration exception must not be altered, at least until all questions posed by the relationship between an arbitral proceeding and a judicial proceeding have been thoroughly reflected upon. Professor Kessedjian goes on to say that this should be done bearing in mind the role of Europe as a favoured place of arbitration. In addition, the reform of the regulation may not be limited to intra-European cases but also deal with relations with third States and hence an even more cautious approach to the matter is necessary. In that context, Europe should not act unilaterally, unless efforts are undertaken at a universal level and fail¹.

This, together with the alarm which the Heidelberg proposals have – rightly or wrongly – engendered, leads the rapporteur to conclude (again only provisionally) that nothing should be done one way or the other in the forthcoming revision of the regulation. Having read all the submissions from authorities for whom the rapporteur has the greatest respect, the rapporteur takes the view that the question should be addressed in a separate review.

Jurisdiction with regard to labour disputes

The rapporteur is considering the idea that a provision should be added to the regulation laying down the general principle that the competent jurisdiction to hear matters relating to industrial action should be the court of the Member State where the action is to be or has been

¹ See also « Circulez, il n'y a rien à voir ! ». A Response to Professor Hess, posted on <http://kluwarbitrationblog.com> by Alexis Mourre and Professor Hess's response posted on 12 March.

taken. He would be interested to hear the views for and against this proposal from specialist lawyers and interested parties.

Industrial property

Given recent developments in the Council with regard to the patent litigation system, it is probably best to wait before dealing with questions such as the consolidation of patent litigation.

The rapporteur considers that much of what he had to say about *lis alibi pendens* and torpedo actions in his first working document also applies to intellectual property litigation. He would add that he rejects the idea that claims for negative declaratory relief should be excluded altogether from the first in time rule on the ground that such claims can have a legitimate commercial purpose.

Consequently, he considers that the court second seised should be relieved from the obligation to stay proceedings under the *lis pendens* rule where the court first seised evidently has no jurisdiction. Such a limited exception to the priority rule would be aimed in particular at cases where the action is for a declaration of non-infringement of a patent granted in the Member State of the courts second seised (including a national part of a European patent), but where proceedings are brought first in the courts of a Member State that does not have general jurisdiction under Article 2(1) (because the defendant is not domiciled in that Member State). In this scenario, as the case-law currently stands, there is no conceivable basis for the court first seised to have jurisdiction regarding that patent, whether under Article 5(3) or under Article 6(1).

This could be coupled with a general requirement for national courts to deal with jurisdiction expeditiously as a preliminary issue (see also the section of the first working document dealing with *Choice of court*).

What of the Commission's suggestion in this and other contexts that these problems could be alleviated by improved communications between courts? The rapporteur whole-heartedly approves of this idea, but considers that a regulation laying down rules of private international law is not the proper place for applying it and indeed he finds it difficult to see how it could be formally enacted. Better communication between judges can be promoted as part of the creation of the "European judicial culture" through training and by recourse to the European networks in the various sectors of the judicial system (the European Judicial Training Network, the European Network of Councils for the Judiciary, the Network of the Presidents of the Supreme Courts of the European Union, the European Judicial Network in civil and commercial matters).

Rights of the personality

It should be borne in mind that this question also has to do with the Rome II Regulation² and the law applicable to non-contractual obligations. Indeed, the committee has recently started to consider a legislative initiative pursuant to Article 225 TFEU, for which the rapporteur is

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 1997 L 199, p. 40.

Diana Wallis, in an endeavour to fill a gap in the Rome II Regulation which arose because the Council was unable to agree on the original Commission proposal or on the compromise solution put forward by Parliament in the course of the co-decision procedure on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality³. This is an ongoing process of which the hearing held on 28 January 2010 was a part⁴.

It should also be mentioned that, in accordance with Article 30(2) of the Regulation⁵, the Commission has submitted a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁶.

³ The compromise consisted of recital 29 and Article 7, which read as follows: 29) *Regarding violations of privacy or rights relating to the personality, this Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. The country in which the most significant element or elements of the damage occur or are likely to occur should be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.*

Article 7 Violations of privacy and rights relating to the personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or of rights relating to the personality shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.

2. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast shall be the law of the country in which the publisher or broadcaster has its habitual residence.

3. Paragraph 2 shall also apply to violations of privacy or of rights relating to the personality resulting from the handling of personal data.

⁴ Hearing on rights relating to personality, in particular in relation to defamation, in the context of private international law, particularly the Rome II Regulation. For the speakers' contributions, see <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=JURI>.

⁵ *Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

⁶ Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, personality, JLS/2007/C4/028, Final Report.

Why this question has arisen, even though it is not raised in the Commission's Green Paper, has to do with the controversy about so-called "libel tourism"⁷, a type of forum shopping in which a claimant elects to bring an action for defamation in the jurisdiction which is considered most likely to produce a favourable result. This problem is virtually exclusively connected with English law, although the French *droit à l'image* may also attract foreign litigants.

The jurisdiction of choice, it would seem, is that of England and Wales, which is "regarded as the most claimant-friendly in the world"⁸. Under the English law of libel - the argument runs - , the claimant has a prima facie case once he has established that the defendant has published a defamatory statement about him. He does not have to prove that the statement is false (although the defendant has a good defence if he can prove it is true) and he does not have to prove that the defendant acted out of malice. Damages can be high and the English courts allegedly assume jurisdiction in too wide a variety of cases⁹. There is also the problem of high costs. This question has been taken up in the USA where the English law of libel is regarded as being contrary to the First Amendment. The result has been the passing of legislation¹⁰ according to which a foreign judgment in defamation proceedings should not be enforceable in the USA unless the foreign law provides "at least as much protection for freedom of speech and the press" as the American Constitution. This has been coupled with a media campaign against libel tourism and articles such as the one by Professor Hartley cited in note 7 calling for changes in the European rules of private international law.

As against this, an extremely cogent defence of the English law of libel has been mounted not only at the hearing¹¹ but also in a public lecture given by Lord Hoffmann.¹² It must also be noted that English libel law is in the course of review.

It must be said, however, that the concerns of the media in continental Europe antedate the present campaign and tend to focus on the effect of the interpretation given to Article 5(3)¹³ of the regulation in the *Shevill* case¹⁴, according to which a person claiming that his or her reputation has been injured may sue (a) either before the courts for the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or (b) before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

The media's problem is connected with situation (b). What they are afraid of is being sued in

⁷ The English law of defamation is complex: it subdivides into libel - which is usually written or in some other permanent form - and slander, a statement in some non-permanent form.

⁸ See Trevor Hartley, *'Libel Tourism' and Conflict of Laws*, ICLQ vol 59, January 2010, p. 25, at p. 26.

⁹ *Ibid.*

¹⁰ E.g. the Libel Terrorism Act passed by the State of New York in 2008.

¹¹ The Current State of Defamation Law in England and Wales, a paper presented by William Bennett to the hearing held on 28 January 2010.

¹² See the Fifth Dame Anne Ebsworth Memorial Lecture given by the Rt Hon. The Lord Hoffmann on 6 February 2010. This paper has been distributed to members.

¹³ "A person domiciled in a Member State may, in another Member State, be sued: ... 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

¹⁴ Case C-68/93 *Shevill and Others v. Presse Alliance* [1995] ECRI-415.

the UK, a high-cost jurisdiction where the damages are potentially high, on the basis of distribution of the publication outside the country for which it is principally intended. The fact that Internet publication is accessible virtually everywhere means that courts may accept jurisdiction where the actual connection between the publication and the country in which the claimant sues - and indeed in some cases between that country and the claimant - is in fact slight. The media also point out that where the costs of defending proceedings are very high, the publisher may be forced to settle even where it has a good defence.

Whilst sympathising with the media's concerns, the rapporteur would point out that, in Europe, none of the rights involved - the right to freedom of expression, the right to a private life and the right to one's good reputation - are absolute. The public interest in freedom of expression and a free media has to be balanced against the private interest of persons who have been defamed in the media or have had their privacy invaded in having their day in court and being able to seek compensation for the damage they have sustained.

The rapporteur understands that the protection of reputation/privacy/one's image and freedom of expression is secured in such different ways in the Member States (including in some by the criminal law, which falls outside the scope of Brussels I) that it could be argued that such disputes should almost invariably be brought before the courts of the place at which editorial control is carried out and under the law of that country. However, to impose a rule to this effect could result in a denial of justice to persons not having the means or the energy to pursue a case outside their own Member State, where the offending article/broadcast was disseminated. It could also have the perverse result of obliging persons to sue in England where the costs of bringing proceedings are high if they have been defamed in an English newspaper distributed in their own country.

To the extent that "libel tourism" does exist, however, another question arises. Would it not be an abuse of Community law to try to deal with this problem in an instrument which purports to lay down rules of private international law? In other words, would it be legally proper to seek to regulate a problem - of freedom of the press and the right to family life/reputation - by restricting the jurisdiction of the courts or the reach of the law of a particular Member State or States by means of a regulation which is supposed merely to lay down rules enabling it to be identified on the basis of objective criteria which courts have jurisdiction in particular cases and what judicial decisions should be enforced across borders? An instrument such as Brussels I is not meant to apply a value judgment to the judicial systems of the other Member States. As the Court of Justice pointed out in the *Lugano* opinion¹⁵, the system of Brussels I is based on mutual trust.

A possible solution might lie in introducing the concept of *forum non conveniens*. That is to say a provision stating that the judge seised (where he or she is not the judge for the place of editorial control or the place of domicile/nationality of the complainant) should consider the proportionality of the claim. More specifically, he or she should consider, as a preliminary issue, whether publication in his or her Member State was significant in terms of the number

¹⁵ Opinion 1/03 [2006] ECR I-1145: "... the simplified mechanism of recognition and enforcement set out in Article 33(1) of that regulation, to the effect that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required and which leads in principle, pursuant to Article 35(3) of that regulation, to the lack of review of the jurisdiction of courts of the Member State of origin, rests on *mutual trust* between the Member States and, in particular, by that placed in the court of the State of origin by the court of the State in which enforcement is required" (para. 163; emphasis supplied).

of the particular issue sold, the number of sales outlets and the target customer base. The same reasoning could apply *mutatis mutandis* to the Internet¹⁶.

If the judge determined that publication was *de minimis*, he or she would be entitled but not bound to decline jurisdiction in favour of the courts for the place where the publisher of the defamatory publication was established, provided that those courts accepted jurisdiction.

Alternatively, Professor Hartley suggests a provision to the effect that in the case of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, Article 5(3) shall apply only if (a) the claimant is domiciled in the territory of the forum or (b) the defendant has taken significant steps to make the offending material available in the country of the forum and has targeted that country more than any other.

The rapporteur regards both these solutions as unsatisfactory. Both the solution of the *forum non conveniens* type and Professor Hartley's solution wrongly conflate distribution and damage. Furthermore, *forum non conveniens* is regarded with disfavour by civil lawyers and Professor Hartley's solution could leave a person defamed without any remedy. What is more, both solutions could be regarded as unduly interfering with access to justice and using the rules of private international law for ends which they are not intended to pursue. However, in view of the media's concerns, the rapporteur will give further consideration to whether a solution of the *forum non conveniens* type, suitably refined, might not be helpful.

Provisional measures

The rapporteur considers that the *Denilauer*¹⁷ case-law should be clarified by making it clear that *ex parte* measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them.

At present, it is not entirely clear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31. Therefore, in order to ensure better access to justice, it is suggested that such orders should be covered by the notion of provisional and protective measures. Furthermore, the rapporteur considers that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, besides the jurisdiction of the courts having jurisdiction with respect to the substance of the matter.

As some provisional measures have the effect of both preserving and collecting information and evidence, it is desirable for Article 31 to be broadened to cover preserving and collecting evidence.

On a more general note the rapporteur agrees that "provisional, including protective

¹⁶ Lord Hoffman points out, however, in his speech cited in n.12 with regard to a suggestion of EnglishPEN that an English court should take jurisdiction only where at least 10% of the copies of the publication have been sold in England that there does not seem to be much logic in saying that if you have significantly damaged someone's reputation in England, it should be a defence that you have published ten times as many copies of the libel somewhere else.

¹⁷ Case 125/79 *Denilauer v. Couchet Freres* [1980] ECR 1553.

measures" should be defined in a recital in the terms used in *St Paul Dairy* case¹⁸.

Furthermore, the rapporteur considers that the distinction drawn in *Van Uden*¹⁹ between cases in which the court granting the measure has jurisdiction over the substance of the case, and cases in which it does not, should be replaced by 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 (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (when the Article 31 restrictions should apply).

In order to overcome the difficulties posed by the requirement recognised in *Van Uden* for a "real connecting link" to the territorial jurisdiction of the Member State court granting the measure, the rapporteur considers that a recital should be introduced to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure granted 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 State²⁰.

The rapporteur agrees that communication and cooperation between the courts could be very helpful in this connection, but, as mentioned above, he considers that this should be dealt with in another, more general, context.

The rapporteur rejects the Commission's idea that the court seised of the main proceedings should be able to discharge, modify or adapt provisional measure granted by a court from another Member State. He considers that this would not be in the spirit of the principle of mutual trust established by the Regulation. Moreover, it is unclear on what basis a court could review a decision made by a court in a different jurisdiction, and which law would apply in these circumstances. Furthermore, this could give rise to real practical problems, for example with regard to costs.

¹⁸ Case C-104/03 *St Paul Dairy Industries v. Unibel* [2005] ECR I-3481, para. 13: measures intended to "preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case".

¹⁹ Case C-391/95 *Van Uden v. Deco-Line* [1998] ECR I-7091.

²⁰ The rapporteur is grateful to A. Dickinson for these suggestions.