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DRAFT REPORT

on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
(2009/2140(INI))

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

The European Parliament,

- having regard to Article 81 of the Treaty on the Functioning of the European Union,
- having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹ (hereinafter ‘the Brussels I Regulation’ or ‘the Regulation’),
- having regard to the Commission’s report on the application of that regulation (COM(2009)0174),
- having regard to the Commission’s Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175),
- having regard to the Heidelberg Report (JLS/2004/C4/03) on the application of Brussels I in the Member States and the responses to the Commission’s Green Paper,
- having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme² specifically the sections ‘Greater access to civil justice for citizens and business’ and ‘Building a European judicial culture’,
- having regard to the Union’s accession to the Hague Conference on private international law on 3 April 2007,
- having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,
- having regard to the case law of the Court of Justice, in particular *Gambazzi v. DaimlerChrysler Canada*³, the *Lugano* opinion⁴, *West Tankers*⁵, *Gasser v. MISAT*⁶, *Owusu v. Jackson*⁷, *Shevill*⁸, *Owens Bank v. Bracco*⁹, *Denilauer*¹⁰, *St Paul Dairy*

¹ OJ L 12, 16.1.2001, p. 1.

² Texts Adopted, P7_TA(2009)0090.

³ Judgment of 2 April 2009 in Case C-394/07 *Gambazzi v. DaimlerChrysler Canada*, not yet reported in the ECR.

⁴ Opinion 1/03 [2006] ECR I-1145.

⁵ Judgment of 10 February 2009 in Case C-185/07 *Allianz SpA v. West Tankers Inc.*, not yet reported in the ECR.

⁶ Case C-185/07 *Gasser GmbH v. MISAT Srl* [2003] ECR I-14693.

⁷ Case C-281/02 *Owusu v. Jackson* [2005] ECR I-1383.

⁸ Case C-68/93 *Shevill and Others v. Presse Alliance* [1995] ECR I-415.

⁹ Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR I-117.

¹⁰ Case 125/79 *Denilauer v. Couchet Frères* [1980] ECR 1553.

*Industries*¹ and *Van Uden*²;

- Having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters³, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims⁴, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure⁵, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure⁶, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations⁷ and 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 1347/2000⁸,
 - having regard to 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)⁹,
 - having regard to the opinion of the European Economic and Social Committee of 16 December 2009,
 - having regard to Rules 48 and 119(2) of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0000/2010),
- A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules – supplemented by a substantial body of case-law, – and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,
- B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,
- C. whereas abolition of exequatur – the Commission’s main objective – would expedite the free movement of judicial decisions,
- D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those

¹ Case C-104/03 *St Paul Dairy Industries v. Unibel* [2005] ECR I-3481.

² Case C-391/95 *Van Uden v. Deco-Line* [1998] ECR I-7091.

³ Consolidated version in OJ, C 27, 26.1.1998, p. 1.

⁴ OJ L 143, 30.4.2004, p. 15.

⁵ OJ L 399, 30.12.2006, p. 1,

⁶ OJ L 199, 31.7.2007, p. 1.

⁷ OJ L 7, 10.1.2009, p. 1.

⁸ OJ L 338, 23.12.2003, p. 1.

⁹ OJ L 199, 31.7.2007, p. 40.

appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are 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,

- E. whereas there is no requirement for exequatur in several EU instruments: the European enforcement order, the European payment order, the European small claims procedure and the maintenance obligations regulation¹,
- F. whereas abolition of exequatur will necessitate the introduction of a special review procedure so as to guarantee judgment debtors an adequate right of recourse to the courts of the State of enforcement in the event that they wish to contest enforcement; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,
- G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,
- H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,
- I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,
- J. whereas party autonomy is of key importance and the application of the *lis pendens* rule as endorsed by the Court of Justice (*e.g.* in *Gasser*) enables choice-of-court clauses to be undermined by abusive 'torpedo' actions,
- K. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture through training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),
- L. whereas, as regards rights of the personality, the media complain that the internet, in particular, and the readiness of the courts in certain Member States to accept jurisdiction, creates problems for the media because of the ruling in *Shevill*; whereas this problem will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance may be given to national courts in the amended regulation,

Abolition of exequatur

¹ See the 9th recital in the preamble.

1. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by stringent safeguards designed to protect the rights of the judgment debtor; takes the view that provision will have to be made for a special review procedure conducted *a posteriori* on the judgment debtor's application;
2. Considers that the grounds on which exception may be taken to enforcement must be no fewer than those set out in Articles 34 and 35 of the Regulation and encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;
3. Considers that there must be a harmonised procedural time-frame for such review so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for special review has expired or the special review has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;
4. Argues not only that the requirement for a certificate of authenticity must be maintained, but also that there should be a standard form for that certificate;
5. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for review;

Authentic instruments

6. Considers that authentic instruments should not be directly enforceable without the possibility of review by the judicial authorities in the State in which enforcement is sought; takes the view that the special review procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

Scope of the Regulation

7. Considers that maintenance obligations should be excluded from the scope of the Regulation in view of the adoption of Regulation No 4/2009;
8. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;
9. Takes the view that the questions posed by the relationship between arbitral and judicial proceedings must be thoroughly reflected upon in a separate review and that, until such time as review has been conducted, the idea of an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States and a corresponding obligation on the courts in other Member States to transfer parallel litigation to the courts of the Member State where the arbitration takes place should not be

contemplated;

10. Considers that, in order to deal with the *West Tankers* question, the arbitration exception should be clarified in a recital so as to make it clear that proceedings brought in breach of arbitration clauses and judgments not given by the competent court holding that arbitration clauses are invalid fall outside of the scope of the Regulation and are therefore not enforceable in other Member States; further takes the view that it would be helpful for the *Kompetenz-Kompetenz* principle to be endorsed in a recital;

Choice of court

11. Advocates, as a solution to the problem of ‘torpedo actions’, releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

Forum non conveniens

12. Suggests, in order to avoid the type of problem which came to the fore in *Owusu v. Jackson*, a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance 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, thus enabling the parties to bring an application before that court or to enable the court seised to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession¹;

Operation of the Regulation in the international legal order

13. Considers that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role; further considers that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should be sought in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law;
14. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights *in rem* in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;
15. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice of court clauses in favour of third states’ courts;

¹ COM(2009)154 final; Art. 5.

16. Takes the view that the question of a rule overturning *Owens Bank v. Bracco* should be the subject of a separate review;

Definition of domicile of natural and legal persons

17. Takes the view 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 than one domicile and would favour a single definition of the domicile of companies, while appreciating the considerable difficulties involved;

Interest rates

18. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the special review procedure;

Industrial property

19. Considers that, in order to overcome the problem of ‘torpedo actions’, 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; rejects the idea, however, 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;

Rights of the personality

20. Endorses the rule in *Shevill*; considers, however, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be sufficiently protective of freedom of expression, the right to a private life and the right to one’s good reputation;

Other questions

21. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;
22. Instructs its President to forward this resolution to the Council and the Commission.

EXPLANATORY STATEMENT

This report deals with the implementation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") in the light of the Commission's Green Paper.

The Brussels I Regulation has a long history, since its origins lie in the 1968 Brussels Convention. It lays down detailed rules on which courts have jurisdiction in civil and commercial disputes and on the recognition and enforcement of judgments from other Member States. It is generally regarded as being a great success in so far as it has promoted the free movement of judgments, increased legal certainty and enabled parallel proceedings to be avoided, although it is criticised in some quarters for producing inconvenient or uncommercial results. The quality of the case-law of the Court of Justice is also viewed as uneven.

When the Brussels I Regulation was adopted, Parliament was only consulted. It will be dealing with any future proposal for its amendment under the ordinary legislative procedure, which will be a considerable challenge owing to the highly technical nature of the Regulation and to the challenging problems which its application has thrown up in recent years. The rapporteur therefore considers it important that Parliament should be involved also at the stage of the Commission's Green Paper.

The Green Paper and the substantial body of case-law are not the only documentation available, the responses to the Green Paper are available on line and members of the committee have also had the benefit of the various studies carried out for the Commission, namely the Heidelberg report, the study on residual jurisdiction produced by Professor Nuyts and the Study to inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community. The rapporteur would also thank the experts who took part in the hearings held on 5 October 2009 and 19 January 2010.

The questions raised by the Green Paper relate to the possible abolition of exequatur (order for enforcement), the operation of the Regulation in the broader international order, the operation of choice-of-court clauses, the operation of the Regulation in intellectual/industrial property litigation, possible reform of the rules governing *lis pendens* and related actions, problems arising in connection with provisional measures such as interim injunctions and the interface of the Regulation with arbitration proceedings.

These questions are not exhaustive: others have been raised in the various studies which have been commissioned and in the responses received to the Green Paper.

The rapporteur has been at pains to produce a balanced, forward-looking report. Whilst he has been moved by the reaction to his two working papers to endorse the idea of abolishing exequatur, he is convinced that this step will have to be set off by a strong review procedure, coupled with stringent safeguards for judgment debtors. He maintains his opposition to the abolition of the exclusion of arbitration from the scope of the Regulation, but considers that much more thought needs to be given to the relationship between arbitral and judicial

proceedings and that until such time a full review and thorough consultations have been carried out, the idea of an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States should not be pursued.

The rapporteur finds the idea of giving full reflexive effect to the provisions of the Regulation an attractive one. But it is before its time. Again, he would press for wide consultations and political debate before any action is taken in this matter above and beyond the suggestions made in his draft report. He also espouses of the idea of resuming negotiations on an international judgments convention in the Hague Conference.

Owing to the length constraints imposed upon him, the rapporteur has been unable to include proposals on such matters as provisional measures in his draft report. He will, however, be moving additional amendments to his report by the deadline for tabling amendments.