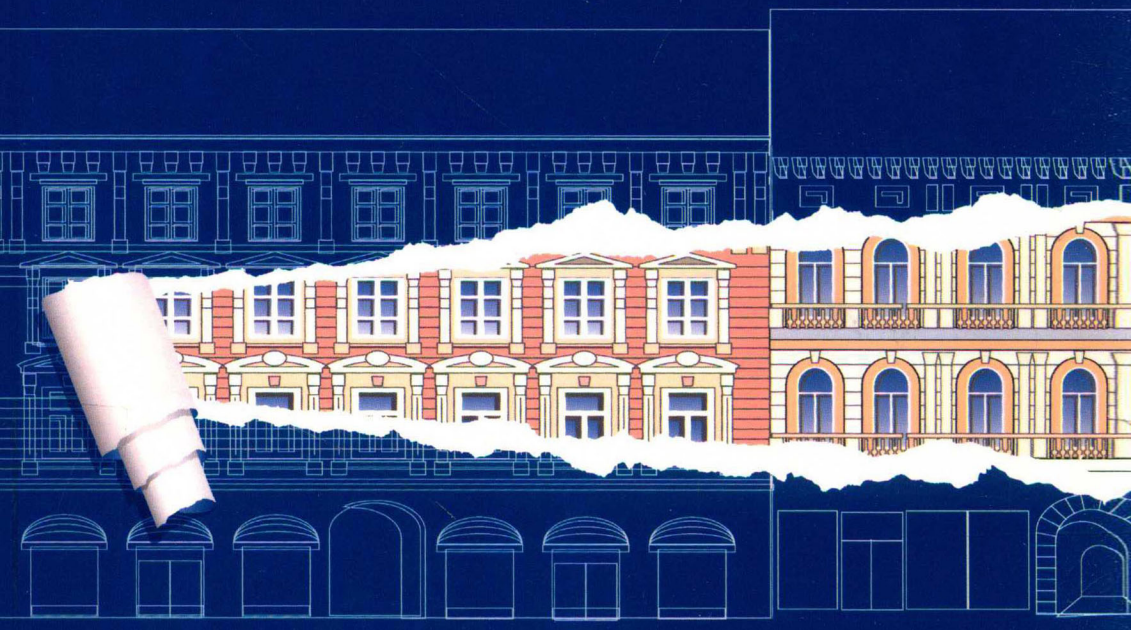
The Brussels I Review Proposal Uncovered

Edited by EVA LEIN



British Institute of International and Comparative Law

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Foreword

This book, originating in an all-day conference hosted by the British Institute of International and Comparative Law, appears at a useful moment. The process of revising the Brussels I Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is under way, and bound to continue well into 2012.

The United Kingdom took the decision to opt into that process in Spring 2011. The process can be viewed at two levels. The first, technical, concerns all who look for just, pragmatic and workable solutions to the procedural problems and tactical manoeuvring that can beset international disputes. The second, constitutional, arises from the interplay between decisions of the Court of Justice of the European Union, concerns about their effect, the Commission's willingness to respond to such concerns, the Parliament's reaction to the Commission's consequent proposals and the forthcoming negotiations involving the Council, the Parliament and the Commission.

At the technical level, the problems are well-known. The Court of Justice has insisted unremittingly on two themes: certainty and an obligation of mutual trust between Member States in each other's legal systems. Its decisions have led to concerns about the efficacy in a European context of choice of court clauses (Case C-116/02 – *Gasser v Misat*) and arbitration clauses (Case C-185/07 – *Allianz SpA v West Tankers*), as well as about a jurisprudence applying the existing Regulation in relation to third countries with regard to which litigants do not (apparently) enjoy any of the protections which exist where only Member States are involved (Case C-281/02 – *Owusu v Jackson* and the "Lugano" *Opinion* C-1/03 of 7 February 2006, para 153). Professor Jonathan Harris and Dr Eva Lein note that, far from promoting the internal market, some of the results may be positively detrimental to it.

The work addresses such concerns from the standpoint of both common and civilian lawyers, it outlines the Commission's proposals and the Parliament's present position, and it discusses the issues arising and makes positive suggestions as to how they may best be addressed.

It also addresses the Commission's other main aims. One is to harmonise and limit the grounds of jurisdiction in relation to defendants domiciled outside any Member State. The Parliament, rightly, regarded such attempt as inopportune. The Commission's reasoning for pressing this fails to convince. The limited grounds of jurisdiction which it contemplates (largely modelled on the internal European grounds) would, by superseding a well-tested English jurisdictional code developed over a long period to meet the needs of English civil and commercial litigation, inflict a gratuitous blow on English courts' ability to adjudicate comprehensively or at all in a significant number

of cases currently coming before them. This would be detrimental to the overall bundle of business, financial and legal services which London presently offers. Whether it would be within the EU's competence is, one hopes, an issue that can remain academic.

The Commission's other main aim is less radical. It is to simplify enforcement by abolishing wherever possible any requirement of *exequatur*, and so to permit automatic enforcement of judgments as between Member States without any prior procedure for their recognition or registration. The Commission wishes moreover to remove any public policy defence to enforcement. In relation to these proposed changes, Professor Andrew Dickinson rightly notes the need for greater protection for defendants against misuse and the poverty of the argument for removing any public policy defence.

At the constitutional level, the process must be seen as encouraging. Giving evidence to the House of Lords European Union Select Committee enquiry into the Lisbon Treaty (10th Report of Session 2007–08, HL Paper 62-I), Sir David Edward wondered whether the Brussels regime was really appropriate for the jurisdiction of the Court of Justice, and whether it might not have been better to create a tribunal consisting of civil judges of Member States who would sit every three or four months, with the necessary expertise, and would have a much clearer understanding of the practical problems of jurisdiction (S38, Q133). As he went on to recognise, the Lisbon Treaty was, however, concerned with very different issues. Maybe, one day, the idea will be pursued of a form of specialist chamber, to deal not only with jurisdictional issues, but also with the other civil law issues which are bound to arise with the EU's increasing activity in this field.

As matters stand, however, credit is due to the Commission for its energetic and positive reaction to perceived problems revealed or caused by the Court of Justice's jurisprudence, and highlighted by academic and practitioner comment. The Parliament's engagement is equally welcome. The negotiations between the representatives of Member States, the Commission and the Parliament will, one also trusts, prove Europe's ability to address such problems on a broad and sensible basis. A major concern for the United Kingdom will clearly have to be to ensure that there is no compulsory harmonisation and limitation of grounds of jurisdiction in relation to third country domiciliaries.

All these topics are discussed in the present book in wide-ranging and stimulating terms. The book will be a valuable guide to the issues, and a pointer to the way in which some might constructively be resolved. It is my pleasure to commend it to the many practising and academic lawyers, insurers, business people and others interested directly or indirectly in issues of jurisdiction or of recognition and enforcement of foreign judgments.

LORD MANCE

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The Brussels I Review Proposal – An Overview

*Pamela Kiesselbach**

I. INTRODUCTION

On 14 December 2010 the European Commission published its Proposal [1] for changes to the Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation'). This Proposal was preceded by detailed studies – the Heidelberg Report on the application of the Brussels I Regulation in the Member States[2] and the Nuyts Report on residual jurisdiction,[3] both published in September 2007, and the Commission's Report and Green Paper, published on 21 April 2009.[4] The Commission's Proposal is extensive and relates to a number of central topics within the Brussels I Regulation. Many of them are controversial.

This chapter will aim to provide an overview of the perceived shortcomings of the Brussels I Regulation in its current form, followed by a summary of the key proposals made by the Commission and of the reactions to these proposals, as expressed by the European Parliament and during the consultations initiated by the Ministry of Justice of the United Kingdom. This chapter will conclude with an outlook on what is likely to happen next.

II. THE BRUSSELS I REGULATION – PERCEIVED SHORTCOMINGS

Although the general perception is that the Brussels I Regulation has been

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[1] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final.

[2] B Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation 44/2001 – Application and Enforcement in the EU* ('Heidelberg Report') (Beck, Hart, Nomos 2008).

[3] A Nuyts, *Study on Residual Jurisdiction* 2007.

[4] 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, COM(2009) 175 final; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final.

a success and is working well, there are a number of key areas which are considered to require improvements.

A. The free circulation of judgments

Currently, judgments originating from the court of an EU Member State need to be either declared enforceable or registered by the enforcing court before enforcement measures can be taken in another Member State. Studies have shown that this process, which is known as '*exequatur*', is potentially both costly and time-consuming. The studies have also shown that in more than 90% of cases the procedure is a pure administrative (and therefore, it is argued, unnecessary) formality, due to the absence of grounds for refusing the recognition or enforcement of the judgments. The cost and time factor inherent in the *exequatur* process is further exacerbated where a judgment creditor seeks to enforce a judgment across a number of Member States, as the judgment will need to be declared enforceable or registered in each Member State in which enforcement is sought. This is seen as an unnecessary burden on cross-border trade and contrary to the aim of the Brussels I Regulation of enabling the free circulation of judgments in the EU.

B. The operation of the Brussels I Regulation in the international legal order

Currently, the jurisdiction rules in the Brussels I Regulation only apply where the defendant is domiciled in an EU Member State (Articles 2, 5 and 6) or is deemed to be domiciled there (Articles 9(2), 15(2) and 18(2)), or at least one of the parties to a choice of court agreement is domiciled in a Member State (Article 23) or certain subject matters of the proceedings are located in a Member State (Article 22). Where these connecting factors do not exist, the national rules on jurisdiction continue to apply in order to determine whether a Member State court has jurisdiction to hear a dispute (Article 4).

These rules differ considerably from Member State to Member State and, the concern is, provide unequal access to justice for claimants across the EU, particularly where jurisdiction is based on the nationality of the claimant (as is the case in Luxembourg and France). There is a further concern that the different national rules result in non-EU defendants being treated 'less favourably' than EU domiciled defendants where the national rules are 'exorbitant' in nature.[5] Also, where the national rules do not

[5] See A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa Law 2009) para 7.04.

provide for the jurisdiction of a Member State court, this could result in a potential loss of protection afforded by mandatory EU legislation protecting weaker parties (eg consumers, employees and insured).

A separate category of issues has arisen as a result of *Owusu v Jackson*,[6] in which the Court of Justice of the European Union (CJEU) held that the jurisdiction rules in the Brussels I Regulation, in particular the basic rule in Article 2 based upon the defendant's domicile, are mandatory in nature and cannot be departed from in favour of another, in particular non-EU jurisdiction, even if the dispute is more closely connected to that jurisdiction and that jurisdiction is clearly the more appropriate forum. In other words, the common law concept of being able to stay proceedings on the basis of *forum non conveniens* grounds does not apply within the context of the Brussels I Regulation.

As a result of *Owusu* there is uncertainty whether a Member State court must also take jurisdiction in accordance with the Brussels I Regulation (ie may not stay or dismiss proceedings), even where the parties have entered into a(n) (exclusive) choice of court agreement in favour of a non-EU court, or the subject matter of the dispute as identified in Article 22 is located outside the EU, or earlier proceedings relating to the same cause of action and the same parties have been commenced in the courts of a non-EU country. These are questions which the CJEU expressly declined to answer in *Owusu*. There are voices in legal writings which advocate a 'reflexive'[7] application of the rules in Articles 22, 23, 27 and 28 in these cases which would allow (or even require) EU Member State courts to dismiss proceedings in favour of the relevant non-EU state court.[8] However, the matter remains uncertain in the absence of an express ruling by the CJEU (which according to its comments in Opinion 1/03 relating to the new Lugano Convention appears to suggest that it does not favour a reflexive effect[9]) or of (clarifying) changes to the Brussels I Regulation.

C. The efficacy of choice of court agreements

The ability of parties to determine the court that will decide disputes arising

[6] CJEU, C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

[7] See also the contribution of A Layton, in this publication.

[8] See the discussions in GC Cheshire, P North and JJ Fawcett, *Private International Law* (14th edn, OUP 2008) 333; AV Dicey, JHC Morris and L Collins, *The Conflict of Laws*, vol. I (14th edn, Sweet & Maxwell 2006) paras 12-021–12-022; A Briggs and P Rees (n 5) paras 2.256–2.260; see also the remarks delivered by Alexander Layton QC to the Legal Affairs Committee of the European Parliament on 5 October 2009 in which he states that '...it is plainly unsustainable in today's conditions for Community law to require that choice of court agreements in favour of non-Member State courts be overridden in favour of the adjudicatory powers of the courts of Member States. Urgent reform is needed.'

[9] See para 153 of the CJEU Opinion 1/03 dated 7 February 2006, relating to the competence of the EU to conclude the New Lugano Convention.

between them is of considerable importance to the international commercial community.

However, the current interrelationship between Article 23, which gives effect to a parties' choice of court agreement, and Article 27, which contains the *lis pendens* rule, undermines the efficacy of choice of court agreements in an EU context. Article 27 requires a Member State court to stay its proceedings if another Member State court has been first seised of proceedings involving the same cause of action and between the same parties and to allow the court first seised to determine whether or not it has jurisdiction. The fact that this rule applies also where the first court has been seised in breach of a choice of court agreement and the second court is the chosen court was established by the CJEU in *Erich Gasser v MISAT.*[10] This allows a party to obstruct the bringing of proceedings in the chosen Member State court by bringing a 'torpedo' action in another Member State court (albeit in violation of the choice of court agreement). This problem is magnified where such violating proceedings are brought in a Member State court whose procedural rules do not provide for the determination of jurisdiction as a preliminary issue or in an otherwise speedy manner.

Further, the Commission has signed the 2005 Hague Convention on Choice of Court Agreements (Hague Convention) which allows the chosen court to continue proceedings regardless of whether parallel proceedings have been brought first in another court (Article 5), and which requires any court seised in breach of a choice of court agreement to suspend or dismiss its proceedings (Article 6). If ratified, the Hague Convention will apply where at least one of the parties to the agreement is a resident of a Contracting State other than an EU Member State, whereas the equivalent Brussels I rules will apply where at least one party is domiciled in an EU Member State and none of the parties to the agreement is domiciled in a Contracting State which is not also an EU Member State.

The concern is that different rules relating to the efficacy of choice of court agreements will give rise to confusion and complications and that the Brussels I regime should be brought in line with the Hague Convention in order to facilitate its ratification by the EU as soon as the Brussels I reforms have been finalised.

D. 'Torpedo' actions in patent claims

Article 27 is considered to lead to particular difficulties in patent actions. The *lis pendens* rule allows a party which faces the prospect of an infringement action being brought in a 'quick' jurisdiction to bring a pre-emptive action (eg for a declaration of non-liability) in the courts of a 'slow' juris-

[10] CJEU, C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] QB 1.

diction (even though these courts may not have jurisdiction). Such pre-emptive proceedings would block any subsequent proceedings being brought in the competent courts pending a decision by the first seised court on its jurisdiction.

A further difficulty arises as a result of the interrelationship between Articles 27 and 22. The CJEU in *Overseas Union Insurance v New Hampshire Insurance*[11] left open the question whether the *lis pendens* rule also applied where the court second seised had exclusive jurisdiction under Article 16 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), the predecessor of Article 22 of the Brussels I Regulation. It was further decided in *GAT v Luk*[12] that where a party in a patent action raises the issue of validity of the patent by way of defence this will trigger the exclusive jurisdiction under Article 16 of the Brussels Convention (now Article 22(4) of the Brussels I Regulation). The combination of these two decisions raises the question of whether there is an exception to the *lis pendens* rule where the court seised second has exclusive jurisdiction under Article 22(4).[13] This would mean that a defendant in an infringement action could divert any proceedings to the courts of the Member State in which the patent was registered by simply raising the validity defence.

There is a sense that as a result of how the Brussels I Regulation rules operate in industrial property matters there is too much scope for the (prospective) defendant to manipulate and obstruct any infringement actions against him.

The latter problem can potentially also arise in the context of insurance or consumer contracts where the proceedings brought second can rely on the special jurisdiction rules set out in sections 3 (insurance contracts) and 4 (consumer contracts) of the Brussels I Regulation and a judgment of the court first seised made in breach of these protective rules would not be recognised in accordance with Article 35(1).

E. The interface between the Brussels I Regulation and arbitration

Although Article 1(2)(d) provides for the exclusion of arbitration from the scope of the Brussels I Regulation, the delineation of this exclusion has recently become blurred as a result of the CJEU decision in *Allianz SpA v*

[11] CJEU, C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317.

[12] CJEU, C-4/03 *GAT v Luk* [2006] ECR I-6509.

[13] See AV Dicey, JHC Morris and L Collins (n 8) para 12-049 who are in favour of such an exception based on the argument that a judgment given by a court first seised in breach of art 22 would be unenforceable in accordance with art 35(1) and consequently 'there is no sensible purpose in deferring to a court whose judgment will be a nullity in England'.