CCBE RESPONSE TO THE GREEN PAPER ON THE REVIEW OF THE COUNCIL REGULATION (EC) NO 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further ten European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers. This is the Response of the CCBE to the Commission's 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). Unless the context otherwise requires, Council Regulation (EC) 44/2001 is referred to in this Response as "the Regulation".

1. The abolition of all intermediate measures to enforce and recognise foreign judgments ("*exequatur*")

Question 1:
Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

1.1. As outlined in the Commission Green Paper on the Revision of Regulation No 44/2001, it is difficult to justify in an internal market without frontiers that citizens, companies and institutions suffer costs and wait for the necessary time to obtain a judicial order must incur further costs and take further time for the only reason that they must seek recognition of the title they have obtained from one country in another European country. Having increasingly advanced economic integration within the European Union involves rights recognised within a Member state of the European Union being asserted in another Member state with ease.

1.2. The organisation of the exequatur procedure by the Brussels Convention in 1968 was at the time an improvement. Yesterday's improvement, which has become today's tradition, is not tomorrow's hope. The exequatur of a judicial order has become a formality which seems unnecessary, an expression of the mistrust that States feel towards judicial orders given in other countries or also the desire to control such orders. The attachment of States to their sovereignty takes place at the expense of the internal market construction.

1.3. However we draw attention to the fact that the trust in foreign judgments would be improved if there were a comparable level of access to justice in all Member States. This indicates that there should be minimum standards of procedural safeguards in cross-border cases. For example, when judges are required by the Rome I and Rome II Regulations to apply foreign law – the approach to this issue varies considerably from a position where the court is required to seek and pay for its own evidence whereas in other Member States evidence of foreign law is a question of fact to be proved by the parties at their own cost and is subject to very limited possibilities of appeal. Of equal importance is the issue of proper service of judgments and judicial documents, in particular documents instituting proceedings. Although regulated to some extent by an EC Regulation, there is no harmonisation, with wide variations in the methods of service leading to difficulties when applying national procedural rules developed in the context

of national rules on service. This also leads to practical difficulties for citizens. If they are used to service of judicial documents by a bailiff, receipt of a document by post will not convey to the citizen the same legal force.

1.4. The CCBE therefore agrees with the proposal in the Green Paper that there is room for the further rationalisation of the law relating to the enforcement of judgments in other Member States. Provided adequate safeguards are adopted, the abolition of *exequatur* would facilitate such enforcement without an undue erosion of the rights of defendants. The safeguards which would need to be put in place to ensure that judgment debtors have adequate protection should be such as to ensure (i) that they have an adequate right of recourse to the courts of the state of enforcement for review of the propriety of the enforcement; (ii) that the grounds on which exception may be taken to the enforcement are no less than those provided by Articles 34 and 35 of the Regulation; and (iii) the steps by way of enforcement which may be taken meanwhile are not irreversible. In addition it would be appropriate to make express provision for refusal or revocation of a declaration of enforceability where the judgment being enforced is revoked by a subsequent decision of the court of origin.

1.5. Whether or not the requirement of exequatur for judgments is removed, the opportunity ought also to be taken to correct the anomaly created by Article 57 in favour of authentic instruments despite the fact that court judgments have been the subject of due process in a court but authentic instruments have not. Article 57 effectively restricts the grounds of refusal or revocation of a declaration of enforceability to Article 34(1) when certainly Article 34(3) and logically also Article 34(4) (both concerning irreconcilability with earlier judgments) are equally applicable to the situation of competing enforceable titles. If a French authentic instrument for €50,000 is brought to Germany and is confronted by a German judgment for damages for a misrepresentation committed in Germany between the same parties, to permit the authentic instrument to be enforced without regard to the judgment would be unjust.

1.6. Secondly in relation to authentic instruments, the *authenticity* of the instrument must be clearly distinguished from the *validity* of the act which may be the subject of challenge in the courts of the Member State of origin on the grounds of mistake, misrepresentation etc. even during the course of enforcement (see paragraph 628 of the Heidelberg report). Accordingly express provision for refusal or revocation of a declaration of enforcement is necessary for the cases where the authentic act loses its executory force in the Member State of origin.

2. The operation of the Regulation in the international legal order.

Question 2:
Do you think that the special jurisdiction rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or exclusive jurisdiction lays with the courts of the Member States?

2.1 The Commission raises the possibility of extending the scope of the existing jurisdictional rules to defendants domiciled in third states.

2.2 The CCBE considers that the Commission's proposals raise interesting and complex issues. The impact of what is proposed, is, however, far reaching and requires detailed consideration not only of the potential problems which would arise in this context which do not arise in the context of the closed system provided by the Regulation, but also of the actual rules which

currently exist in the member States vis-à-vis third states. (For example, consideration would need to be given to the respects in which legislation at the Community level for the recognition of judgments from third states would impact on existing bilateral or multilateral conventions concluded between individual member states and the third states in question). The scope and complexity of this exercise is such as might unbalance the other aspects of the revision of the Regulation.

2.3 The CCBE therefore considers that it is not appropriate to undertake a wholesale review of the operation of the Regulation in the international order as part of the current review, but that the reform of Article 4 of the Regulation should be considered separately in due course.

2.4 Nonetheless, there is one topic which could be considered at this stage, which is perhaps the most urgent issue involving the operation of the Regulation in the wider legal order, namely the question whether effect should be given to exclusive jurisdiction clauses which, because they do not select the courts of a Member State, fall outside Article 23. In other words, whether the ordinary rules of the Regulation can or should be set aside in favour of giving effect to such jurisdiction clauses. In principle, the CCBE favours such a reform which can readily be undertaken without a wider review of Article 4.

3. Choice of Court

Question 3:
Which of the above suggested solutions, or any other possible solutions, do you consider most appropriate in order to enhance the effectiveness of choice of court agreements in the Community?

3.1 The CCBE considers that the solution which should be adopted is the Commission's second suggestion, namely that *"the Court designated by the agreement would have priority to determine its jurisdiction and any other court seised would stay proceedings until the jurisdiction of the chosen court is established"*

3.2 This proposal envisages separate proceedings for a declaration of validity or invalidity being heard and determined before the putatively chosen court while all other proceedings were stayed.

3.3 The CCBE considers that this solution promotes the two objectives of certainty and avoiding the multiplicity of proceedings.

3.4 The proposal promotes the objective of certainty as it provides a simple and straightforward rule which permits litigants faced with proceedings in breach of agreed jurisdiction clauses with a method to have the validity or invalidity of its dispute resolution clause determined by the contractually agreed court.

3.5 The proposal promotes the objective of avoiding the multiplicity of proceedings as only one court will determine the validity or invalidity of the jurisdiction clause. In this regard, the CCBE considers that this option is preferable to the Commission's first option, namely to release the court designated in an exclusive choice of court agreement from its obligation to stay proceedings in accordance with the *lis pendens* rules contained in Articles 27 or 28. Although the CCBE considers that this proposal is not without its attractions, particularly as it would remove much of the incentive for a party to bring its proceedings in a court other than the one (at least putatively) contractually agreed, this proposal will not stop both courts from proceeding in parallel and each determining the validity or invalidity of the jurisdiction clause in question.

3.6 However, the proposal will require a number of additional consequential changes if it is to work satisfactorily:

(a) The first is that the EU should adopt a uniform rule regarding the standard of proof to be applied in determining whether a jurisdiction clause is binding. This is currently left to national law and the disparities that this leads to are unsatisfactory. A uniform rule would provide a level playing field in the determination of the questions of validity and applicability of jurisdiction clauses and should provide that these issues should be definitively determined to a common standard. Such a rule would need to be robust with clearly defined criteria.

(b) If a uniform procedural rule were not adopted to determine whether the clause is valid, it would be desirable to adopt a common choice of law rule for the issue of whether there has been sufficient consent for the purposes of Article 23. The Rome I Regulation does not apply to choice of court clauses, but the CCBE suggests that the appropriate rule is that the question of consent should be determined by the law of the state of the putatively designated forum. This is the solution adopted by the Hague Convention on Choice of Court Agreements.[1] and is consistent with the approach in Article 10 of the Rome I Regulation.

(c) The second is that the effectiveness of jurisdiction clauses could be strengthened by two further amendments;

  (i) The first would be to confer exclusive jurisdiction on the chosen court. Article 23 is presently to be found in section 7 of the Regulation - “Prorogation of Jurisdiction”, and not in section 6 – “Exclusive Jurisdiction”;

  (ii) The second, and by way of corollary to the first, is to make clear that a judgment obtained in breach of a jurisdiction clause does not have to be recognised.

  (iii) As to this latter proposal, there are a number of ways of achieving this;

  (iv) The first, and on its face, simplest, way would be that if Article 23 was moved from section 7 to section 6 of the Regulation, any judgment obtained in breach of Article 23 would not be recognised under Article 35. However, such a solution raises difficulties as a result of Article 35(2) which provides that in examining whether the judgment was obtained in breach of a jurisdiction clause, the factual findings of the first court are binding in the second court. This is inherently undesirable. In many cases, the validity of the underlying jurisdiction clause may be inextricably linked to factual findings of the court that has given the judgment which is said to have been obtained in breach;

  (v) In light of this, the CCBE considers that the pragmatic solution may not in fact to move Article 23 from section 7 to section 6 at all. Rather, Article 34 could be amended to include as a separate grounds for non-recognition, that the judgment had been obtained in breach of a jurisdiction clause falling within Article 23.

(d) Thirdly, if a court other than the contractually agreed court is to stay its proceedings whilst the latter court determines the validity or applicability of a jurisdiction clause, that court must do so within a reasonable time and by way of a preliminary issue. The CCBE supports the suggestion in the Heidelberg Report (see paragraphs 177-179 and 394) that States must ensure that such jurisdictional disputes are determined at the outset of the proceedings, if necessary as a separate and preliminary issue, and within a short time scale. Issues as to the validity or applicability of the jurisdiction clause should not have to await the final resolution of the dispute on the merits.

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[1] See the Explanatory Report by Hartley and Dogauchi published by the Hague Conference on Private International Law, para. 94.

4. Industrial property

Question 4:
What are the shortcomings in the current system of patent litigation you would consider the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

4. This is a specialist issue on which there are differing views and to which the CCBE defers to specialist European and national associations of intellectual property lawyers. It may however be commented that disputes over jurisdiction have reduced in the light of the judgments of the ECJ in Case C-4/03 *GAT v. Luk* and Case C-539/03 *Roche v. Primus*.

5. Lis pendens and related actions

Question 5:

How do you think the coordination of parallel proceedings (lis pendens) before the courts of different member states may be improved.

Do you think that a consolidation of proceedings by and/or against several parties should be provided for at Community level on the basis of uniform rules?

Elimination of claims for negative declaratory relief

5.1 The Commission suggests that one way that current problems might be eased would be by excluding the application of the *lis pendens* rule in the case of negative declaratory relief.

5.2 The CCBE respectfully disagrees with this approach. Claims for negative declaratory relief are now widespread throughout the EU and Lugano States and are viewed as a mainstream and useful tool in modern litigation.

5.3 For example, it is relatively common for a party to a commercial contract to seek a declaration that he is not liable under it.

5.4 Further, applications for negative declaratory relief may also enable a party who is concerned that a “torpedo action” will be brought against him, to enforce an agreed jurisdiction clause. It would be unfair to permit a party to secure a contractually agreed forum by way of a claim for positive relief but not by way of a claim for negative relief.

5.5 Finally, removing the *lis pendens* rules in relation to claims for negative declaratory relief would raise serious potential problems in terms of multiplicity of proceedings (e.g. two claims before different courts, one for positive relief and one for negative relief) and the risk of inconsistent judgments.

5.6 The CCBE is aware that claims for negative declaratory relief are capable of abuse (e.g. the risk of “torpedo” actions). However, the CCBE believes that inhibiting or preventing the use of declaratory actions is not the solution to such abuses. For example, the CCBE’s proposal that Members States should be required to determine jurisdiction by way of a preliminary issue and within a short time limit should assist greatly in curbing abusive claims at an early stage.

Grouping of related actions and consolidation

5.7 The CCBE agrees with the Commission that it would be desirable to permit related proceedings to be brought in a single forum and that a sensible way of doing this would be to provide a limited exception to the *lis pendens* rules in the context of Article 6(1).

5.8 The CCBE considers, however, that how this could be achieved practically raises real and complex difficulties which require a detailed investigation. The CCBE notes the Commission's suggestion that one "possibility" would be to permit consolidation if the court had jurisdiction "over a certain quorum of defendants." The CCBE notes that such a mechanical rule could be an appropriate tool to resolve the matter subject to sufficient investigation and definition of the criteria to be applied to establish the quorum and to the minimum procedural standards referred to in Question 1 above.

6. Provisional measures

Question 6:
Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?

6.1 The CCBE agrees with the suggestion by the Commission that it would be desirable to promote the circulation of provisional including protective measures by enabling such measures to be enforced in other Member States if the defendant had had an opportunity to challenge the measure in the state of origin, whether or not he had availed himself of that opportunity, provided that lawful service of the document instituting proceedings can be established.

6.2 Similarly, the CCBE agrees with the suggestion that the rigidity of the tests established by the *Van Uden* decision of the European Court could be relaxed if a measure granted under Article 31 could be discharged, modified or adapted by the courts of the Member State which has jurisdiction as to the substance of the matter.

7. The interface between the Regulation and arbitration

Question 7:
Which action do you consider appropriate at Community level:

- ***To strengthen the effectiveness of arbitration agreements;***
- ***To ensure a good coordination between judicial and arbitration proceedings;***
- ***To enhance the effectiveness of arbitration awards.***

7.1 Arbitration has always been excluded from the scope of the Brussels Convention/Regulation from the very beginning. This is because arbitration is governed by international agreements (in particular the New York Convention) create a worldwide system for arbitration. This position must not change. However the CCBE suggests the exclusion of arbitration from the scope of the Regulation has given rise to certain difficulties concerning the interface between court proceedings and arbitration. The practical effects of the case law of the European Court, and particularly its decision in the case of *Allianz v. West Tankers* is unsatisfactory, in particular because of the complexity surrounding the question of which proceedings are governed by the rules in the Regulation, and which are not.

7.2 The principle which it is suggested should guide the amendments on this topic is that arbitration is a wholly separate system of dispute resolution in which the parties have opted out of the dispute-resolution mechanisms provided by state courts. The principle of party autonomy has a

particularly strong role to play in arbitration and respect for this principle should be a guiding principle in any proposals for reform. The world-wide success of arbitration as a modern method of dispute resolution, which is adopted typically by commercial parties in commercial contracts, is attributable to the fact that this principle lies at its heart.

7.3 The best solution is probably that identified by the Commission, and by the Heidelberg report, that the scope of the exclusion of arbitration in Article 1 be the subject of a specific and narrowly confined relaxation, so as to bring within the scope of the Regulation certain court proceedings ancillary to arbitral proceedings, while at the same time conferring exclusive jurisdiction on the courts of the chosen seat of the arbitration (subject only to issues of cross-border assistance to support the arbitration through securing evidence, freezing orders etc). This position must not be interpreted as advocating the full inclusion of arbitration but a specific and limited ancillary jurisdiction.

7.4 The CCBE agrees that a definition would be needed for the courts of the seat. In most cases the seat will be easily identifiable, by reference to the parties' agreement or the decision of the arbitral tribunal, but a uniform rule would be needed for the small number of "delocalised" arbitrations where this test will not provide an answer. The suggestion in footnote 14 of the Green Paper that this be the Member State which would, absent the arbitration, have jurisdiction over the dispute, however, is capable of producing multiple seats, which is not satisfactory.

7.5 The proposals relating to arbitration will need to take account of questions of recognition and enforcement and the CCBE respectfully agrees with the suggestion that it should be a ground for refusal of recognition and enforcement of a judgment that it was given in breach of an arbitration agreement or is irreconcilable with an arbitral award. The CCBE would, however, not favour provisions whereby the enforceability of an award would depend on its having been granted exequatur by the state of the seat (or of any state).

7.6 The Green paper raises the possibility of a uniform conflict rule for determining the validity of arbitration agreements, perhaps linking this question to the law of the state of the seat of the arbitration. The CCBE favours a uniform rule and considers that the Commission's proposal in this regard is workable.

7.7 The suggestion that there should be time limits within which a contest to the validity of the agreement should be made. The CCBE can see the attraction of this proposal in principle, but has some doubts about how readily it could be put into effect in the various different Member States.

8. Other issues

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

8.1 Scope

8.1 The CCBE agrees that it is appropriate to remove maintenance from the scope of the Regulation.

8.2 Jurisdiction

8.2.1 The CCBE agrees that an autonomous concept of domicile is appropriate and suggests that the most satisfactory approach would be to adopt the concept of habitual residence, which is

known to the legal systems of many Member States and has gained international currency through several Hague Conference conventions.

8.2.2 The CCBE is generally supportive of the various suggestions for reform of jurisdictional rules contained in paragraph 8.2 of the Green Paper.

8.3 Recognition and Enforcement

8.3.1 With regard to the automatic execution of judgements that include an order to pay a certain sum of money or a debt, it would be essential if, as is proposed, the wording of the judgements from the different Member States were to have an identical format, establishing clearly and precisely certain facts such as the identity of the debtor, in whose favour the judgement is given, the amount owed, etc..

8.3.2 The issue of authentic instruments is mentioned in the answer to Question 1 above.

8.3.3 Furthermore authentic instruments provide citizens with evidential guarantees, in particular as to the identity of the parties, and also provide a valuable documentary record. However, authentic instruments should not be enforceable in a Member State other than that in which they have been drawn up, without any further control.

8.3.4 First, an authentic instrument is certified at the moment when the agreement between the parties is to be recorded in writing. It is not drawn up at the moment when the dispute between those parties arises. Yet, it is precisely when a conflict arises that verifying the legitimacy of a party's claims becomes necessary. How could authentic instruments be recognised as enforceable abroad if they might already have lost their enforceability in the country in which they were originally certified?

8.3.5 Secondly, not all European countries have authentic acts in the sense of notarial acts. Various difficult issues may arise from this: what effect can be given in Member state B – which does not have authentic acts – to authentic acts certified in Member state A? What effects can be given to equivalent acts performed by professionals other than notaries, when going in the opposite direction?

8.3.6 Accordingly, regarding authentic instruments, the judicial supervision of both their validity and their currency is important, as much in the home country as in the country of enforcement.

8.3.7 Furthermore, the definition of authentic instruments should include not only authentic acts as drawn up by notaries and other legal professionals, but also any other legal act having equivalent legal effect under the national law of its country of origin.

8.3.8 The CCBE agrees that Article 49 of the Regulation may be relaxed, but this should be limited to permitting the authorities of the state of enforcement to calculate the sums due according to the formula established by the court or origin. A standard form for such an order would be desirable to assist in such a calculation. The CCBE would not favour the use of the Regulation's mechanisms for purposes of collecting sums due by way of court fees or other sums due to the state or public authorities (otherwise than under judgments in their favour in civil and commercial matters falling within the subject-matter scope of the Regulation).

8.3.9 The CCBE does not agree that the requirement should be abolished for a party seeking the enforcement of a judgment in another Member State to give an address for service in that state. For the reasons mentioned in paragraph 1.1 above, it may be necessary for the judgment debtor to have recourse to the courts of that state, and his ease of access to those courts should not be inhibited or delayed by abolishing this requirement.