CCBE RESPONSE TO THE PROPOSAL FOR A REGULATION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN CIVIL AND COMMERCIAL MATTERS (RECAST), COM (2010) 748 FINAL

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CCBE Response to the Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), COM (2010) 748 final

The Council of Bars and Law Societies of Europe (CCBE) represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer member countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In June 2009 the CCBE has responded 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. In the current paper the CCBE is responding to the "recasting" of Council Regulation (EC) No 44/2001 of 22 December 2000 (hereinafter "the Brussels I regulation) which was published by the European Commission on 14 December 2010.[1]

With the proposed revision of the Brussels I regulation the Commission aims at:

- an abolition of the intermediate procedure for the recognition and enforcement of judgements (exequatur) with the exception of judgments in defamation cases and judgments rendered in collective compensatory proceedings;
- extension of the scope of the jurisdiction rules of the Brussels I regulation to disputes involving third country defendants;
- enhancement of the effectiveness of choice of court agreements;
- improvement of the "interface" between the Brussels I regulation and arbitration;
- better coordination of proceedings before the courts of Member States;
- improvement of access to justice for certain specific disputes such as
    - claims of rights in rem,
    - claims of employees against multiple defendants,
    - the possibility to choose the court for disputes concerning the tenancy of premises for professional use and
    - mandatory information to be given to defendants entering an appearance about the legal consequences of not contesting the court`s jurisdiction;
- clarification of the conditions under which provisional and protective measures can circulate in the EU.

The CCBE generally welcomes these objectives, but considers that the current proposal only partially contains the proper means and provisions to accomplish these aims. Therefore, the CCBE wishes to make the following recommendations, including a number of concrete amendments to the draft proposal.

1. General Purpose of the Proposal: Abolition of Exequatur, Minimum Procedural Standards and Public Policy

The CCBE agrees with the proposal to abolish the exequatur proceedings as long as certain minimum procedural standards (public policy/*ordre public*) will be guaranteed. In addition to the minimum standards in article 47 of the EU Charter on Fundamental Rights, a defendant should be able to

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contest the execution of a judgment of a court of another member state not just because of procedural defects having arisen during the proceedings before the court of origin but also on public policy grounds.

Public policy has been part of the exequatur proceeding of the Brussels I Regulation, article 34 (1). As there will not be a special exequatur proceeding according to the proposal, the parties themselves should have the possibility to raise public policy questions in the proceeding to apply for a refusal of enforcement of a judgement. There are no good grounds why parties should not be able to defend themselves within national proceedings of the enforcement state with the argument that the judgment to be enforced or already being enforced violates public policy (substantive and procedural) in that member state.

Therefore, the CCBE proposes to reintegrate into article 46 of the proposal the possibility of a party to apply for a refusal of recognition or enforcement of a judgment in cases public policy of the state of enforcement would be infringed.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 46 1. In cases other than those covered by Article 45, a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial.	*Article 46* 1. In cases other than those covered by Article 45, a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial ***or on grounds of public policy of that member state***.

The CCBE would like the interplay between Article 45 and 46 to be clarified. Does the wording in Article 46(1) ("[i]n cases other than those covered by Article 45") exclude Article 45 cases?

2. Further Comments to Individual Rules of the Proposal

2.1 Plurality of Parties, Article 45 (5) of the Proposal

The current draft proposal provides in article 45 (5) second paragraph that: "*If a court decided that a review is justified on one of the grounds laid down in paragraph 1, the judgment shall be null and void".* However, in the case of a judgment directed at several individuals, article 45 (5) remains unclear as to whether the nullity and voidance would apply towards everyone (*erga omnes*) or only between the parties (*inter partes*). The CCBE proposes therefore to complete the first sentence of the second paragraph of article 45 (5) in as outlined below.

In article 45(4), the timing is unclear as well, for example, *"…promptly, in any event within 45 days from the day the defendant was effectively acquainted with the contents of the judgment and was able to react."*

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 45 5. If the application for a review is manifestly unfounded, the court shall dismiss the application immediately and in any event within 30 days from the receipt of the application. In such case, the judgment shall remain in force. If the court decides that a review is justified on one of the grounds laid down in paragraph 1, the judgment shall be null and void. However, the party who obtained the judgment before the court of origin shall not lose the benefits of the interruption of prescription or limitation periods acquired in the initial proceedings.	*Article 45* 5. If the application for a review is manifestly unfounded, the court shall dismiss the application immediately and in any event within 30 days from the receipt of the application. In such case, the judgment shall remain in force. If a court decided that a review is justified on one of the grounds laid down in paragraph 1, the judgment shall be null and void ***inter partes, and, in case of a litige indivisible, null and void erga omnes. Before any such decision is rendered, all parties shall be duly informed by the court of origin in order to provide the parties with the opportunity to challenge it.*** However, the party who obtained the judgment before the court of origin shall not lose the benefits of the interruption of prescription or limitation periods acquired in the initial proceedings.

2.2 Interim and/or Preliminary Procedures

2.2.1 The CCBE already agreed 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. Provisional including protective measures are already within the scope of the Brussels I Regulation (article 31).

The CCBE is of the opinion that in case of ex-parte measures the abolition of exequatur proceedings is not appropriate. Hence, it considers that the definition of decision should be changed in article 2 second paragraph ("For the purposes of Chapter III ...") in order to limit the definition of "judgement" for the purposes of Chapter III to those measures that (i) have been ordered by a court which had a jurisdiction as to the substance of the matter, and (ii) which have been taken after that the writ of summons had been validly served on the defendant party and the latter had the possibility to defend himself.

Member State courts regularly grant provisional relief under article 31 in aid of ongoing substantive proceedings (or proceedings about to be issued) in another Member State court. For example, in England, where appropriate, such interim relief may be granted on an *ex parte* basis (e.g. freezing an alleged fraudster's bank accounts). Provided there was an opportunity to contest such *ex parte* interim measures subsequently then this could be sufficient protection. However, where *ex parte* court orders are rendered without oral hearing or without contested written proceeding, an exequatur proceeding as a pre-condition for execution of that *ex parte* order in Member States other than that of the origin of the court order, seems to guarantee minimum standards of procedural fairness after a plaintiff has chosen not to take action in the state where assets of the defendant could be object of preliminary court orders.

2.2.2 Regarding the wording of Article 2 (a) and (b) there need to be clarification in both the French and the English versions regarding "*ordonnances/décisions*" and "judgments/orders". The words "*ordonnances*" (French version) and "orders" (English version) of article 2(b) should be replaced with the words "*décisions*" (French version) and "judgments" (English version) in order to make it consistent with article 2(a).

Text proposed by the Commission	*Amendments proposed by the CCBE*
French version *Article 2* (b) les «mesures provisoires et/ou les mesures conservatoires» englobent les ordonnances conservatoires visant à obtenir des informations et des preuves. *English version* *Article 2* (b) ´provisional, including protective measures´ shall include protective orders aimed at obtaining information and evidence;	*French version* *Article 2* (b) les «mesures provisoires et/ou les mesures conservatoires» englobent les ~~ordonnances~~ ***décisions*** conservatoires visant à obtenir des informations et des preuves. *English version* *Article 2* (b) ´provisional, including protective measures´ shall include protective ~~orders~~ ***judgments*** aimed at obtaining information and evidence;

2.2.3. Article 31 foresees in its first paragraph that "*If proceedings as to the substance are pending before a court of a Member State and the courts of another Member State are seized with an application for provisional, including protective measures, the courts concerned shall cooperate in order to ensure proper coordination* […]".

However, according to the CCBE, this article fails to organise this cooperation/coordination and, more importantly, does not foresee any sanction in case a court would refuse to cooperate/coordinate. These points need therefore to be clarified or to be deleted.

2.3 Parties having seats and domiciles in third states

As to the proposed extension of the scope of the Regulation to disputes involving third country defendants, the CCBE considers that reciprocity should be guaranteed.

Moreover, detailed consideration should be given to the practical implications of the Commission's proposals in this area to ensure that there are no *lacunas*. It would be undesirable if claimants (including EU claimants) who wish to bring proceedings before an EU Member State court were left without an opportunity to do so under the new rules especially in circumstances where they had been previously able to do so under the existing national rules. Practitioners in particular are of the view that the proposals as currently drafted need to be reworked substantially as they are overly restrictive and narrow (not expand) the grounds upon which certain Member State courts are able to take jurisdiction. For example, some business contracts contain only a governing law clause and not a jurisdiction clause, but parties (perhaps without the aid of lawyers) often do not distinguish between governing law and jurisdiction and expect their choice of law to enable them to bring disputes before the courts of the same jurisdiction as the chosen governing law. For example: the Commission's current draft would not enable the English courts to take jurisdiction where there was an English governing law clause. Currently, under national rules, the English courts are able to do so. Many finance documents, for

example guarantees and letters of credit, only specify a governing law clause not a jurisdiction clause. This could give rise to real problems in practice and create uncertainty in business.

Other areas of concern include claims in respect of trusts, admiralty claims and injunctions where the grounds under which member state courts may take jurisdiction under the new rules have been restricted.

Furthermore, the CCBE considers that the Commission should address the position of what happens when the parties have specified that the courts of a non EU state has jurisdiction. The draft is currently silent in this area save for certain *lis pendens* rules in article 34. This is unsatisfactory and will create further jurisdictional races – it cannot be right that if a party breaches a New York jurisdiction clause and brings proceedings in Paris that the Paris court can only stay those proceedings if New York proceedings are brought first in time (as contemplated by article 34 (1) (a) - as well as satisfy other provisions at (b) and (c)). This is does not reflect commercial practice and would be contrary to the fundamental principle of freedom of choice. .

2.4 Subsidiary Jurisdiction and forum necessitatis, international labour contract law

2.4.1 The CCBE agrees with the new articles 25 and 26, providing additional/subsidiary court venues where no Member State court has jurisdiction otherwise. However, in relation to the last sentence of articles 25 and 26 *"[…] and the dispute has a sufficient connection with the Member State of the court seised*" clarification is needed on how strong or qualified this connection should be.

2.4.2 Regarding the jurisdiction over individual contracts of employment (article 18) in cases where an employee is domiciled in another country than the place of his work, the CCBE considers that practice has shown that the application of the rules of the currently applicable Brussels I Regulation is problematic, as the courts will be requested to apply foreign law. In order to increase the legal security, the proposal should return to the previous solution that was foreseen in article 5.1. of the former Brussels Convention, i.e. that also for a court action brought by the employer against its employee, the court of the place of work will have jurisdiction.

2.5 Lis pendens, Articles 5, 29 (2), 32

Article 29 (2) provides that *"the court shall establish its jurisdiction within six months".* However, the draft proposal does not give an answer what happens if a court fails to respond within this time delay.

The CCBE would like to note its support for the attempt to eradicate the *"torpedo"* problem and the proposed article 32(2).

According to the CCBE, article 29 (4) of the proposal needs further clarification in order to ensure that the arbitrational tribunal itself is entitled – as well as the "*courts of the Member State where the seat of arbitration is located*" – to decide about the "*existence, validity or effects*" of the contested arbitration agreement.

This might be clarified simply by adding two commas in article 29 (4).

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 29 4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.	*Article 29* 4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located**,** or the arbitral tribunal**,** have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

The CCBE is furthermore of the opinion that Article 32 (2) regarding effectiveness of choice of courts should be redrafted. In many cases, the question of validity of such agreements is raised and the CCBE respectfully disagrees that the solution suggested in article 32 (2) will solve this problem, e.g. in case of a battle of forms. A solution could be to strengthen Article 23 (1) regarding jurisdiction agreements.

The CCBE also believes that in order to be taken into account, these agreements need to be in writing to ensure that the will of both parties has been met on this choice of court. Such an agreement should be signed by both parties on the same document (qualified written agreement). Hence the CCBE generally believes that article 23 (1) paragraphs b and c should be deleted.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 23 1. […]	*Article 23* 1. […]
(a) in writing or evidenced in writing; or	(a) in writing or evidenced in writing~~.; or~~
(b) in a form which accords with practices which the parties have established between themselves; or	~~(b) in a form which accords with practices which the parties have established between themselves; or~~
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.	~~(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.~~

In conjunction with this, the CCBE notes that the provisions of article 5 (1) (b) should not allow a party to bypass the conditions of article 23. The CCBE proposes therefore that any agreement on the place

of performance must comply with the same formalities as the jurisdiction clause. As a consequence, a third point should be added into this paragraph stipulating that any agreement (other than contained in this provision) needs to be qualified by a written agreement or a qualified electronic signature.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 5 1. […] (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,	*Article 5* *1. […]* (b) for the purpose of this provision and unless otherwise agreed ***in writing or evidenced in writing in compliance with the provisions of article 23,*** the place of performance of the obligation in question shall be: – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

The demand for a written form of choice of court clauses would be in line with the provisions in article II (1) and (2) of the UN New York Convention regarding the recognition and enforcement of foreign arbitration decisions of June 10, 1958.

However, the European legislator will finally have to decide whether for the sake of clarity to impose formal written requirements or in favorem negotii to leave the form to the parties. In this respect the CCBE notes that customs in the field of trade law, especially in the shipping, banking and insurance industries – where reliance is often placed on the trade practises and customs provisions – are contradictory to a general strict written form for choice of forum clauses. In fact, during the elaboration of this response, the view has been expressed that a requirement for agreements to be in writing and signed by both parties is too restrictive and would cause real difficulties for example, in the shipping, banking and insurance industries where reliance is often placed on the trade practices/customs provisions of Article 23(1) (b) and (c). In addition, it was also noted that the requirement stipulated in article II (1) and (2) of the UN New York Convention was removed in the 1978 revision to the Brussels Convention because the original text was regarded as too restricted in its scope and as undermining the effectiveness of jurisdiction agreements.

2.6 Authentic Acts and Equivalent Executionary Instruments

Regarding article 70 (1) the words “and instruments with comparable status and effect” should be added to ensure that any instruments in civil and commercial matters which are within the scope of the proposal and do have an executionable content are affected.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 70 (1): 1. An authentic instrument which is enforceable in one Member State shall be enforced in the other Member States in the same way as judgments in accordance with Sections 1 or 2 of Chapter III respectively.	Article 70 (1): 1. An authentic instrument ***and instruments with comparable status and effect*** which is **are** enforceable in one Member State shall be enforced in the other Member States in the same way as judgments in accordance with Sections 1 or 2 of Chapter III respectively.