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The future of international litigation in Europe: proposed amendments to Council Regulation (EC) 44/2001

The conference of the IBA Litigation Committee and the ABA Section of International Law, held on 4 and 5 June 2009 in Vienna, opened its first session under the title 'The future of international litigation in Europe'. The session, chaired by Mr Klaus Reichert (Law Library, Dublin & Brick Court Chambers, London) was very well attended and dealt mainly with proposed amendments to Council Regulation (EC) 44/2001. This Regulation is regarded as an important piece of legislation for everyone involved in European cross-border litigation. Emerging from the Brussels Convention, the Council Regulation is presently being assessed and reviewed by the European Commission and the outstanding speakers of this session highlighted, discussed and challenged the proposals made by the European Commission, including the abolition of exequatur, subsidiary jurisdiction, choice of court agreements, and whether to implement aspects of arbitration into the Regulation.

Both the Report from the Commission to the European Parliament (dated 21 April 2009) and the Green Paper (dated 21 April 2009) which accompanies the Report were outlined by Ms Karen Vanderkerckhove. She is a senior member of the secretary to the EC Commission and highly involved in the preparation of these documents.

The Regulation and its predecessor, the Brussels Convention, are regarded as key instruments for litigants and their counsel. The scope of the Regulation encompasses not only the question of jurisdiction but also the recognition and acceptance of judicial awards and is applicable in all Member States. The Lugano Convention (a parallel Convention to the Brussels Convention) governing the same subject matter binds Member States as well as Iceland, Norway and Switzerland.

The aim of the proposed amendments is to enhance the free circulation of judgments and to work on the fine tuning of the Regulation. The Commission called on interested persons to submit their comments on any of the raised points by 30 June 2009. Ms Vanderkerckhove welcomed any contributions from practitioners. The amendments to the Regulation are planned to be enacted on 31 December 2009.

The proposed amendments focus on the following issues:

The abolition of exequatur

According to factual findings, between 90 and 100 per cent of applications for a declaration of enforcement are successful. The proceedings take, on average, between seven days and four months. Only one to five per cent of the decisions are appealed. As to public policy, probably the most relevant ground, the factual findings show that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant.

Professor Paul Oberhammer, Professor at the Faculty of Law of the University of Zurich, highly welcomed the intention to abolish the exequatur procedure by which a judgment is declared enforceable in all matters covered by the Regulation. Following a brief outline of the current exequatur procedures in various Member States of the European Union, he showed that the so-called 'title import function' (meaning the transfer of a foreign judgment into the state where enforcement

is sought) is of less relevance than initially thought. For example in Switzerland, if the debtor does not make objections, the competent administrative authority simply proceeds with the enforcement procedure. The question of whether any domestic or foreign judgment exists at all does not arise. Only when the debtor raises objections against the enforcement does the creditor have to turn to the court. If the creditor has already obtained a foreign judgment, he can request leave by the court to proceed with the enforcement. It is also within this procedure that the court examines whether there is a title for enforcement and, in case of a foreign judgment, whether the requirements according to the Lugano Convention have been met. Separate exequatur proceedings are neither provided for nor necessary.

Professor Oberhammer further stressed the need for a truly uniform exequatur procedure throughout the Member States. He then turned to the 'title inspection function' which covers the grounds for refusal of recognition. According to Professor Oberhammer, it appears to be more efficient to implement the grounds for refusal of recognition into grounds for remedies in enforcement proceedings. He also made clear that the abolition of exequatur requires from the Member States that the jurisdiction of the court of origin is examined according to the rules of the jurisdiction that are uniform and clearly acceptable. Secondly, the abolition of exequatur requires that the examination is made by a court of a state in whose judgments one confides on the basis of mutual trust that the courts of all Member States work in the same diligent manner. With the recent admission of new Member States to the European Union this mutual trust has yet to be established. It will be another challenging task to bring the judicial systems of all Member States to the required level allowing claimants and defendants to trust the court of origin.

Subsidiary jurisdiction

Ms Vanderkerckhove also outlined a range of further issues. Under the title 'The operation of the Regulation in the international legal order', it was discussed whether there is room for a so-called 'subsidiary jurisdiction', which would allow a claimant to sue a defendant who is not domiciled in a Member State, eg, in international trademark or patent proceedings where infringements occurred outside Member States of the EU.

Choice of court agreements

A further topic was the law applicable to choice of court agreements. While Article 23 of the Regulation, as interpreted by the European Court of Justice, extensively set forth the conditions concerning the validity of choice of forum agreements, uncertainties exist as to the exhaustive character of these conditions. This leads to the consequence that a choice of court agreement may be considered valid in one Member State and invalid in another. In the Green Paper it was suggested to introduce a prescribed 'standard choice of court agreement'.
Peter Rees, QC (Debevoise & Plimpton, London), stressed that the aim should be to enhance effectiveness for all parties involved. A so-called 'standard choice of court agreement' looks attractive at only first glance. Such a solution would clearly put parties without legal advice at a disadvantage. For instance, what if a single word was missing in the clause which was used by the parties? According to Mr Rees, such proposals might easily create more problems than they solve. He therefore proposed to let the parties express their intentions and agreements in their own words, as they do today.

Implementing aspects of arbitration into the Regulation

A thorough discussion was held on the issue of implementing aspects of arbitration into the Regulation. According to the Green Paper, the New York Convention is perceived as a useful and effective instrument. It would therefore seem appropriate to leave the operation of the Convention untouched. Nonetheless, a proposal was made, mainly to prevent parallel proceedings. Such situations could arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court.

Again, Mr Rees questioned this proposal fundamentally. In a comprehensive overview, he raised the issue of whether there are any compelling reasons to include specific angles of arbitration into the Regulation. Until today, arbitration has remained fully outside the scope of the Regulation. An overwhelming number of Member States were opposed to this proposal of the Commission. There is no need for specific legislation within the European Union as long as the New York Convention provided appropriate and efficient measures worldwide. It is up to the

claimant to choose the proceedings (litigation or arbitration) and to decide where to seek justice. This may not be the place of the arbitral tribunal, especially if, for example, the evidence (electronic files etc) was located somewhere else. Having regard to the minor number of infringements in the past (only two cases were reported), the opinion of a vast majority in the audience was that arbitration should be kept outside the scope of the Regulation, as the law is today.

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The workings of the Brussels Regulations

Part of the IBA Litigation Committee's 2009 conference 'The Future of Transnational Litigation' comprised a case study on the workings of the Brussels Regulation.

Setting the scene

An Austrian based company, HappyPatient Hospitals (HH), has been purchasing MRI equipment for its hospitals in various EU Member States (England and Hungary) from a German company, between 2004 and 2006. The equipment was manufactured by the German supplier's US parent. French and Japanese competitors to the German supplier have offered the same product at similar or higher prices. In 2006, following an investigation, the EU Commission made a finding of a cartel amongst the three MRI suppliers. The effect of the above is that on the basis of an expert retained by HH, it appears that HH has been massively over paying for its MRI equipment. Apart from the invoices, offers from suppliers and the Commission decision, HH has no evidence for a private claim.

The case study tracked a meeting between HH's CEO (Florian Kremslehner), who was seeking compensation from the German supplier in respect of the price fixing, HH's internal counsel (Michael Schuette) and lawyers from each of four potential jurisdictions where proceedings might be launched, each pitching in favour of their own jurisdiction. Relevant to HH's decision of where to sue included having a proper jurisdictional basis, methods of proving applicable and possibly foreign law, various procedural issues, level of damages and costs.

Jurisdiction

Mr Niggemann said that there was no difficulty suing in Germany as that was the domicile of the German supplier and the payments made to that company also represented the harmful event for the purpose of Article 5 (3) of the Brussels Regulation. Under Article 6, the other two suppliers could all be sued in Germany once the main defendant had been sued there.

Mr Wollman explained Austria clearly has jurisdiction because although none of the suppliers are domiciled in Austria, the harmful event (for the purpose of Art 5(3)) was suffered in Austria, namely the making of an overpayment by the Austrian company.

Although no supplier was domiciled in Hungary, proceedings could be started there, said Mr Toth, because offers by the French supplier had been received by one of HH's hospitals in Hungary. Arguably that amounted to a 'harmful event'.

England is not, on the above facts, an obvious jurisdiction but in fact, said Mr Maton, because one of HH's hospitals in the United Kingdom received an offer in relation to the supply of equipment and because a meeting took place in the United Kingdom to discuss supply, that would probably be enough for the English court to take jurisdiction under Article 5(3).