

The position of the Council of the European Union on the recast of the Regulation "Brussels I": A new step forwards or backwards?

Background

EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") is the cornerstone of the European legislation on cross-border litigation and judicial cooperation in the European Union. This Regulation, which came into force 10 years ago, replaced the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

As previously reported (see *A step forward in the revision of the Brussels I Regulation: the European Commission's proposal*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin, July 2011), the European Commission is contemplating bringing radical changes to the current version of the Regulation. These changes are shown in the Draft Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters published on 14 December 2010 (Document no. COM(2010) 748 final) (the "Draft Proposal"). The United Kingdom and Ireland have decided to take part in the adoption and application of the recast Regulation and the provisions of the latter, once adopted, should also be applicable to Denmark.

The European Economic and Social Committee submitted its opinion on the Draft Proposal on 5 May 2011, whereby it generally approved the Draft Regulation and its major orientations, with yet a few reservations on some of the proposed changes (Document no. 2011/C 218/14). The Rapporteur appointed by the European Parliament also published on 28 June 2011 a Draft Report on this proposal which suggested a few amendments (Document no. 2010/0383(COD)).

More recently, on 8 June 2012, the Council of the European Union (Justice and Home Affairs) adopted a general approach on the proposed recast of the Brussels I Regulation in the form of an amended version of the Draft Proposal prepared by the European Commission (the "General Approach"). The General Approach results from the guidelines previously agreed upon by the Council during its session in December 2011, as well as from further discussions which enabled the Presidency to present a compromise to the Council during the June session. This text is not complete yet as one article (establishing a new and specific ground of jurisdiction for cultural goods) as well as the recitals and annexes remain to be completed and proofread. However, the changes brought by the General Approach to the Draft Proposal are significant enough to deserve attention. Only the most important of these changes will be examined below.

Further limitation of the material scope of the Brussels I Regulation

To achieve better coordination, the Draft Proposal included provisions on the interface between arbitration and court proceedings. The objective was to no longer completely exclude arbitration from the scope of application of the Brussels I Regulation. These provisions were subject to debates by legal scholars who feared that arbitration clauses could consequently become less efficient. The Council decided to remove the new rules and to maintain arbitration issues outside the scope of the Regulation.

In addition, the General Approach mentions a few additional exclusions relating to the liability of the State for acts and omissions committed in the exercise of State authority, to relationships having comparable effects to marriage and to wills and successions. The exclusion of maintenance obligations suggested by the European Commission is not challenged by the Council. These exclusions may be justified by the enactment of other instruments covering such matters (for example, the adoption of EU Regulation no. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession).

Status quo regarding the territorial scope of the rules of jurisdiction

Currently, the territorial scope of most of the rules of jurisdiction provided for in the Brussels I Regulation, subject to certain noteworthy exceptions, is limited to cases where the defendant is domiciled in a Member State. However, one of the most ground-breaking amendments of the Draft Proposal consisted in eliminating such a limitation by extending all rules of jurisdiction to defendants domiciled in third countries.

The Council did not agree with this specific proposal. As a result, the General Approach contains a wording very close to the current provisions of the Brussels I Regulation. After the recast of this Regulation, only defendants domiciled in a Member State could thus be sued in another Member State based on the rules set out in the Regulation. In the presence of a defendant not domiciled in a Member State, the international rules of jurisdiction comprised in the domestic law of each Member State would be applicable as a matter of principle.

The Brussels I Regulation currently provides for several exceptions to this principle, which relate to rules establishing the exclusive jurisdiction of specific courts or rules regarding prorogation of jurisdiction, which are applicable even if the defendant is not located in a Member State. These exceptions are maintained and even broadened in the General Approach.

Firstly, the rule governing jurisdiction clauses would become applicable regardless of the domicile of all parties (whereas, currently, Article 23 of the Brussels I Regulation requires one of the parties, either the defendant or the claimant, to be domiciled in a Member State). In addition, the General Approach adds a new exception corresponding to specific rules in favour of consumers, which allows consumers to sue their contracting party in the Member State where they are domiciled even if the contracting party is not a European defendant. A similar approach is adopted for employment issues: employees would be entitled to bring proceedings against non-European employers in most cases in the courts of the place where they usually carry out their work.

These amendments, which are rather limited compared with the Draft Proposal, aim at fulfilling one of the main objectives set by the European Commission, i.e. reinforcing the protection of weak parties by ensuring that the protective rules of jurisdiction available for consumers and employees are applicable in a greater number of cases (i.e. against non-European defendants). It is worth noting that the same reasoning is not transposed to insurance matters (yet, non-European insurers could be sued before a court of a Member State with respect to the operation in such country of their local branches or establishments). This being said, such modifications are significant compared with the current state of law because they imply that, in cross-border litigation, the court(s) having jurisdiction over proceedings brought by consumers or employees would no longer be determined by applying the domestic law of one Member State but the recast Brussels I Regulation.

Moreover, Member States will be required, pursuant to the General Approach, to notify the European Commission of their national rules of jurisdiction which could not be applied to European defendants. One can anticipate that these notifications will mostly correspond to the grounds of jurisdiction already mentioned in Annex I to the Brussels I Regulation (this Annex together with all the other Annexes to the Brussels I Regulation have recently been consolidated by EU Regulation no. 156/2012 of 22 February 2012 following the receipt of new notifications from Member States by the European Commission). Indeed, the application of the Brussels I Regulation is still perceived as a protection offered to European defendants against the so-called exorbitant rules of jurisdiction that may be part of the domestic law of Member States. Typically, an example of an exorbitant rule of jurisdiction can be found in Articles 14 and 15 of the French Civil Code pursuant to which the French courts have jurisdiction over claims brought by or against a French citizen or company. Pursuant to the General Approach and the Brussels I Regulation, such rules would be available to persons domiciled in a Member State (whatever their nationality) only against non-European defendants.

Adjustment to several rules of jurisdiction

Compared with the Draft Proposal, the General Approach includes a number of amendments which are the consequences of the Council's choice to generally limit the scope of rules of jurisdiction to European defendants (subject to the exceptions discussed above). Most notably, the Draft Proposal included two additional rules of jurisdiction designed to be applicable where no other rule of the Brussels I Regulation would confer jurisdiction on the courts of one of the Member States. The first rule, referred to as Subsidiary Jurisdiction, enabled to sue a non-European defendant at the place of his/her/its assets in the European Union. The second provision established a *forum necessitatis* ground of jurisdiction to be used on an exceptional basis. By definition, such rules could only have applied in disputes involving defendants domiciled outside the European Union since the courts of the Member State where the domicile of the defendant is located have, as a matter of principle, jurisdiction. As a result, both rules have been deleted from the General Approach as they have become irrelevant.

With respect to jurisdiction clauses, it is interesting to note that the Council validated the proposal of the European Commission to address the issue of the substantive validity of the clause in the Regulation. The General Approach goes further in this direction: it is not only specified that the substantive validity of the clause will be subject to the law of the Member State of the chosen court (including its rules of conflict of laws), but also that jurisdiction clauses should be considered as distinct and separate clauses from the remainder of the contract in which they are included and that their validity should not be questioned based only on the invalidity of the contract.

In addition, the General Approach extends the protection of jurisdiction clauses to ensure their efficiency, even though the rules proposed by the Commission are only slightly amended. At present, if the parties have designated by contract a particular court to resolve their dispute, *lis pendens* rules (generally applicable when the same dispute is brought before two different courts) prevail over jurisdiction clauses. This means that the chosen court may have to stay the proceedings until the decision of the court first seized accepting or declining its own jurisdiction. To ensure a better enforcement of choice-of-court agreements, pursuant to the General Approach, the court initially designated by the parties would now be given priority to decide on its own jurisdiction forcing other courts in the European Union to stay the proceedings pending before them and to decline their jurisdiction once the chosen court has acknowledged its jurisdiction.

The Draft Proposal also sought to improve the *lis pendens* rules by creating a six-month timeframe for the court first seised to rule on its jurisdiction. However, such limitation has been removed from the General Approach which only relies on the duty of cooperation of courts within the European Union by providing that, upon request, a court should indicate without delay the date when it was seised.

Specific rules relating to coordination in the event of proceedings pending in third States set forth in the Draft Proposal were accepted and completed by the Council. The courts of a Member State, if seised on certain grounds of jurisdiction of the Brussels I Regulation, would be allowed to stay the proceedings if an action relating to the same cause of action and involving the same parties or a related action is already pending in a third State subject to two conditions: (i) the judgment to be handed down in the third State could be recognised and/or enforced in the Member State concerned and (ii) a stay would appear necessary for the proper administration of justice. However, if the proceedings in the third State are discontinued, stayed or unlikely to be concluded within a reasonable period of time, the court may reinstate and continue the proceedings. Yet, once the non-European court has given a decision that may be recognised and/or enforced in the Member State of the court seised, the proceedings pending in the latter country should be dismissed.

Towards the limitation of recognition and enforcement proceedings

The area in which the Draft Proposal has endured the most changes relates to the recognition and enforcement of judgments. Based on the principle of mutual trust between Member States, the Draft Proposal provided for the complete abolishment of *exequatur* procedures and an automatic system of circulation of judgments in civil and commercial matters. Pursuant to the General Approach, the objective remains the same as it is established, as a matter of principle, that a judgment given in a Member State should be recognised in other Member States without any specific procedure and, if enforceable in the Member State of origin, should be enforceable without any declaration of enforceability.

This system of circulation of judgments will be based on the issuance by the courts of origin, at the request of one party, of certificates following a standard form. This certificate will notably mention if the judgment is enforceable in the Member State of origin, and, if so, the conditions of such enforceability, if any, or any relevant indications regarding the recoverable costs of the proceedings or measures ordered. The certificate will have to be served on the person against whom enforcement is sought before enforcement measures can be initiated and the person concerned would be entitled to challenge the enforcement of the decision. Furthermore, any interested party would be allowed to apply for either a

decision refusing the recognition of the judgment or a decision acknowledging that there is no ground for refusal of recognition.

The grounds allowing the courts of the Member State addressed to refuse recognition or enforcement are strictly limited and along the same lines as those currently in force. They relate to (i) conflicts with the public policy of the Member State addressed, (ii) judgments given in default of appearance if the defendant was not adequately informed of the proceedings, (iii) the irreconcilable nature of the judgment with another decision between the same parties given in the Member State addressed or with a previous decision (of another Member State or third State) involving the same cause of action and between the same parties (provided it fulfils the conditions to be recognised), and finally (iv) non-compliance of the judgment with the rules of exclusive jurisdiction or the protecting rules of jurisdiction applicable in insurance, employment and consumer matters (provided the weak party was the defendant). Apart from the latter ground for refusal, the courts of the Member State addressed are prohibited from examining whether the court of origin had jurisdiction (even pursuant to the public policy clause).

Therefore, the Council did not follow the Draft Proposal insofar as it suggested creating specific safeguards to protect defendants' rights and to maintain *exequatur* proceedings in a few areas such as matters relating to defamation and collective redress mechanisms.

Conclusion

The Draft Proposal of the European Commission was very innovative, especially with respect to three key topics which were the abolishment of *exequatur* proceedings, the interface between the Brussels I Regulation and arbitration and the general extension of rules of jurisdiction of the Regulation to non-European defendants. Yet, the Council of the European Union decided not to keep the two latter points in its General Approach. Indeed, the major point of the recast of the Brussels I Regulation is clearly the system of circulation of judgments across Europe, which should greatly facilitate the enforcement of judgments.

Should the adopted amended Regulation be along the same lines as the General Approach, its impact on cross-border litigation between the European Union and third States should remain more limited than what could be anticipated after examining the European Commission's Draft Proposal. The proposed general extension of the Regulation to non-European defendants will apparently not have any future. However, it will be interesting to see if the *lis pendens* rules aiming at a better coordination of proceedings pending in Europe with proceedings pending outside Europe will have any significant effect.

In any case, before making one's final opinion on the recast of the Brussels I Regulation, one should wait for a final and complete text including recitals as they play an increasing role in the construction of European law. Besides, the European Parliament is expected to review the General Approach in first reading in December 2012, which could give rise to further amendments.



Christelle Coslin
christelle.coslin@hoganlovells.com
