Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - “Brussels I”.

Response of the Law Society of England and Wales

July 2009
General

1. This position is presented by the Law Society of England and Wales (the Society). The Society is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations towards regulators and government in both the domestic and European arena.

2. The Society welcomes the opportunity to feed into the debate on the review of the Brussels I Regulation. The consultation deadline however seems unnecessarily short for such an important issue. The Society hopes that the Commission will continue to engage with stakeholders and present any future draft Regulation for consultation as well. An examination of the practical consequences of the proposed rules, their impact on the diverse legal systems of the Member States and the commercial consequences needs to be undertaken in addition to an academic analysis of Private International Law rules.

3. The Society considers that there is an urgent need to reform some aspects of the Regulation, such as in relation to the *lis pendens* rule. The Commission needs to act without delay to resolve these difficulties as they are having a significant impact on commercial business in the European Union.

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?*

4. The Society supports the abolition of *exequatur* provided that a number of safeguards are introduced. In this context we note the examples set out in the Green Paper, including minimum standards relating to service and information to the defendant, and would add that there has to be a process of verification to ensure the judgment is a valid one. Translation issues need to be addressed as it is necessary to have the judgment in the language of the second Member State.

5. As suggested in paragraph 8.3 of the Green paper, an EU-wide standardised form could be developed which states that the judgment/order is valid and was issued by X court on X date; it should be duly authenticated by the relevant court i.e. with a court stamp or seal. It should include proof of service of the original proceedings and proof that the party had a proper chance to defend the judgment.

6. This form should be obtainable as of right at the end of the proceedings and should not require any additional procedure or involve extra costs for the parties, only those related to the court’s proper costs (administrative) involved.
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?

7. Possible changes to existing rules in the areas mentioned above constitute radical reforms to the current system and the common law rules in relation to this issue. The Society is of the view that there is no strong presumption to change the current rules in relation to third state defendants, either as regards jurisdiction or the enforcement of judgments.

8. On the question of the conditions under which third State judgments be recognised and enforced in the Community, it must be understood that this would be a huge undertaking involving a harmonising of all existing national safeguards on enforcement and reflecting all the Member States' bilateral and multinational enforcement commitments.

9. There is no demonstrable need to do this and we query the extent of any competence under the EC Treaty to effect such radical amendment which could have wide implications for proceedings in national courts, in particular to determine commercial disputes and for existing agreements with third states.

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?

10. The Society is of the view that it is of the utmost importance to respect the principle of party autonomy and to give effect to the parties’ choice. We consider that the second option is to be preferred (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).

11. This option meets the objective of legal certainty and could assist in overcoming so-called “Torpedo” actions and multiplicity of proceedings. That said, the choice of court needs to be sufficiently clear in order for the choice to be valid. In practice we understand that 95% of contracts indicate a clear priority. Questions as to the validity of the choice of court clause should be determined by the law of the state of the “chosen” court.

12. As regards the suggestion in the Green Paper that the Community might develop a system of granting of damages for breach of choice of court agreements, the Society is concerned that this could lead to satellite or “sub-litigation”, a development which would be most unsatisfactory.
Question 4

What are the shortcomings in the current system of patent litigation you would consider to be 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?

13. The Society notes that the report identifies two problems with existing industrial property rights litigation: torpedo actions; and the requirement to bring multiple proceedings against infringement by a group of companies. In addition the Green Paper refers to Commission initiatives for the creation of an integrated jurisdictional system through the establishment of a unified European patent litigation system and proposals for a Community patent. However, it proposes that “certain shortcomings of the current system may be identified and addressed in the context of Regulation (EC) No 44/2001”.

Taking those proposals in turn:

a) it is firstly proposed that communication and interaction between courts be strengthened with respect to the coordination of parallel infringement proceedings. The existing system has undoubtedly already benefited from an increase in communication and interaction between courts; it is well known that the Member States’ industrial property judges enjoy a close degree of interaction and consider each other’s judgments carefully. It is not clear what further measures are being proposed. The Society’s view is that it is not possible to conduct a meaningful public consultation on strengthening communication and interaction between courts without details of those further measures.

b) it is proposed that the lis pendens rule be excluded in the case of negative declaratory relief. The Society can see the force in finding workable solutions to abusive uses of declaratory relief. In particular, we believe there is considerable force in permitting the court with exclusive jurisdiction to hear validity of a national industrial property right (i.e. the court in the jurisdiction where the right is registered) to rule on questions of jurisdiction over infringement of that national right; this exception would go a long way to removing the abusive use of declaratory proceedings.

c) it is recognised in respect of infringement and invalidity proceedings that “the problems may be dealt with by the creation of the unified patent litigation system in which case modifications of the Regulation would not be necessary”. The Society respectfully agrees. The ECJ correctly recognised the impossibility of separating decisions on validity from those on infringement. The proposals for the unified patent litigation system have been developed through many years of careful work and are reaching a critical stage. The Society considers that it would be an unnecessary and potentially damaging distraction from the development of that work to engage in a parallel debate on achieving similar goals through reform of Regulation 44/2001.

d) it is suggested that a solution to infringing groups of companies might be to establish a specific rule allowing infringement proceedings against several
defendants to be brought before the courts of the Member State where the
defendant coordinating the activities or otherwise having the closest connection
with the infringement is domiciled. The Green Paper recognises, and the
Society respectfully agrees, “that the strong factual basis of the rule may lead to
a multiplication of the potential heads of jurisdiction, thereby undermining the
predictability of the jurisdiction rules of the Regulation and the principle of legal
certainty. In addition, such a rule may lead to forum shopping.” The Society is
not convinced that the problem of infringing groups of companies is a real one.
If there is a problem of the abuse of group structures by infringing groups of
companies that needs to be addressed, we would prefer the approach to rely
on the use of provisional and protective measures (post-judgment in a
substantive action) in a Member State to ensure that groups of companies do
not use their group structure to act so as to undermine justice.

e) a final suggestion is that “alternatively, a re-formulation of the rule on
plurality of defendants might be envisaged in order to enhance the role of the
courts of the Member State where the primary responsible defendant is
domiciled.” As with the proposal in (a) above, without details of what is
intended in an “enhanced” role, it is not possible to provide useful commentary
on this suggestion.

14. In summary, in answer to Question 4, the Society therefore believes:

i) details are needed of the proposals for cooperation and interaction between
courts before a proper public consultation can take place on them;
ii) there is a case for allowing the court in the jurisdiction where a right is
registered to rule on jurisdiction over declaratory judgments;
iii) in general, questions over jurisdiction in patent actions should be resolved in
the context of the proposals for a unified patent litigation system;
iv) proposals to address issues of abuse within infringing groups of companies
are not well addressed by modifications to Regulation 44/2001 although there
may be a case for ensuring that provisional and protective measures are
capable of addressing actual abuses.

Question 5

How do you think that 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?

15. The Society is of the view that there is an issue to address. It has been reported
that, in general, the rules work well in cases where the parties to the case and the
scope of the dispute are reasonably well defined. This might, for instance be the
case in relation to contractual disputes. For other cases, such as tort actions
(e.g. mass claims and cartel cases) and intellectual property cases, the Society
does not consider the rules to work well. “Torpedo” actions (especially for
negative declaratory relief) are to be discouraged and that the rigour of the
current lis pendens rule can work in an unjust way.

16. Claims for negative declaratory relief are seen as useful in litigation. However, in
certain cases, particularly mass claims, the rules lead to a rush to court either to
seize a court in a “claimant-friendly” country by claimants or to “torpedo” claims,
by seeking court declarations, in “defendant-friendly” courts. The rule has the
merit of being simple. It is questionable whether it always serves well the smooth administration of justice.

17. Proposing a workable alternative is not evident. Courts should be obliged to determine questions of jurisdiction quickly and as a preliminary issue.

18. Communication between the courts concerned is to be encouraged and the European Judicial Network could be an important communication channel. It is for consideration whether the Regulation should provide a means by which the second court can call on the court first seised to act within a specified time (perhaps within limits set out in the Regulation).

19. It has been suggested that, in addition to considering whether it has jurisdiction, courts might consider whether the case has a closer connection or “centre of gravity” in another jurisdiction. A number of elements might be used in assessing this. In relation to mass claims or other cases, however, this could lead to forum shopping if there was not a sufficient degree of certainty provided by the rules. It is imperative that there is a clear, easily applicable rule setting out clear parameters for determining jurisdiction in relation to mass claims.

20. For collective claims, if work progresses in developing mechanisms for collective redress, particularly that are open to parties from multiple jurisdictions, special rules on jurisdiction might have to be developed. Equally, however, it should be borne in mind that such special rules should not have the effect of creating incentives or facilitating collective claims over unitary claims.

21. The related issue of what constitutes a “related action” in terms of Article 28 also needs to be addressed. Again, in relation to antitrust for instance, it might be clear that any follow-on actions from the decision of a competition authority will be related (even if they involve different parties), whereas the same cannot be said for stand-alone actions. The same is true and no less complex in other fields of law.

22. The Society can see the merits in developing a mechanism for consolidation of proceedings and that this may be potentially useful.

**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?*

23. We support the move to ensure that *ex parte* measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently.

24. The Society supports the approach of mutual assistance in terms of “lending remedies”.

**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?

25. The Society is strongly of the view that there is a clear need to strengthen the effectiveness of arbitration agreements at Community level in so far as such arbitral agreements come to be considered before the courts. The Society is not, however, proposing a duplication of international law rules on regulating arbitration, principally the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention. The Society considers action could be taken to remedy problems in circumstances where the arbitration process is ancillary to court proceedings.

26. It must be underlined that whilst we do not advocate compulsory arbitration, the arbitration process is a valuable dispute resolution tool and one that is increasingly relied on by commercial operators. The approach of the European Court in such cases as West Tankers ¹ raises serious concerns.

27. The Society advocates strong action to support all three elements of Question 7.

28. Any weakening of the effectiveness of arbitration agreement by the Brussels I Regulation should be remedied so as to reflect the commercial realities of the day, both in terms of allocation of jurisdiction and in terms of recognition and enforcement.

29. Moreover arbitration is based, significantly, on the choice of the parties and effect should be given to this principle. The same status should be give to an agreement to arbitrate in a designated seat as a choice of “court” agreement in so far as such arbitral agreements come to be considered before the courts.

30. The Society supports the solution offered by the Heidelberg report, which would have the effect of making clear and also limiting the extent of the exclusion of arbitration in Article 1 of the Regulation. Exclusive jurisdiction should be conferred on the chosen seat of the arbitration.

31. We also support the proposal that the Member State where an arbitral award is given should have exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which it would "freely circulate” and be enforceable throughout the European Union.

Question 8

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

32. The Society agrees that it is appropriate to remove maintenance from the scope of the Regulation as this is dealt with in a stand-alone instrument specifically dealing with maintenance – Regulation 4/2009.

33. The Society is cautious about the need to seek a uniform definition of “seat”. This may not be easy and experience should be learned from discussion in the

¹ Allianz SpA and another v West Tankers Inc (Case C-185/07)
company law field. We would welcome evidence that the absence of a common
definition has given rise to many or serious difficulties in practice.

34. The Society is similarly cautious in relation to the suggestion that there should be
a uniform definition of domicile.

35. The Society agrees that in the context of the development of collective redress
mechanisms consideration should be given to the question of jurisdiction. Indeed
the Brussels I Regulation does not contain specific provisions on mass claims
and the question of determining jurisdiction is key in mass claims involving a
number of jurisdictions. When referring to a multi-jurisdiction action it must be
noted that there is not always a multiplicity of defendants or parallel proceedings
rather the effect of a breach through a distribution network. On the other hand
determining jurisdiction via an identification of the market where the greatest
effect of the breach is found could lead to forum shopping.

a) Allocation of jurisdiction should be closely tied to that of applicable law and
the merits in using the law of the forum for legal certainty and expediency of
proceedings should be underlined. It has been noted frequently by
practitioners in many jurisdictions that the application of foreign law is not
desirable. The Society is concerned that initiatives in relation to collective
redress might have the effect of requiring judges to apply multiple bodies of
law to one mass claim.

b) With particular reference to consumer claims, the scope for the applicable
contractual law to be different to that of the consumer’s residence is still
limited under the Rome I Regulation. As such it is preferable for consumers
still to litigate in their home Member State. In mass claims, however,
particularly in relation to non-contractual matters, further consideration should
be given to the ability of consumers to choose to join an action in another
Member State.

c) If the Commission’s idea of a “test case” model in the consumer field is
developed further, it is possible that cases in different Member States will
concern the same question of liability. For instance, consumers who have
suffered harm in different Member States may bring claims against importers
of retailers of the same product. The Commission should consider and clarify
to what extent these are parallel proceedings. The Commission should also
note that, because the law in question might not be harmonised fully, the
issues of legal liability (as well as the facts of the case) might vary between
Member States.

d) One suggestion mooted in the current debate is to allocate jurisdiction to the
courts of the defendant which would hear a test case to determine liability.
Then questions of damages would be dealt with in the claimant (consumer)
home courts. However this could lead to different approaches in terms of
types of damages awarded and levels of damages awarded. That said
harmonisation or standardisation of damages would not be appropriate and
go further than an approximation of civil procedure as permitted by Article
65(c) TEC.

36. The Green Paper refers to the whether it might be appropriate to address the
question of the free circulation of authentic instruments. The Society does not
consider that administrative procedures prior to recognition and enforcement
should be removed in relation to the authentic instruments. These authentic instruments have not been the subject of due process in a court.

37. Moreover, the Society, supporting the view of the Council of European Bars and Law Societies of Europe, considers that 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.

38. In addition, 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.

39. Finally, the Society considers that the definition of authentic instrument should also include acts having equivalent legal effects under the relevant national system.

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