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THE RT.HON. THE LORD HOFFMANN

3 July 2009

Mr. Jonathan Faull
Directorate-General Justice, Freedom and Security
European Commission
Unit E-2 – Civil Justice
B-1049 Brussels
Belgium

Dear Mr Faull

Green Paper: 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)

The remit of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

Following the publication by the European Commission of its Report¹ and accompanying Green Paper² on the review of Council Regulation (EC) No 44/2001 (the "Regulation") on 21 April 2009, the FMLC resolved to respond to the questions contained in the Green Paper addressing issues that particularly concern its remit. The response of the FMLC to each question is set out below.

The FMLC welcomes the Commission's Report on the Regulation and the Green Paper. The FMLC believes that, for the financial markets, the most important question in the Green Paper is Question 3 on the enforceability of choice of court agreements (and, to the extent that it overlaps, Question 5). The FMLC would urge the Commission to give the resolution of these issues a high priority.

*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?*

Whilst it is not strictly an issue within the normal remit of the FMLC, as it does not concern an issue of legal uncertainty, the proposed abolition of *exequatur* would appear to provide clear practical benefits in terms of reducing costs and delays in obtaining recognition and enforcement of foreign judgments if, as the Report states, such recognition and enforcement is very rarely refused in practice. However, in the event that *exequatur* is abolished, it is

¹ COM (2009) 174

² COM (2009) 175

essential that safeguards are maintained. The FMLC considers that the existing safeguards in articles 34 and 35 of the Regulation would suffice for this purpose.

With regard to the Commission's proposal to harmonise a special review procedure, the FMLC does not consider this necessary. When faced with enforcement procedures in a Member State, there is no obvious reason why defendants should not continue to be able to resist enforcement in accordance with local procedures; nor do there appear to be any practical difficulties caused by the lack of harmonisation in the current rules on recognition and the current rules on enforcement.³ In the FMLC's view, therefore, the benefits of establishing a single review procedure would not justify the amount of work that this would entail.

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?

The FMLC agrees, in principle, with the proposal to extend the special jurisdiction rules of the Regulation so that they apply to third State defendants. As the Regulation now stands, in a case where a claimant domiciled within a Member State sues a third State defendant, any EU court which is seized of the matter is not subject to the usual requirement, imposed by the Regulation in the case of EU-domiciled defendants, requiring that court to decline jurisdiction in favour of the courts of the defendant's home Member State.⁴ In addition, if the claimant brings proceedings in the courts of his own Member State, those courts may, with limited exceptions, take jurisdiction over the defendant under their local rules.⁵ This not only undermines the idea of fairness which is at the heart of the Regulation, it also undermines consistency and predictability in the provision of civil justice, not least because the local civil procedure rules which are, by default, applied by EU Member States' courts in the case of third State defendants will vary from one Member State to another. Moreover, in certain cases involving third State defendants, the only basis on which the courts in question have jurisdiction may be that the claim is brought by a person domiciled in that Member State, and yet the judgment of such courts will qualify for automatic recognition and enforcement in all Member States under the terms of the Regulation. As a result, to quote Adrian Briggs, Professor of Private International Law at Oxford University, a third State defendant "is at the mercy of jurisdictional rules which are deemed to be unfit for use against European defendants".⁶

However, an extension of the application of the jurisdiction rules in the Regulation would have to be accompanied by adequate safeguards in order properly to protect EU citizens. The FMLC is concerned, in particular, about the implications of imposing an obligation on the courts of a Member State to decline jurisdiction over a case involving an EU citizen as claimant in favour of the courts of a third State on the grounds of the defendant's domicile, in cases where the sure, impartial and timely provision of justice is in doubt. Additional jurisdiction grounds for disputes involving third State defendants would, therefore, have to be introduced so that jurisdiction in favour of courts of third States can be declined in certain circumstances. In this respect, the FMLC broadly approves of those additional jurisdiction grounds which are proposed in the Green Paper, but considers that the concept of *forum necessitatis* is too narrowly construed.⁷ At the very least, a court should have discretion to exercise jurisdiction over a case involving a third State defendant if the result of refusing to do so would be to leave a court that did not apply proper standards to resolve the case.

³ Chapter 3, sections 1 and 3 of the Regulation

⁴ Article 2 of the Regulation

⁵ Article 4 of the Regulation

⁶ Briggs & Rees, *Civil Jurisdiction and Judgments* (4th edition), paragraph 7.04

⁷ See section 2, paragraph 2 of the Green Paper

The Commission's proposal is further complicated by the absence of common jurisdictional rules between Member States and non-Member States. If an EU court were to decide to exercise jurisdiction over a case involving a third State defendant in the circumstances outlined above, this would not prevent proceedings being issued in the courts of a third State in respect of the same matter. Conversely, it is difficult to see how the Regulation might introduce common rules for the enforcement of non-EU judgments without common jurisdictional rules which ensure that only one non-EU judgment is enforceable in the EU.

In view of the number and complexity of the issues raised by an extension of the special jurisdiction rules to apply to third State defendants, the FMLC would need to see more details of the proposed new rules before it would be possible to say whether the proposal is workable. We look forward to seeing the Commission's more detailed proposal in this regard.

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?

The effectiveness of choice of court agreements in the Community is the FMLC's principal area of concern about the way in which the Regulation now operates. This issue should, in the FMLC's view, be the main focus of the Commission's current work on the Regulation. In its recent paper on the subject, the FMLC sought to highlight how recent European cases have had an unfortunate impact on the integrity of exclusive jurisdiction clauses which, in turn, has raised the risk of uncertainty and increasing delays and costs in relation the bringing and conduct of civil proceedings in European courts.⁸

As the Report acknowledges, the consequence of the law as it stands is that, even when a potential defendant is on the face of it bound by an exclusive jurisdiction agreement in favour of a particular jurisdiction, the potential defendant may have an incentive to issue proceedings pre-emptively in another jurisdiction (in particular, one perceived to be procedurally inefficient) as a means of delaying the litigation. Aside from unfairly prejudicing the claimant, the pre-emptive proceedings may waste the time and resources of both parties if the potential dispute then never materialises.

The Report also refers to a tendency on the part of lenders in corporate loan transactions to institute proceedings pre-maturely so as to ensure the jurisdiction of the court designated in the agreement. Its criticism of such action however is not justified, since lenders run the risk that a borrower might seek to gain a tactical advantage by commencing proceedings in a different court. In the *PrimaCom* case,⁹ for example, it took the lenders nine months to persuade the German court that it did not have jurisdiction which, as Professor Hess and his colleagues concede, is "too long for the specific purposes of the cross-border loan business".¹⁰

The FMLC's paper suggests a number of ways to enhance the effectiveness of choice of court agreements in the Community. In particular, it recommends amending the Regulation to empower a court favoured by a jurisdiction clause to consider its jurisdiction, irrespective of the fact that another court may be seized, and to proceed to address the merits if it considers the agreement to be effective. In the view of the FMLC, this is the most efficient means of addressing the problems identified. It would represent, at the same time, a step towards fulfilment of the European Community's obligation to ratify and implement the Hague Convention on Exclusive Choice of Court Agreements.¹¹

⁸ See the FMLC paper headed "Issue 107 – Brussels I Regulation Article 23 Cases" (July 2008), which is available on the FMLC website (<http://www.fmlc.org/papers.html>).

⁹ *JPMorgan Europe Limited v. Primacom* [2005] EWHC 508

¹⁰ "Report on the Application of Regulation Brussels I in the Member States", presented to the Commission by Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schollosser (Final Version September 2007), p.428

¹¹ Hague Conference on Private International Law, Twentieth Session, Final Act, 30 June 2005; Kruger, "The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership" (2005) 55 ICLQ 447

It may be objected that such a measure would undermine the imperative of avoiding parallel proceedings within the Community by contemplating the possibility that two different courts could reach opposing views on the validity and interpretation of a jurisdiction clause, allowing both courts to proceed on the merits. The FMLC regards this risk as more theoretical than real, since the effect of the proposed reform would be very largely to remove the incentive to issue or pursue parallel proceedings. Nevertheless, the FMLC's paper discusses a number of measures which might mitigate this risk still further, including (i) the legislative endorsement of a standard-form jurisdiction clause in which courts can have confidence, and (ii) an amendment to the Regulation to provide that, where a court of a Member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have jurisdiction by virtue of an exclusive jurisdiction agreement, it should of its own motion stay proceedings before it.

The approach discussed above could also be supported by an amendment to the Regulation to provide that a judgment shall not be recognised if it was obtained in breach of an exclusive jurisdiction clause; and by the introduction of civil procedure legislation requiring Member States to establish a mechanism by which its courts will address jurisdictional issues promptly in preliminary proceedings and without the necessity for substantive pleadings.

The Green Paper proposes three alternative ways in which to strengthen the effectiveness of choice of court agreements, which are not specifically considered in the FMLC's paper. The first is communication between the courts. Whilst, in principle, communication between courts is a good thing, the FMLC considers that it is unrealistic to expect that this would provide any assistance in practice. There is a risk, in fact, that it would give rise to further problems if there were any suspicion that that the courts of two Member States had together arrived at a decision as to which of them should determine a case, irrespective of the submissions of the parties. Similarly, the FMLC is not convinced that reversing the *lis pendens* rule for negative declaratory proceedings would have any significant effect because, in such cases, a party is likely to be able to add a substantive claim of some sort to proceedings.

The FMLC agrees with the Commission's suggestion that damages should be granted for breach of jurisdiction agreements. This could not, however, form a stand-alone solution to the issue of the effectiveness of choice of court agreements because it does not address the fundamental underlying problems identified in the Report. In any case, it would appear that the English courts are already willing to award damages for breach of exclusive jurisdiction clauses.¹²

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 rightsholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

No comment.

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?

See Question 3 above.

The FMLC would be in favour of consolidation of proceedings by and/or against several parties on the basis of uniform rules. It is, however, questionable how this may be achieved in practice. It would, as the Green Paper notes, require some degree of communication and

¹² See for example *National Westminster Bank v Rabobank Nederland* [2008] 1 Lloyd's Rep 16.

cooperation between the courts involved which, as discussed above, may give rise to more problems than it solves. It is suggested therefore that this proposal, whilst it should remain an aspiration in the long-term, should not be included in the Commission's package of reforms at the end of this consultation process.

There is, however, much to be said for a limited extension to Article 6(1), allowing for a consolidation of proceedings if a court has jurisdiction over a certain quorum of defendants. In the view of the FMLC, this is the only instance in which proceedings should be permitted to take place in a court which is not the court designated in an exclusive jurisdiction agreement.

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

The FMLC would support the Commission's proposal for *ex parte measures* to be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the relevant measure in the court in which it was granted.

However, the FMLC would be concerned if a court other than the court that granted an order were able to discharge, modify or adapt that order. It is unclear, amongst other things, on what basis a court could review a decision which is made by a court in a different jurisdiction, and which law would apply in these circumstances. Does the Commission propose, for example, that a French court with jurisdiction over substantive proceedings could review an English court's ability under English law to make an interim order? The proposal would also inevitably lead to parties taking legal advice, with attendant costs, in two different Member States in order to establish whether an order by a court in one Member State had been affected by an order of a court in another. On the other hand, the FMLC considers that, in this context, communication between the courts involved would be helpful. It would be necessary, however, to prescribe what kind of communication is permitted and this may prove difficult, if not impossible, to achieve. As a general point, the FMLC would suggest that the Commission's focus in this area should be on clarifying under what circumstances a secondary court is able to grant remedies, since it remains unclear how the "real connecting link between the subject matter of the measure sought and the territorial jurisdiction"¹³ should be interpreted.

The Commission's final suggestion is that a guarantee of repayment of an interim payment should not necessarily consist of a provisional payment or bank guarantee. The FMLC would oppose such proposal. If a defendant is ordered to make an interim payment, it should have, as near as possible, a complete guarantee of immediate repayment (whether by way of bank guarantee or otherwise) in the event that it later transpires that the interim payment was not justified.

Question 7: Which action do you consider appropriate at Community level: to strengthen the effectiveness of arbitration agreements; to ensure good coordination between judicial and arbitration proceedings; to enhance the effectiveness of arbitration awards?

The FMLC would support the partial deletion of the exclusion of arbitration from the scope of the Regulation for a limited purpose only, namely to provide for the courts of the Member State where the arbitration takes place to have exclusive jurisdiction to decide on the existence, validity and scope of an arbitration agreement. If the Regulation is not narrowly circumscribed in the way in which it applies to arbitration, the attraction of choosing arbitration as being separate from and independent of the judicial process may be lost. The FMLC would therefore need to see the proposed drafting of the relevant provisions of the Regulation before it would be able to form a view on the merits of this proposal.

¹³ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line* [1999] QB 1225, [1998] ECR I-7091, ECJ

Question 8: Do you believe that the operation of the Regulation could be improved in the ways suggested above?

The FMLC has no objection to these suggested amendments to the Regulation, with the possible exception of the proposal regarding the free circulation of judgments ordering payment of penalties. It is doubtful however whether they are necessary. The absence of an autonomous definition of domicile, for example, does not appear to cause any difficulties at present.

The FMLC would welcome the opportunity to discuss any of these responses further if that would be useful.

Yours sincerely

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Lord Hoffmann

Copies to: Salla Saastamoinen
Karen Vandekerckhove
Francisco Fonseca Morillo

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