HOUSE OF LORDS

European Union Committee

21st Report of Session 2008–09

Green Paper on the Brussels I Regulation

Report with Evidence

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The European Union Committee

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(p) refers to a page of written evidence

SUMMARY

Earlier this year the European Commission published a Report and Green Paper into the operation of European Community Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"). Its Report concluded that the Brussels I Regulation is a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings and rules to ensure the mutual recognition of judgments.

Reform of the Brussels I Regulation's rules, in particular its jurisdiction settlement rules, raises a number of highly technical legal matters with ramifications for London's role as a centre for international legal dispute resolution and as a respected seat of international arbitration. The Committee very much welcomes the Commission's initiative in producing the Report and the proposals outlined in the Green Paper.

The Committee supports measures designed to counteract action by defendants which has as its aim the exploitation for their own advantage of the Regulation's jurisdictional rules, in particular, where the defendant is motivated by a desire to undermine the express will of the parties as expressed in either a choice of court clause or arbitration agreement.

The Committee's main area of concern is with the Commission's approach to the operation of the Regulation in the wider international order. The Committee believes that the scope of the Commission's discussion needs broadening to include, for example, how the rules under the Regulation operate in cases including third country based claimants or defendants. The Committee's suggested solution draws inspiration from the English Civil Procedure Rules.

Green Paper on the Brussels I Regulation

CHAPTER 1: INTRODUCTION

1. This Report considers the recently published European Commission Report and Green Paper on the operation of Council Regulation (EC) no. 44/2001 ("the Brussels I Regulation") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Article 73 of the Regulation obliges the Commission to present a report within five years of the Regulation's adoption to the European Parliament, the Council and the European Economic and Social Committee, on the efficacy of its application. The Commission's Report fulfils that obligation and is accompanied by a Green Paper which launches a consultation and calls for submissions to the Commission on possible ways to improve the operation of the Regulation suggested by the Report.

Background

The Brussels Convention

2. The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Brussels Convention") was agreed on 27 September 1968 by the (then) six Member States of the European Economic Community. It sought to avoid parallel legal proceedings within the Community, to simplify the recognition and enforcement of judgments and to strengthen the legal protection afforded to citizens of the Member States. It included detailed rules dealing with the circumstances under which the courts in the Member States might exercise jurisdiction and rules addressing specific civil and commercial legal areas including contract, tort and maintenance. It was amended and extended on subsequent occasions following the accession of the United Kingdom and other states to the European Community. Effect was given to the Convention in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982, which came fully into force on 1 January 1987.

The Brussels I Regulation

3. The Brussels I Regulation replaced the Brussels Convention. It came into force on 1 March 2002 and applies to all Member States of the European Union[1] with the exception of Denmark, which does not participate in measures adopted under Title IV of the Treaty establishing the European Community.[2] Denmark has concluded a separate agreement[3] with the European Community, the effect of which is to extend the Regulation's rules to Denmark.

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1 But not to certain territories—see Article 68 of the Regulation.

2 Protocol on the position of Denmark.

3 Agreement reached between European Community and Denmark on 19 October 2005, OJ L299 (16 November 2005); approved by Council Decision on 27 April 2006, OJ L94 (4 April 2006); entered into force on 1 July 2007, OJ L94 (4 April 2007).

4. The Regulation lays down uniform rules to settle conflicts of jurisdiction and facilitate the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters. It also includes rules to assist courts in settling jurisdictional matters.

5. The preamble to the Regulation states many of its policy aims and objectives. It is designed to contribute to the continued development of an area of freedom, security and justice and to the "sound operation of the internal market". The regime aims at facilitating the mutual recognition of judgments in civil and commercial matters through a system of highly predictable jurisdictional rules which are generally based on the defendant's domicile. The regime established by the Regulation is founded upon a principle of "mutual trust [between Member States] in the administration of justice" in each others' jurisdictions.

The Lugano Convention

6. The scope of the Brussels regime was also extended by the Lugano Convention, concluded on 16 September 1988 between the (then) 12 Member States of the Community and the (then) six Member States of the European Free Trade Association. The Lugano Convention covers the same subject matters as the Brussels Convention, now the Brussels I Regulation. Its effect is to create common rules regarding jurisdiction and judgments across a single legal space consisting of the Member States (including Denmark) and the three European Free Trade Association states of Iceland, Norway and Switzerland. (Liechtenstein, which joined the European Free Trade Association in 1991, is not party to the Lugano Convention.) The Lugano Convention was given effect in the United Kingdom in 1991. An amended Lugano Convention was agreed by the Community on 27 November 2008, and is about to be ratified.[4]

The United Kingdom's right not to opt in

7. The Brussels Convention was an international treaty, voluntarily entered into by the UK. The Brussels I Regulation is in contrast a European Community measure (as will be any proposal arising out of this Green Paper). Under the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom does not participate in European Community measures focusing on judicial cooperation in civil and commercial matters unless it notifies the Community of its wish to participate (to "opt in" as it is commonly known). Thus, the UK's participation in the Brussels Regulation depended upon the UK notifying the Community of its wish to take part in the adoption and application of the Regulation. This was done, and the Regulation became directly applicable in the UK on 1 March 2002.

8. Any legislative proposal which arises from the Commission's Green Paper will also be subject to the UK's right to decide whether or not to opt in.

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4 Council Decision of 27 November 2008 concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/430/EC) OJ L147 (10 June 2009) p 1.

The Position in England

9. The Committee did not address the legal position in Scotland prior to the enactment of the 1982 Act giving effect to the Brussels Convention.

10. Prior to that Act, English courts enjoyed jurisdiction over (a) persons who were present in England at the time of service of process, and (b) persons outside England, service on whom was dependent on obtaining the permission of the English court. Permission was obtained under Order 11 of the old Rules of the Supreme Court. (Since 1997, in the case of non-Regulation or Lugano states, cases in category (b) are dealt with under Civil Procedure Rule 6.20.)

11. Where it was suggested that some overseas jurisdiction was clearly more appropriate for the resolution of a dispute, English courts applied a principle of *forum non conveniens* (i.e. inappropriate jurisdiction) (inspired by Scottish law) in relation to categories (a) and (b) above, with the difference that in category (a) it was for the defendant to show that English proceedings were inappropriate, whereas in category (b) the onus of showing appropriateness lay on the claimant.[5] Where they concluded that the dispute was clearly more appropriate for resolution in an overseas court, English courts would, unless there were other countervailing factors, either decline jurisdiction or stay their proceedings in favour of that overseas jurisdiction.

12. From the 17th century English courts developed common law rules addressing the recognition and enforcement of foreign judgments. These were based originally on the idea of comity—English courts would recognise and enforce foreign judgments in England so that English judgments would be enforced abroad.[6] By the late 19th century the rationale of comity was largely replaced by the doctrine of obligation[7]—the theory that a foreign judgment creates an obligation on the defendant to pay which the English courts are obliged to enforce. A mixture of these theories was discussed and accepted by the Court of Appeal in 1990.[8] The common law rules still apply in relation to judgments from countries (such as the United States, China and Japan) to which no statutory scheme applies.

13. The relevant statutory schemes are the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. Under each, a person holding a foreign judgment which he wants enforced must make a corresponding application to, in England, the High Court. This is made by lodging a certified copy of the judgment to be enforced (with a translation of the judgment where relevant) supported by an affidavit. If the court accepts that the required conditions have been met, it will recognise the judgment and notice will then be served on the defendant that judgment has been registered and that the defendant has 21 days in which to apply to have the registration set aside.

14. Under the Brussels I regime the system for the recognition and enforcement of judgments is similar to the procedure under the 1920 and 1933 Acts. However, the rules governing the English court's jurisdiction and its

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5 See *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

6 *Roach v Garvan* (1748) 1 Ves.Sen. 157, *Wright v Simpson* (1802) 6 Ves. 714.

7 *Russel v Smyth* (1842) 9 M. & W. 628, *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 139.

8 *Adams v Cape Industries Plc* [1990] Ch 433.

approach to jurisdictional questions were substantially changed when the 1982 Act came fully into force on 1 January 1987.

The Commission's Report[9]

15. The Report is a general study of the application of the Regulation but includes analysis of the national jurisdictional rules applicable where the defendant is not domiciled in a Member State (cases of "subsidiary jurisdiction"), the impact of the possible ratification by the European Community of the Hague Convention on choice of court agreements[10] and the European Court of Justice's case law[11] on the Regulation.

16. The Report concludes that the Regulation "is a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings" and rules to ensure the circulation of judgments.

17. The Report identifies seven main areas which may nevertheless merit specific attention with a view to improving the functioning of the Regulation.

The Commission's Green Paper[12]

BOX 1

Suggested areas for reform

(i) The abolition of *exequatur* (see paragraphs 23–30) in the context of the international recognition and enforcement of judgments,

(ii) The operation of the Regulation in the broader international order,

(iii) The operation of choice of court clauses,

(iv) Intellectual property,

(v) Rules governing *lis pendens* (see paragraphs 49–71) and related actions,

(vi) Provisional measures such as interim injunctions,

(vii) The interface of the Regulation with arbitration proceedings, and

(viii) Other issues covering scope, jurisdiction, recognition and enforcement.

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9 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final.

10 Concluded on 30 June 2005; see the Commission's Proposal for a Council Decision on the signing by the European Community of the Convention on Choice of Court Agreements, COM(2008) 538, 5 September 2008. The Convention is designed to offer greater certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial alternative to the existing arbitration system.

11 Significant case law includes: C-412/98 *Group Josi Reinsurance SA v Universal General Insurance Co* [2000] ECR I 5925, C-281/02 *Owusu v Jackson* [2005] ECR I 1383, The Lugano Opinion 1/03 [2006] ECR I 1145, C-116/02 *Erich Gasser Gmbh v MISAT Srl* [2003] ECR 14, C-125/79 *Bernard Denilauler v SNC Couchet Frères* [1980] ECR 1553, C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I 3481, C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I 7091, C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I 2277, C-185/07 *Allianz SpA, Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] 1 Lloyd's Law Reports 413.

12 Green Paper on the 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 final.

Our Inquiry

18. The principal purpose of our inquiry was to inform the Government's response to the Commission's Green Paper. In addition, the Committee wished to respond to the Commission's consultation. We have accordingly followed the framework set by the Commission in its Green Paper.[13]

19. This inquiry was conducted by Sub-Committee E (Law and Institutions), whose members are listed in Appendix 1. The Committee took oral evidence from two witnesses: Mr Richard Fentiman of Queens' College, Cambridge and Lord Bach, Parliamentary Under Secretary of State at the Ministry of Justice who was accompanied by a Senior Legal Adviser from his Department, Mr Oliver Parker. The Committee would like to take this opportunity to thank the witnesses for their evidence. The Committee did not issue a general call for evidence.

20. **We make this report for the information of the House.**

[13] Given their interaction, discussed below, the Committee's inquiries into items iii. and v. were amalgamated.

CHAPTER 2: AREAS FOR REFORM

21. In his opening comments to the Committee assessing the general effectiveness of the Regulation, Richard Fentiman said that "my overall impression is that the Convention as it was, and the Regulation as it now is, has actually operated fairly successfully" (Q 2). However, he identified a general difficulty with the Regulation's rules and their application to England, pointing to their "inappropriateness … in the context of the kind of high value, complex, multi-jurisdiction litigation which the English courts are very used to" (Q 2). He described the Commission's Green Paper as "presenting a very exciting opportunity" which offers "a real prospect … of being able to improve the rules of jurisdiction that operate in the Member States" (Q 1).

22. The Minister, Lord Bach, also praised the Commission's Green Paper. He expressed the Government's appreciation of the work done by the Commission and added that "they have identified all [the Government's] major concerns and in terms which are encouragingly open minded" (Q 55).

The Abolition of *Exequatur*

23. *Exequatur* deals with the Regulation's response to the following question: what happens when, for instance, you have won a successful breach of contract claim in the UK courts against a French domiciled defendant and you want to have the decision enforced against them in France? Under Chapter III, Articles 38–52 of the Regulation, you have to apply to the French courts for a declaration of enforceability (called an order of *exequatur*) that entitles you to have the UK judgment enforced in France.

24. The Green Paper argues that in an internal market without frontiers it should be possible to eliminate this additional stage (and expense) in the enforcement of rights abroad, although adequate safeguards for defendants would be needed. The Green Paper draws inspiration for reform from the Maintenance Obligation Regulation (4/2009)[14] which abolishes *exequatur* in the context of family maintenance awards. Under that Regulation, defendants who did not appear before the courts in the state from where the decision originates can be heard by the courts where the decision is to be enforced, if they were not served with the documents instituting proceedings in sufficient time to mount a defence or were prevented from mounting a defence due to "extraordinary circumstances".

25. Under Article 47 of the Regulation an order of *exequatur* entitles the holder to apply for injunctions against the property of the party against whom enforcement is sought. The Commission argue that any abolition of *exequatur* would necessitate reform of this Article (see section 6 of the Green Paper dealing with provisional measures). Again, as an example, the Commission cite the measure in the Maintenance Regulation 4/2009 which provides that an enforceable decision carries with it the power to apply for protective injunctions of this sort.

26. The Regulation currently includes in Articles 33–37 a number of safeguards designed to protect the defendant's interests under certain circumstances. Thus, for example, judgments from another Member State will not be recognised where this would be manifestly contrary to public policy in the

[14] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. In particular see Article 17.

State in which recognition is sought, or where the judgment was given in default of appearance and the defendant has not been served with the claim documentation in time to enable him to arrange for his defence, unless it was possible for him to challenge the judgment in the State giving it.

27. The Commission's Report finds that applications for orders of *exequatur* are rarely refused, only between one and five per cent of them are appealed and these appeals are "rarely successful". Applications by defendants challenging these orders are "rarely accepted". As to judgments manifestly contrary to public policy, the Report concludes that "it seems extremely rare … that courts would apply the public policy exception with respect to the substantive ruling by the foreign court".

28. The abolition of *exequatur* is "the main objective" of the Commission's proposals for revision of the Regulation and Richard Fentiman stated that the abolition of *exequatur* "is inevitable" (Q 9). Acknowledging that the grounds of objection in Articles 33–37 are rarely invoked, Mr Fentiman said that he would favour the *status quo* so far as safeguards are concerned, and since there would be no harm in allowing them to continue, "there is no demonstrable need for change in this area" (Q 13). He sounded a note of caution in relation to the English defence of fraud (which in this context means procedural fraud, for example, failure by a claimant in the foreign proceedings to disclose evidence). This defence, Mr Fentiman argued, is currently caught by the Regulation's public policy exception so that "if one were to dispense with public policy it would have to be on the assumption that fraud is otherwise dealt with specifically" (Q 10).

29. The Government have not as yet formed a final view on the abolition of *exequatur* but stated that it "does not appear to be an area where the current rules create significant practical problems for litigants" (Q 58). However, the Minister did say that should *exequatur* be abolished the need for procedural safeguards would remain. In the Government's view, these safeguards must address "the need for adequate service on the defendant in the country where the original proceedings took place, the absence of any other judgment which conflicts with the judgment in question and the need to ensure that the judgment does not breach the principle of public policy" (Q 58). The Government would be cautious about abolishing the public policy exception (Q 60).

30. We agree with the Commission that it is now difficult to justify maintaining the requirement for intermediate proceedings before an order of a court from one Member State can be enforced in another. **On the basis of the Commission's evidence that objections to applications for enforcement orders are rarely made and rarely sustained, we support the Commission's proposal to abolish the requirement for enforcement orders. We consider, however, that safeguards need to be maintained, along the lines of those found in Articles 33–37, and that, if *exequatur* is to be abolished, some process must still exist to forewarn a defendant that steps are being taken to execute a judgment against him, in order to enable him to challenge enforcement of the judgment in the country where enforcement is intended on such grounds as are permitted (e.g. that it was a default judgment in proceedings not properly served on him, or on public policy grounds).**

The operation of the Brussels I Regulation in the international legal order

31. One of the purposes of the Regulation is to determine in any given situation which is the competent court to hear the dispute. To do this the Regulation

contains a number of rules designed to identify the court with jurisdiction to hear the case.

32. The main jurisdictional rules established by the Regulation (and Lugano Convention) relate to defendants domiciled in a Brussels (or Lugano) Member State. The primary rule is that such a defendant must be sued in the courts of the State in which he or she is domiciled.

33. However, Articles 5–7 contain rules of "special jurisdiction" allowing such a defendant to be sued in certain other Member States, to which the dispute has a link. For example, a claimant may sue such a defendant in the courts of the place of performance of a contractual obligation,[15] or in the courts of the place where any tort was committed (or where harm was directly caused by it). Co-defendants may be sued in the courts for the place where any one of them is domiciled, where the claims against them are sufficiently closely connected. Other special rules exist in favour of insured persons, consumers and employees.

34. Two important heads of jurisdiction exist apart from, and are capable of overriding the main rules based on, a defendant's domicile. First, under Article 22, in the case of most disputes about real property, "exclusive jurisdiction" is given, irrespective of domicile, to the courts of the Member State in which such property is situated. This corresponds to a general principle of public international law. Other heads of exclusive jurisdiction under Article 22 include proceedings concerning the validity or dissolution of companies or associations with their seat in a Member State, of entries in public registers kept in a Member State, of patents and other similar rights registered or located in a Member State (Article 22(2)–(5)).

35. Article 23 bears the unfamiliar title "Prorogation of jurisdiction", meaning simply "choice of court". It provides that if parties have chosen (e.g. by agreement in their contract) to decide any disputes arising between them in a court in a specific Member State, then, if one or more of the parties to the proceedings is also domiciled in any Member State, the courts of the chosen State shall have exclusive jurisdiction over the dispute.

36. Article 4 of the Regulation deals with all situations where the defendant is not domiciled in a Member State, apart from those falling within Article 22 or 23. It provides that, in such situations, "the jurisdiction of the court of each Member State shall … be determined by the law of that Member State". This head of jurisdiction, applicable to non-Member State domiciled (or "third state") defendants, is known as "subsidiary jurisdiction".

37. The Commission's Report identifies a lack of uniformity in the national jurisdictional rules applicable in different Member States relating to third state defendants, and suggests that this gives rise to unequal access to justice for claimants who are Community citizens. It also suggests that the absence of rules addressing jurisdictional questions in relation to such States may jeopardise the enforcement of mandatory rules of European Community law, such as rules on consumer protection, commercial agents and product liability.[16]

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[15] In C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I 3699, the European Court of Justice held that, where there are several places of performance in one Member State, then (a) an action may be brought in that State, but also (b) the place of performance for the purpose of such an action within that State is an autonomous European concept which requires proceedings to be brought in "the place of principal delivery, which must be determined on the basis of economic criteria". Ruling (b) could impinge on national procedural autonomy in a way which might merit some attention.

[16] See Commission's Report, Section 3.2 pp 4–5.

BOX 2

The Owusu Case

Some of the problems which the Regulation's jurisdictional rules have in relation to litigation with an international context are illustrated by the case of *Owusu v Jackson.*[17]

Whilst holidaying in Jamaica, in a property with a private beach area which had been let to him by Mr Jackson, Mr Owusu (a British national domiciled in the United Kingdom) waded out to sea. When the water was up to his waist he dived in, struck his head against a submerged sandbank and fractured his neck, leaving him severely physically disabled. Mr Owusu brought an action for breach of contract against Mr Jackson in England on the basis that Mr Jackson was also domiciled in the United Kingdom. He also brought an action in tort against three Jamaican based companies on the basis that they were necessary or proper parties to the action against Mr Jackson under Article 4 of the Convention and the provision authorising service on such parties out of the jurisdiction contained in Civil Procedure Rule 6.20.

All four defendants applied to the court in England for a declaration that the English court should decline jurisdiction because the case had closer links to Jamaica than the United Kingdom, i.e. they argued that Jamaica was the appropriate jurisdiction.

The first instance judge held that, although at common law, he would have declined jurisdiction in favour of Jamaica in relation to the claims against all four defendants, he was bound under Article 2 of the Convention to accept jurisdiction as against Mr Jackson, and that it therefore also became appropriate to deal with the claim against the other three defendants.[18]

On a preliminary reference from the Court of Appeal[19] on the question whether the court was bound to assume jurisdiction over Mr Jackson, the European Court of Justice held that it was, with the result that the proceedings went ahead in England against all four defendants. The Court held that, in the interests of legal certainty, the Convention's jurisdictional rules are mandatory. This was so, even though the jurisdiction of no other European Union Member State or Lugano state was in issue and the proceedings had no other connecting factor to England apart from Mr Jackson's domicile here.

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[17] C-281/02 *Owusu v Jackson* [2005] ECR I 1383. Owusu is a case concerning the interpretation of Article 2 of the Brussels Convention. The European Court of Justice's decision is still good law in relation to the Regulation. The case ended with an out of court settlement in November 2005.

[18] Contrast however *American Motorists Insurance Co. v Cellstar Corpn.* [2003] EWCA Civ 206, where the Court of Appeal (which included in its membership the then Lord Justice Mance) concluded that even if it had no power to decline jurisdiction in respect of an English domiciled subsidiary company, it should do so in relation to the co-defendant, its United States parent, since the proceedings were more appropriate for resolution in Texas where the parent was based.

[19] They asked the European Court of Justice: "1. Is it consistent with the Brussels Convention …, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State: (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue; (b) if the proceedings have no connecting factors to any other Contracting state? 2. If the answer to question 1(a) or (b) is yes, is it consistent in all circumstances or only in some and if so which?"

> Thus the main jurisdictional rules in the Convention were interpreted as conferring on claimants unconditional rights of action, which prevailed over the interests of the parties and of the legal system of any State not party to the Brussels or Lugano regime, in having the case decided in the courts of the Convention states. The Court of Justice confirmed the width of this conclusion in its later *Lugano* opinion,[20] where it appears clearly to indicate (paragraph 153) that a defendant's domicile in a Member State would prevail even over the express will of the parties as agreed in a choice of court clause (choosing, say, the courts of New York for resolution of disputes) or over the interests of a non-Member State in having proceedings about real property decided in its courts.[21]

38. We asked the Government if they thought the Commission should be considering a modification of the *Owusu* decision. Lord Bach replied that "[t]he short answer would be yes, it should consider such a course". He added "[w]e regret the inflexibility inherent in this decision and the significant restriction we feel it imposes on the availability of a valuable, procedural mechanism to deal with cases which should be more appropriately dealt with elsewhere" (Q 62) i.e. the principle of *forum non conveniens*. He made clear that it is the Government's intention to seek the reinstatement of the principle "at least in situations where no other Member States can assume jurisdiction … and where it is available under the national law of the Member State in question" (Q 62).

39. The Green Paper suggests that a common approach to subsidiary jurisdiction would strengthen legal protection for Community citizens. The Commission offers two alternative reforms:

    (i) Extending the scope of the rules governing "special jurisdiction" to apply as against third state defendants; or

    (ii) Creating new, special jurisdictional grounds for disputes involving third state defendants. These could be based on:

        (a) the location where the activities subject to the dispute were to be carried out,

        (b) the location of assets subject to the dispute, or

        (c) allowing proceedings to be brought within the EU when there would otherwise be no access to justice.

40. Mr Fentiman said that in two very important respects the Green Paper's approach to the problems raised by the Regulation's rules on subsidiary jurisdiction was "ambiguous" (Q 6). The first ambiguity, he said, was that "[a]t certain points [the Green Paper] gives the impression that the suggestion of extending the Regulation's rules to defendants domiciled in a third state is limited to cases where the claimant is domiciled in a third state"

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20 Opinion 1/03 [2006] ECR I 1145.

21 What the relevant head of jurisdiction would then be under the Regulation seems unclear, since Article 22 only applies to real property in a Member State. The implication of the Court's reasoning in paragraph 153 appears to be that the defendant's domicile in a Member State would give that State a jurisdiction which it would not normally have over a real property dispute. A different view of the position under Owusu v Jackson was taken by Colman J in the English Commercial Court in *Konkola Copper Mines Plc v Coromin* [2005] EWHC 898 (Comm). According to Colman J the English court could give effect by analogy with Article 27 to a choice of court clause in favour of a non-Member State. But this must be at the least very doubtful, following the Court of Justice's Lugano Opinion.

(Q 6). The second ambiguity concerned the *Owusu* decision, and was that the Green Paper's approach "suggests that the question of declining jurisdiction opposite a third state is one which arises only in the context of an extension of the Regulation to third state defendants" (Q 6).

41. The Green Paper recognises that the creation of uniform rules for claims involving third state defendants carries with it the increased risk of parallel proceedings in those states. Nevertheless, the Commission wishes to invite consideration of the extent to which courts in the Member States ought to exercise or decline jurisdiction in relation to third state courts. As examples of when jurisdiction should be declined, it cites choice of court agreements in favour of courts in third states, cases which would in a European context be cases of exclusive jurisdiction under Article 22 and situations where parallel proceedings are underway in third states.[22]

42. Richard Fentiman favoured extending the scope of the Regulation to apply to third state claimants whilst leaving in place national law so that a claimant would have the opportunity to invoke the Regulation's rules as a minimum standard of protection whilst national rules might still be available (Q 16). This, he argued, would avoid the difficulty "of trying to provide some homogenised set of uniform Community additional rules" (Q 18) agreement to which would be difficult at the European Community level. The only caveat Mr Fentiman attached to extending the Regulation's rules in this way was that there should be a connecting factor between the dispute and the Member State in which the litigation was pursued: "provided there is a subject matter connection between the dispute and [the Member State] it seems to me there is no difficulty about the fact that the defendant—or even the defendant and the claimant—come from third states" (Q 19). The Government's opinion was expressed by Oliver Parker who said that "we have no fundamental objection to such an extension of jurisdiction, provided that it is done in the right way". But he added "[w]e are still reflecting on what those terms should be" (Q 65).

43. **We consider that the scope of the discussion under the heading of "The operation of the Regulation in the international legal order" needs broadening.** The problems arising from the decision in *Owusu* need addressing. They arise at three different levels: (i) cases of exclusive jurisdiction (e.g. the situation, discussed above, where there is a New York choice of court clause or a dispute about New York real estate), (ii) cases of competing jurisdiction (e.g. where there is pending litigation in a Member State and in a non-Member State), and (iii) cases where it is obviously inappropriate for the proceedings to take place in a Member State (e.g. because the case has nothing to do with any Member State apart from the fact that one defendant happens to be domiciled here).

44. We appreciate that the last category of problems may be more difficult to address, in view of the probable resistance to any suggestion that jurisdiction should be determined by reference to anything other than fixed and pre-determined criteria. However, **closeness of connection is already a test with resonance in the Regulation (see Mr Fentiman Q 19 and Articles 6(1) and 28(3)), and we suggest that it might be possible to develop proposals drawing on this concept**.

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[22] See Commission Green Paper, section 2 pp 3–4.

45. The first two categories of problem require to be addressed in any event. In addressing them, it will be necessary to bear in mind that, although they may have been extended in scope by the Court of Justice's decision in *Owusu*, the Regulation's main jurisdictional rules were clearly designed to operate within a system of reciprocity, in other words between different legal systems of consenting Member States. We agree with Mr Fentiman that the same rules cannot automatically be extended to apply in the same way in relation to third states which have not formally accepted them and will not necessarily operate similar jurisdictional rules (p 13).

46. **A decision will clearly also be required as to whether any proposals to extend the scope of the Regulation to cover at a European level the exercise of jurisdiction against third state defendants should do so across the board, or only in cases of proceedings brought by claimants domiciled in a Member State.** The Commission's Report and Green Paper address only the latter. It may be that this is because it is not obvious what interest the Community has in regulating, for example, the jurisdiction of courts of a Member State over proceedings between persons domiciled in non-Member States (other than in circumstances where Articles 22 and 23 already do so). Such proceedings could for example be between a Japanese and a Brazilian concern about a shipbuilding contract, subject to English law. **If such cases are to be regulated at all, then it needs to be decided whether any harmonisation of jurisdiction in respect of them needs to be on a maximum basis or whether it would be sufficient to agree on minimum bases for the exercise of jurisdiction. We would favour the latter.**

47. English law has developed over a long period a series of heads (now contained in Civil Procedure Rule 6.20), under which jurisdiction may be exercised with the court's permission. This has been done in response to perceived needs, often no doubt needs relating to London's traditional role as a world trading and financial centre. These include heads of jurisdiction relating to contracts subject to English law or made here. While we have not ourselves undertaken any impact assessment, we are not presently aware that the existence or exercise of jurisdiction on this basis has given rise to any serious objections at an international level, and the Commission's Report and Green Paper do not suggest that it has. **Caution will need to be exercised before replacing the flexible basis which has been found appropriate hitherto with a fixed and perhaps narrower set of criteria on which jurisdiction not only may, but must, once invoked, be exercised.**

48. The Report and Green Paper moot the possibility of common rules on the recognition and enforcement in the Community of judgments given in third states. We regard this as a large topic. Attempts to achieve a worldwide judgments convention under the auspices of the Hague Conference failed. As we have noted, the United Kingdom is party to a network of (largely reciprocal) international conventions, and common law rules enabling judgments from states to which no such Convention applies to be recognised and enforced. **Whether any priority should be given to action regarding recognition and enforcement of third state judgments in this area on a unilateral basis, and whether there would be any real prospect of achieving agreement or any real advantage at a European level are, we think, matters open to doubt.**

Choice of Court: *lis pendens* and choice of court agreements

Lis Pendens

49. Articles 27–31 of the Regulation provide that where proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, any court other than the court first seised must stay its proceedings until such time as the jurisdiction of the court first seised is established (Article 27(1)). These rules, known as the rules on *lis pendens* (proceedings pending, here in different Member States), were developed to address the situation where cases covering the same litigants and the same facts are brought in two different Member States. The provisions aim to avoid such parallel proceedings and to minimise the risk of incompatible judgments on the same facts from differing jurisdictions.

50. The *lis pendens* rules give rise to two related problems identified in the Commission's Report and Green Paper. First, as confirmed by the Court of Justice in its case-law, Article 27 operates on a rigid basis, regardless of whether the proceedings first instituted were commenced with a genuine wish to pursue them to judgment or with any genuine belief or prospect of maintaining that the court in which they were instituted had jurisdiction under the Regulation. Second, and in large measure as a result, Article 27 is capable of being used (arguably abused) to frustrate or undermine a choice of court agreement or indeed an arbitration agreement (a tactic commonly known as the "torpedo").

Choice of court agreements

51. Subject to the rules on exclusive jurisdiction (see paragraph 34), parties are free to choose to pre-empt jurisdictional disputes by choosing a particular jurisdiction through a choice of court agreement also known as exclusive jurisdiction clause (see Articles 23 and 24 of the Regulation).

52. It is well known that litigants can use the *lis pendens* rules as a "torpedo", i.e. a mechanism to frustrate or undermine a choice of court agreement. The efficacy of this tactic was pointed out by a professor of intellectual property, Mario Franzosi,[23] who identified the possibility that under what is now Article 27 of the Regulation, "the enforcement of intellectual property rights would be paralysed" by commencing and taking to appeal proceedings in Member States with "slow-moving" jurisdictions.

The Torpedo

53. The Regulation provides clear rules to prevent parallel proceedings and in support of party autonomy. However, the only criterion is: which court was first seised? The rigid application, confirmed by the European Court of Justice in its case law,[24] of this single criterion, creates the potential for litigants to undermine the efficiency of proceedings and the efficacy of choice

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23 Professor Mario Franzosi "Worldwide Patent Litigation and the Italian Torpedo" [1997] 7 EIPR 38.

24 See in particular cases C-116/02 *Erich Gasser Gmbh v MISAT Srl* [2003] ECR 14; C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004] ECR I 3565. *J P Morgan Europe Ltd. v Primacom AG* [2005] EWHC 508 Comm is a well-known example of an English court having to stay proceedings, in the light of the Erich Gasser case, because of the existence of prior German proceedings commenced in obvious breach of a choice of court clause agreeing on the English courts as the forum for resolution of any dispute.

of court agreements. According to the Court of Justice's case law, a court which has manifestly been chosen by a choice of court clause within Article 23 must, before assuming its own manifest jurisdiction, await the declining of jurisdiction by another Member State in which proceedings have first been started. This encourages well-advised parties to race to court at the first hint of a dispute, either to establish the priority of, or to frustrate or delay progress in, the chosen jurisdiction. **In our view, it is undesirable that the legal framework should create such incentives in either direction.**

54. When asked whether the current rules on *lis pendens* and choice of court agreements give rise to significant problems, Richard Fentiman replied "[e]mphatically yes" (Q 24). He argued that "it is the inflexibility of the application of the rules of the Regulation rather than the practice of counter-claiming in another court or seeking negative declaration in another court which is the difficulty" (Q 5). He broke down this tension between the *lis pendens* rule and choice of court agreements into two distinct issues. The first is the strict application of the Article 27 rule, "even if the proceedings … are of a tactical nature" (Q 24), that is to say, the launch of a "torpedo" which has as its design the exploitation of the Regulation's jurisdictional rules in the defendant's interests. The second issue is the targeted launch of the "torpedo" specifically to frustrate a choice of court agreement (Q 24). This Mr Fentiman described as "one of the most glaring faults of existing regulation" (Q 30).

55. Mr Parker of the Ministry of Justice said that his impression was that amongst Government consultees and the other Member States "there is no general concern about the *lis pendens* rule … It may not be perfect; it may not be our traditional way, but I think people have learned to live with it" (Q 89). However, in relation to the specific problem of the deployment of the "torpedo", the Minister acknowledged that the strict application of the Article 27 rule "has had the effect of having significant problems for the UK in particular" (Q 80). Lord Bach said "it has undermined the ability of commercial parties effectively to select a jurisdiction to resolve their disputes … [and] it has created opportunities for tactical litigation … in jurisdictions that have not been agreed by the party". Nevertheless, the Government have not as yet reached a final view on reform (Q 80).

56. As to whether there was agreement amongst all the Member States that measures designed to defeat the "torpedo" were a priority, Mr Parker said "there may well be disagreement as to what the best solution should be but … there is a general agreement that it should not be possible to get round exclusive choice of court agreements … by tactical litigation involving torpedoes" (Q 84).

57. To alleviate the tension between the *lis pendens* rule and choice of court agreements and thus defuse the "torpedo", the Commission's Green Paper offers four options for reform.[25] These are:

    (i) to release the court designated by the choice of court agreement from its obligation to discontinue or stay proceedings under the *lis pendens* rule (i.e. to stay proceedings when it is the court seised second), or

[25] See Green Paper, section 3 pp 5–6 and section 5 at p 7.

(ii) to reverse the existing priority rule under Article 27, by giving priority to the court designated by a choice of court agreement to settle any issues as to jurisdiction, or

(iii) to suspend the *lis pendens* rule when the parallel proceedings are on the merits in one jurisdiction and for (negative) declaratory relief[26] in another, or

(iv) to enforce provisions in choice of court agreements by providing for damages to be recoverable in case of their breach.

58. Mr Fentiman concluded that "the neatest and cleanest and most effective solution to the problem … is simply to allow the named court to proceed" (Q 30) (i.e. option i. above). He went on also to say that it would be sensible to impose an obligation on the court in which the "torpedo" is launched to stay its proceedings while the court named determined any issue regarding its jurisdiction (Q 31) (i.e. to introduce option ii.). This would in effect reverse the position under Article 27. It would be necessary to define the circumstances in which this reversal would take place. There can be issues as to the existence (including validity), scope or application of a choice of court clause. The reversal could occur whenever a party maintains on arguable grounds that an issue is governed by a choice of court clause; or, whenever a choice of court clause manifestly exists and a party shows an arguable case for its application; or, whenever it manifestly exists and/or manifestly applies. We put these propositions forward for consideration in that order.

59. Option i. mirrors the solution adopted by the Hague Convention on Choice of Court Agreements. The chosen court is able to proceed, and the court first seised can also do so. There are concurrent proceedings, but the risk of concurrent judgments will be negligible in situations where the court first seised has been chosen for tactical or delaying reasons. In practice, a slow-moving jurisdiction will not arrive at judgment in any relevant time. In case it does, however, consideration needs to be given to providing in the Regulation that any judgment in proceedings brought contrary to an applicable exclusive jurisdiction clause will not be recognised in other Member States.

60. Potentially options i. and iii. and, depending on the test adopted, even option ii., raise some possibility of parallel proceedings—the spectre that Article 27 aims to despatch. But, even under the present regime of Article 27, there exists some possibility of competing jurisdictions, while the issue as to which court is competent is decided (a point on which, at least in theory, the relevant courts might also take different views). But Mr Fentiman doubted that the risk of competing proceedings is very real in practice (QQ 27, 28, 33). He argued that in the context of choice of court agreements, empowering the named court to proceed would remove "the incentive on the other party to launch pre-emptive proceedings somewhere else" (Q 30) and thus discourage the use of the "torpedo".

61. The Government argued that reform of the problem is "an important priority for the UK" and that "[t]he essential element in a satisfactory solution will be to ensure a court validly chosen is not subject to the *lis pendens* rule and

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[26] In most Member States, including the UK, it is possible for a potential defendant to seek from the courts a negative declaration setting out the limit of their liability. A declaratory judgment is issued by a court (i) on facts that have not yet arisen, or (ii) to determine the rights and/or liabilities of the parties.

should be able to continue to hear its proceedings notwithstanding that it is seised second" (Q 80)—a solution built around either option i. or ii. above.

62. Mr Fentiman expressed surprise at the inclusion of option iii, but considered it a "perfectly appropriate way forward", adding that it would mean that such cases in the future would be dealt with under Article 28 and would therefore fall under the discretion of the court seised second to decide whether or not to allow proceedings to continue (Q 25). However, whilst the Government said that this reform "deserves consideration" (Q 90), the suggested use of the discretion in Article 28 "is probably not a runner" (Q 93).

63. As to option iv., Mr Fentiman did not believe that the Regulation should be addressing remedies for breach of contract, however attractive the proposition (Q 34). The Government thought this reform "most unlikely" because it would be viewed as "a kind of first cousin to an anti-suit injunction and an improper attempt to influence jurisdictional decisions by courts in other states" (Q 123). We doubt it is helpful.

64. The Commission has also suggested prescribing a standard form choice of court clause to create clarity and expedite jurisdictional questions. Mr Fentiman recognised the neatness of this solution but doubted that everyone would welcome the prospect of the determination of the form of their jurisdiction agreements by somebody else (Q 33). Mr Parker said that this option had not been met with much enthusiasm (Q 124).

65. As a general panacea to problems raised by the Brussels regime, the Commission suggests encouraging direct communication and cooperation between the relevant national courts (see the sections of this report discussing industrial property and interim measures). Mr Fentiman doubted the effectiveness of this solution as it currently stands. He thought that "it is a very nice idea but I wait to see any concrete proposals" (Q 34). His view was echoed by Mr Parker "[w]e are not clear what this really means but we are open minded if it may have some value" (Q 87).

66. **We firmly believe that the current rules on *lis pendens* should be reformed.** We believe that the objective of seeking to avoid parallel proceedings is justifiable (though the risks and disadvantages of such proceedings are, we think, sometimes overstated). However, the implementation of this objective in the Regulation has inadvertently produced the possibility of abuse through the use of the "torpedo"—the tactical seising of a jurisdiction other than that agreed—and has also prevented the proper implementation of choice of court (exclusive jurisdiction) agreements. **The objective should be to discourage the use of tactical pre-emptive claims and to enable the appropriate court to hear proceedings.**

67. We welcome the statement in the Green Paper that the Regulation should ensure that agreements on jurisdiction are given full effect. This is consistent with the principle of party autonomy which we consider is an important consideration in legislative intervention in civil and commercial matters. The present position under the Regulation, which permits the operation of the "torpedo" is highly unsatisfactory and a cause of injustice.

68. Of all the options mentioned in the Green Paper, we see merit in the simplicity of allowing the court named in the parties' agreement to have exclusive jurisdiction (option ii.). In many cases, however, the same outcome would probably alternatively be achieved by simply allowing a court seised

second to proceed if it concludes that it is the chosen court (option i.). **We consider it preferable to adopt a general rule rather than one which refers to one kind of case (for example, proceedings for negative declaratory relief which can in some circumstances be brought on perfectly legitimate reasons).**

69. **We do not support the idea of recognising a remedy in damages. We think that it raises problems both of principle and of practicality. The Regulation is not the place to legislate for substantive remedies and the recognition in the Regulation of a claim in State A for the pursuit of proceedings in State B seems difficult to square with the Regulation's general philosophy of non-interference by the courts of one State in the affairs of the courts of another State. We also doubt whether the possibility of yet further proceedings for damages would sufficiently discourage the use of the "torpedo".**

70. **Closer communication between courts may well assist in resolving instances where parallel proceedings come into existence and it may be worth developing ways to improve such communication. But it will still be essential to provide clear rules in the Regulation to guide both the courts and litigants.**

71. **We doubt that it would be worthwhile developing a standard choice of court clause, and we would oppose any suggestion that use of such a form should be a pre-requisite to invoking Article 23.** Parties are likely to prefer to draft their own agreements, suitable to their particular circumstances and it cannot be assumed that all contracting parties would be aware of any such standard form. Provided that the Regulation enables such agreements to be given effect, differences in drafting seem unlikely to cause difficulties.

Industrial (or Intellectual) Property

72. The Commission's Report argues that litigation to enforce or challenge intellectual property rights (referred to in the Report as "industrial property") raises specific problems.[27] In particular, in intellectual property infringement actions time is often of the essence and this makes these actions vulnerable to the "torpedo" discussed above.

73. As the law in the European Community currently stands, patents are the creatures of national law: "They are not only limited territorially, but exist in parallel. Neither the Convention nor the Regulation specifically considered how parallel claims are to be dealt with … Parallel rights cannot give rise to single claims: only a cluster of parallel, although similar, claims."[28] Further, they may be infringed by a whole range of persons, from the manufacturer or its subsidiary, to an importer or distributor or supplier or user. So, intellectual property proceedings are often multi-jurisdictional and those claiming infringement of a patent often have a wide range of jurisdictional possibilities open to them. There is scope for procedural manoeuvring. A party may bring a claim for a declaration that he is not or will not be infringing a patent. And as soon as a claim is raised that a patent is invalid, that involves an issue which can only be decided by the courts of the place of registration of the patent (Article 22).

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27 For a recent English judicial discussion of the shortcomings of the Regulation in this area see: *Research in Motion UK Ltd. v Visto Corporation* [2008] EWCA Civ 153.

28 See Jacob LJ in the case quoted in the preceding footnote, at para. 5.

74. In the Green Paper the Commission refers to its own attempts to unify the patent litigation system but states that some of the problems could be addressed in the interim through reform of the Regulation. The Commission suggests a system whereby a connection to the best placed jurisdiction is determined by the domicile of the defendant coordinating the alleged infringement or the defendant with primary responsibility.

75. Richard Fentiman agreed. He praised the Green Paper's approach to intellectual property litigation (Q 36) and advocated reform of Article 6(1) of the Regulation so as "to consolidate all the proceedings against the various defendants in the courts of the place of the parent company which is orchestrating the infringements" (Q 38).[29]

76. Oliver Parker said that the Government were still reflecting on reform in this area. However, he was able to give some clues as to the Government's position on the proposed reforms of intellectual property litigation. He said that "where clear improvements can be made … they should be made and we would not want to postpone any improvements until we get a new agreement for a unified patent jurisdiction in the European Union" (Q 94). But he labelled as "controversial" the idea that the court in the state where the infringement took place should deal with issues about patent validity (Q 95).

77. Mr Parker was asked whether allowing a claimant to consolidate patent infringement actions from different patents in different countries in one country might encourage forum shopping. He replied "I entirely agree" and concluded that "it may be that a fully satisfactory and comprehensive solution will have to await a specialist instrument in this area" (Q 96).

78. It is evident, as the Commission and others have indicated, that disputes concerning intellectual property raise particularly thorny issues including, but not confined to, those associated with the use of the "torpedo" to seise a jurisdiction for reasons which are tactical, rather than part of any genuine wish or attempt to have the proceedings brought to judgment. The idea mooted by the Commission that Article 6(1) might be extended to permit joinder in a single jurisdiction of actions against different defendants for infringement of similar patents registered under different national laws could merely add to the scope for tactical manoeuvring. Since we have not ourselves heard evidence from experts in the field, we think that it would be unwise at this stage for us to make even provisional suggestions about the direction in which negotiations might proceed.

Provisional Measures

79. Under Article 31 of the Regulation, courts without jurisdiction to hear the substance of the matter may grant provisional and/or protective measures, for example interim injunctions.

80. The Commission's Report recognises that the diversity of national rules concerning provisional measures such as interim injunctions makes their mutual recognition and enforcement difficult, and identifies three areas for attention:

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[29] Beyond the tension between choice of court agreements and the *lis pendens* rule the Report also identifies a problem with the interaction between *lis pendens* litigation and related actions, i.e. actions brought by several multi-jurisdictional claimants against one defendant. Under the Regulation it is not possible to group these together into one jurisdiction. (However, Article 6 does provide for allocation into a single jurisdiction claims brought by a single claimant against multiple defendants.) The Green Paper suggests not only closer communication and cooperation between courts, but also either the creation of uniform rules addressing jurisdictional issues in multi-claimant class actions or the possibility of extending the rules in Article 6 to cover them.

(i) *Ex parte* measures, that is, orders issued by the court based on one party's request without notice having been given to the other party. In the case of Denilauler[30] the European Court of Justice ruled that such measures fall outside the scope of the Regulation;

(ii) Protective orders aimed at obtaining information or evidence, i.e. freezing orders or search orders. The Report states that the extent to which these fall outside the scope of the Regulation is not clear, see the St Paul Dairy[31] case; and

(iii) The criteria for establishing jurisdiction concerning applications for interim measures made before courts which do not have jurisdiction on the substance of the matter are not clear. The European Court of Justice has said that in these circumstances courts may grant interim injunctions on condition that there exists "a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the … court before which those measures are sought".[32] In addition, any assets to which the interim measure relates must be within the court's jurisdiction: see cases Van Uden[33] and Mietz.[34] In the case of interim payments, the claimant must guarantee via provisional payment or bank guarantee that, if the claim is eventually unsuccessful, the defendant will be repaid. This last criterion, according to the Report, has "given rise to difficulties".

81. The Green Paper suggests that *ex parte* measures should be enforceable on the basis of the Regulation when the defendant has had the opportunity, after the initial (*ex parte*) hearing, to contest the application. The Commission cites as inspiration Article 9(4) of Directive 2004/48[35] on the enforcement of intellectual property rights, which puts in place precisely that mechanism.

82. Lord Bach said that, while at present the Government were unable to state their final position on this aspect of the Green Paper's reforms, it is the Government's view that "the current rules on provisional measures … do not routinely give rise to significant problems in practice" (Q 111). In relation to the recognition of *ex parte* measures generally, the Minister said that "[i]t could be clarified that such measures should be recognised and enforced under the Regulation if the defendant subsequently has the opportunity to contest the measures in question" (Q 111).

83. As to interim measures made before courts which do not have jurisdiction on the substance of the matter, the Commission suggests a different approach. If there were greater communication and cooperation between the jurisdictions then the "real connecting link" test could be dropped, so long as courts with jurisdiction on the substance of the matter were able to modify or adapt

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30 C-125/79 *Bernard Denilauler v SNC Couchet Frères* [1980] ECR 1553.

31 C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I 3481.

32 C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I 7091 at paragraph 40.

33 *Ibid.*

34 C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I 2277.

35 Article 9(4) of Directive 2004/48 states: "Member States shall ensure that … provisional measures … may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder … A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed."

interim injunctions granted by other courts on the basis of Article 31. Mr Fentiman felt that this was a neat solution but "a recipe for uncertainty" (Q 49). This assessment was repeated by the Government: Oliver Parker warned that this reform could lead to a "double bite at the cherry" and "create a lot of legal uncertainty and … represent an unjustified interference with our court orders" (Q 112).

84. Overall, in relation to the problems caused by interim measures, Richard Fentiman advocated the maintenance of the European Court of Justice's current approach, arguing "that the secondary court can grant such relief as is available under its own law provided there is a sufficient link between the relief sought and the courts of that country" (Q 49). When the Government were asked if matters should broadly be left as they are, Mr Parker replied "Yes" (Q 115).

85. The issues concerning the treatment of provisional measures will not be simple to resolve. However, the Committee considers that it would undermine legal certainty and predictability and be in conflict with the principle, recognised by the Court of Justice, of non-interference by one court in the affairs of another national court if the courts of State A were able to vary or discharge orders granted by the courts of State B. It would in practice also remove most of the incentive to apply for relief in any state other than that seised of the substance and give rise to real practical problems, for example regarding costs. **In our view, the present rules for establishing jurisdiction concerning applications for interim measures made before courts which do not have jurisdiction on the substance of the matter and confirmed by the European Court of Justice should probably be maintained.**

The Regulation and Arbitration

86. While the Regulation applies generally to civil and commercial matters, Article 1(2)(d) specifically excludes arbitration from its scope. The Report argues that the rationale for excluding arbitration from the Regulation's scope is that the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which all Member States are parties, governs arbitration.

87. However, the Report has identified tension between the operation of the New York Convention and the Regulation, if and when parallel or ancillary court proceedings arise. For example, a party to an arbitration agreement may challenge the validity of the agreement, or the appointment of the arbitrator, or the venue for the arbitration. The intervention of a court to determine these questions will give rise to a number of problems not currently addressed by the Regulation. In particular, there are no rules on the allocation of jurisdiction in proceedings ancillary to arbitration, the recognition and enforcement of court judgments at odds with arbitral decisions or the recognition and enforcement of arbitral decisions themselves.

88. Some of these problems of giving effect to arbitration agreements are illustrated by the West Tankers[36] case.

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[36] C-185/07 *Allianz SpA, Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] 1 Lloyd's Law Reports 413.

BOX 3

The *West Tankers* Case

In August 2000 the Front Comor, a vessel owned by West Tankers and chartered by Erg Petroli Spa, collided with a jetty owned by Erg in Italy. The agreement under which the Front Comor was chartered was governed by English law and contained a clause providing for arbitration in England. Erg claimed compensation from their insurers Allianz and Generali and began arbitration proceedings in London for recovery of the excess. West Tankers denied any liability.

Having paid Erg their compensation Allianz and Generali brought proceedings against West Tankers in Italy in order to recover the sums they paid to Erg. West Tankers objected to the Italian jurisdiction on the basis of the arbitration agreement.

In the meantime, West Tankers began proceedings in the High Court in the UK seeking an injunction restraining Allianz and Generali from continuing their proceedings in Italy (commonly know as an anti-suit injunction). Their case went all the way to the House of Lords.[37]

In a reference to the European Court of Justice, the House of Lords asked whether it is consistent with the Regulation for a court in a Member State designated under an arbitration agreement as the jurisdiction of choice to make an order to restrain a person from commencing court proceedings in another Member State on the ground that such proceedings are in breach of the agreement.

The European Court of Justice held that although arbitration is excluded from the Regulation's regime, such orders could prevent a court in another Member State from exercising the jurisdiction conferred on it by the Regulation. Citing mutual trust in one another's legal systems and an individual's right to challenge the validity of arbitration proceedings, the European Court of Justice said that these orders were incompatible with the Regulation's regime.

89. The Green Paper argues that the operation of the New York Convention is satisfactory but suggests that the interaction between the Regulation and arbitration proceedings needs clarification in order to "ensure the smooth circulation of judgments … and prevent parallel proceedings". The Commission suggests partially removing the exclusion of arbitration from Article 1. The Commission hopes that this would bring court actions in support of arbitration, including interim applications, clearly into the Regulation's scope and clarify their interaction whilst assisting with the recognition and enforcement of judgments with a view to preventing incompatible and parallel decisions.

90. The Commission also suggests that reform could better facilitate the coordination of proceedings addressing the validity of arbitration agreements. For example, it suggests giving priority to the courts of the Member State of the seat of the arbitration in relation to decisions on the existence (including validity), scope and applicability of the arbitration agreement. Another possibility suggested by the Commission is the creation of a uniform conflict rule addressing the validity of arbitration agreements as a method for

[37] The Judicial Panel which referred the case to the ECJ included Lord Mance.

reducing the risk of one jurisdiction deciding that the agreement is valid whilst another says it is not.

91. Mr Fentiman described the Commission's proposal partially to delete the arbitration exception from Article 1 as "a very positive and welcome suggestion" (Q 41). However, his enthusiasm focuses on the idea that in order to support arbitration and arbitral awards the Regulation should provide for the "non-recognition of civil judgments inconsistent" with arbitration decisions (Q 41).

92. He described as "controversial" (Q 41) the Commission's proposal that the Regulation might support arbitration and coordinate legal proceedings ancillary to arbitration agreements by conferring on the civil court of the country in which the arbitration is seated exclusive jurisdiction. It is controversial, he argued, because in order to make this proposal work there must be a degree of certainty as to where the seat of arbitration is and this would necessitate the introduction of rules in the Regulation addressing that question. This is not straightforward, because of the problem in the differing approaches in the various Member States pertaining to conflict of law issues arising out of arbitration agreements. This problem is "not simply in how [the different Member States] answer the question of which law governs the validity of an arbitration agreement, but also of course as to whether or not that is a justiciable issue anyway" (Q 46). This, he felt, will make agreement at the Community level on the coordination of legal proceedings ancillary to arbitration difficult to achieve.

93. Mr Parker drew an analogy between the difficulties facing arbitration and the problems associated with the *lis pendens* rules and the use of the "torpedo" to defeat exclusive jurisdiction clauses. He said that as a consequence of the West Tankers decision, "English courts are no longer able to support arbitration proceedings … by issuing anti-suit injunctions to prevent competing court proceedings which have been brought in another Member State". This, he said, serves "only to undermine proper agreements by commercial parties to resolve their disputes in a particular way in a particular jurisdiction" (Q 98). As to the possibility of restoring the availability of the anti-suit injunction where foreign litigation is started in breach of an arbitration agreement, Mr Parker replied, "[o]ur assessment is that that is very unlikely" (Q 99) and "it is widely seen amongst the other Member States … as being contrary to the principle of mutual trust that underlies the Regulation" (Q 100).

94. The Government again stated that they have not reached any final views on how best to solve these problems but "[t]he trick will be to modify the existing exclusion of arbitration from the scope of the Brussels I Regulation but not to abrogate it any further than is necessary to solve the existing problem" (Q 98).

95. Arbitration is, as the Green Paper notes, of great importance to international commerce. **The underlying approach to the Regulation, excluding arbitration from the rules applicable to courts in the interests of the autonomy of arbitration proceedings remains, in our view, the right one. We agree with the Commission, however, that changes could usefully be made in the Regulation, the better to facilitate the resolution of disputes through arbitration, rather than the courts. The present blanket exclusion of arbitration from the scope of the Regulation does not provide the best solution.**

96. **We believe that the idea of giving exclusive jurisdiction to the courts of the Member State of the seat of the proposed arbitration to determine issues relating to the existence (including validity), scope and applicability of an arbitration agreement is a promising one.** While in many cases there should be no problem in identifying the seat of the arbitration, the international or non-national nature of some arbitration agreements may make it difficult to identify any clear seat before or even after their commencement. **It may therefore be necessary to consider introducing in the Regulation some rules to identify the seat in cases of doubt.**

97. We would also encourage the introduction into the Regulation of a provision, whereby judgments in court proceedings pursued in breach of an exclusive jurisdiction agreement would not be recognised in other Member States.

Conclusion

98. **We very much welcome the Commission's initiative in producing the Report and the proposals outlined in the Green Paper. While the Regulation has been successful, in particular by introducing clear common rules, there have undoubtedly been areas where some of the rules have, in practice, opened up the possibility for abuse contrary to the interests of justice. This opportunity should be taken to reform the rules with the aim of minimising abuse and to make other useful reforms. We hope the Commission will, following the conclusion of its consultation, move quickly to bring forward proposals to amend the Regulation.**

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Blackwell
Lord Bowness
Lord Burnett
Lord Kerr of Kinlochard
Lord Maclennan of Rogart
Lord Mance (Chairman)
Lord Norton of Louth
Baroness O'Cathain
Lord Rosser
Lord Tomlinson
Lord Wedderburn of Charlton (from July 2009)
Lord Wright of Richmond

Declarations of Interests

A full list of Members' interests can be found in the Register of Lords Interests: http://www.publications.parliament.uk/pa/ld/ldreg.htm

Members have drawn particular attention to the following interests relevant to this inquiry:

Lord Bowness
Regular remunerated employment
Streeter Marshall Solicitors
Notary Public (fees)

Lord Mance
Membership of public bodies
Member of Lord Chancellor's Advisory Committee on Private International Law (the North Committee)

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave oral evidence. Richard Fentiman also provided written evidence.

Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Mr Richard Fentiman, Reader in Private International Law, Queens' College, University of Cambridge

Mr Oliver Parker, Senior Legal Adviser, Ministry of Justice

APPENDIX 3: REPORTS

Previous Reports from the Select Committee

Codecision and national parliamentary scrutiny (17th Report, Session 2008–09, HL Paper 125)

Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report, Session 2008–09, HL Paper 76)

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister for Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: Evidence from the Minister for Europe and the Slovenian Ambassador (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62-I: Report, HL Paper 62-II: Evidence)

Previous Reports from Sub-Committee E

Access to EU Documents (15th Report, Session 2008–09, HL Paper 108)

European Contract Law: the Draft Common Frame of Reference (12th Report, Session 2008–09, HL Paper 95)

Procedural rights in EU criminal proceedings—an update (9th Report, Session 2008–09, HL Paper 84)

Initiation of EU Legislation (22nd Report, Session 2007–08, HL Paper 150)

Green Paper on Succession and Wills (2nd Report, Session 2007–08, HL Paper 12)

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Minutes of Evidence

TAKEN BEFORE THE EU COMMITTEE (SUB-COMMITTEE E)

WEDNESDAY 10 JUNE 2009

Present: Bowness, L; Burnett, L; Mance, L (Chairman); Norton of Louth, L; Rosser, L; Tomlinson, L; Wright of Richmond, L

Examination of Witnesses

Witness: Mr Richard Fentiman, Reader in Private International Law, Queens' College, University of Cambridge, examined.

Q1 ***Chairman:*** Good afternoon. Thank you very much for coming to see us, Mr Fentiman. In a moment I will invite you say whether there is anything you want to say by way or preliminaries. From our point of view I should say that this is a formal session, it is on the record; there will be a transcript which you will have the opportunity of seeing. Members' interests are in the register of interests. I simply mention an interest which I have which is as a member of the Lord Chancellor's Advisory Committee on Private International Law. I see that Mr Oliver Parker, who manages that, is here. We are going to have a meeting later this month and I shall be attending that to consider the very subject which you are here today to help us on. I think there are no other interests which need declaration at this stage which are not in the register. Is there anything you want to say by way of preliminary?
Mr Fentiman: I should say, first of all, thank you very much for the opportunity to be here and, by way of preliminary, that I regard the Green Paper and the suggestions it contains as presenting a very exciting opportunity. I think there is the real prospect here of being able to improve the rules of jurisdiction that operate in Member States.

Q2 ***Chairman:*** The Green Paper did generally praise the success of the Convention while recognising that it is always possible to think of improvements. I do not know whether you have any view as to whether there have been real problems.
Mr Fentiman: Certainly there are some specific problems which we are going to address in a moment. I think my overall impression is that the Convention as it was, and the Regulation as it now is, has actually operated fairly successfully. There are a number of difficulties which I think the English courts in particular have encountered. A general difficulty of course is the inappropriateness perhaps of many of the Regulation's rules in the context of the kind of high value, complex, multi-jurisdiction litigation which the English courts are very used to. However, I think certainly in general it has worked well. I would say as a corollary to that that I was very much struck by the impression that one gets from the Green Paper that perhaps the Commission is open-minded in the way of taking suggestions about reform, and I was very struck that some of the possibilities mooted are much more radical than I think an English lawyer would ever have supposed. If I can just take one example, which I know we are going to come back to, it came as something of a surprise to have the Commission itself suggesting that negative declarations might be taken outside the scope of Article 27 of the Regulation, which is something which English lawyers have long been concerned about but never really thought would happen.

Q3 ***Chairman:*** Having said that, there are occasions on which the English courts have used negative declarations or accepted them as a basis for jurisdiction and it has occasionally led to issues being determined here which would not otherwise have been determined.
Mr Fentiman: Indeed. I would say, perhaps for clarification, that I think the days are gone when we would regard negative declaratory relief as being inherently suspect. It does have a useful purpose. The difficulty which of course has been exposed by so many well known cases in the Court of Justice is that the process can be abused.

Q4 ***Chairman:*** Just focussing on that point, is there any particular way of distinguishing between actions for negative declaratory relief which are welcome and beneficial and those which are not?
Mr Fentiman: I think I would take as an example a case that was decided in the English courts only a few years ago, the case of *JP Morgan v Primacom*. Here I am thinking not so much of the grounds for a negative declaration. I am thinking of the fact that an application for a negative declaration was used as a way of launching a pre-emptive strike in another Member State so as to avoid an exclusive English

jurisdiction agreement. My point is that there is nothing inherently wrong, it seems to me, in launching proceedings for a negative declaration in another court if you have a substantial case, that is to say you actually think that the question of liability is something which needs to be resolved in that way and early. But more importantly it is perfectly possible to bring proceedings for a negative declaration if you have a genuine objection to the interpretation or the validity of a jurisdiction agreement. I think there is a distinction in that context between a situation where somebody launches proceedings in another Member State—perhaps using the negative declaration procedure as the vehicle—where they have a genuine objection to an exclusive jurisdiction agreement and a situation where they have no genuine objection and the reason is entirely tactical, that is to say that the proceedings are launched in the knowledge that they first state will ultimately give effect to the jurisdiction agreement. That is the kind of distinction I would make.

Q5 ***Chairman:*** We will get back to a more schematic approach in a moment, but just to conclude that point, that is an approach which the European Court of Justice has hitherto not adopted; it has not looked at people's motives or whether what is being done is abusive or whether it is even clear that it is wrong. It has simply applied mechanistically the principles of, for example, the court first seised of the matter must resolve it.
Mr Fentiman: Yes indeed, and I think it is the inflexibility of the application of the rules of the Regulation rather than the practice of counter-claiming in another court or seeking negative declaration in another court which is the difficulty.

Q6 ***Chairman:*** Let us now take the questions more schematically. The first question we want to ask is whether there are any areas of the Brussels I regime not mentioned in the Green Paper which in your view might merit reconsideration?
Mr Fentiman: In some ways this is a harder question to answer than might appear. I think it depends on how you read the Green Paper. In two very important respects it is ambiguous. At certain points it gives the impression that the suggestion of extending the Regulation's rules to defendants domiciled in a third state is limited to cases where the claimant is domiciled in a third state, and that is a question of course to which we will return. I am not convinced that it was intended that the question should be prescribed in that way, but certainly we should be mindful of the wider issue. Again, although English law is of course all too familiar with the difficulties that have followed in the wake of the decision of the Court of Justice in *Owusu v Jackson*, the treatment of that issue in the Green Paper rather suggests that the question of declining jurisdiction opposite a third State is one which arises only in the context of an extension of the Regulation to third state defendants. Again I cannot suppose that that was intended but it is very important to keep that issue firmly on the table.

Q7 ***Chairman:*** So what you are suggesting is that one might reconsider the appropriateness of the decision in *Owusu* in so far as it says that the Regulation governs the position between where you are choosing between the state of a defendant who is domiciled in Europe and a third party state outside Europe. You might, in other words, confine the Regulation to dealing with situations basically where you are choosing between two Member States rather than between Europe and the world.
Mr Fentiman: I would certainly not be averse to that possibility, though I wonder how realistic it is in the context of the present consultation. I think much more likely is that in designing the new rules (which I think we are going to have to have, dealing with declining jurisdiction in favour of third states) it might be possible to argue for a discretionary approach which is certainly much more familiar to English lawyers. In saying that, I am very hesitant to make it sound as if I am arguing for the preservation of the doctrine of *forum non conveniens* but, as we will see in answer to a later question, I find it very difficult to conceive of a sophisticated, practical regime governing declining jurisdiction in favour of third states which does not contain, in the form of some new uniform rules, an element of discretion which English lawyers would recognise and find congenial.

Q8 ***Chairman:*** Maybe also in that context because of problems of access to justice are likely to arise in relation to third party states.
Mr Fentiman: The point I wish to return to in answer to a later question is that what English lawyers would recognise as the second limb of the *Spiliada* test—that is to say the access to justice element in the English rules for declining jurisdiction—is going to be very necessary. In any new uniform rules the courts of Member States should not be required to decline to exercise jurisdiction where the effect is to send a claimant to a third State unless they are satisfied that access to justice is available in that state.

Q9 ***Chairman:*** Having dealt with that preliminary question, can we just touch on the question of *exequatur*. The Green Paper raises the possibility that one might abolish *exequatur* in relation to applications for recognition of judgments or enforcement and place the onus on a defendant, once a judgment is being enforced in a different state from the state it was given in, to apply to have the judgment set aside or in some way to resist

enforcement or recognition. What about that? Do you see that as justified?
Mr Fentiman: I do, yes. Perhaps I should preface my answer by saying that I think this particular revision is inevitable. I think this is regarded—and perhaps rightly so—by the Commission as being the inevitable fulfilment of the project which the Brussels Regulation (and its predecessor the Brussels Convention) represents, that is to say the more or less automatic enforcement of judgments between Member States. That is supported, I think, by practical benefits in terms of minimising the cost and delay of obtaining enforcement of a judgment. I think the abolition of *exequatur* is probably relatively uncontroversial. Perhaps more difficult are the issues raised in your question three.

Q10 ***Chairman:*** Yes, I was going to ask about that. The Commission floats the idea that you might also, at the same time, remove some of the grounds for resisting recognition or enforcement and it says two things, firstly that they are pretty rarely invoked and secondly it questions whether they are justified. They are, of course, manifestly contrary to public policy, given in default of appearance without an opportunity to appear, irreconcilable with a prior judgment between the same parties in the Member State in which recognition is sought and irreconcilable with an earlier judgment given in another Member State between the same parties on the same point. What do you say about that?
Mr Fentiman: I think the only firm proposal is to simply remove the public policy defence on the basis that it is rarely invoked, and in any event the European Court of Justice has made it clear that the grounds on which it can be invoked are now so narrow. Whether or not one allows the courts of one Member State to employ their public policy to review the enforcement of a judgment obtained somewhere else is in a sense a political question, and I mean that in the broadest sense of the word. That is to say, is it appropriate in the Community? Is it appropriate on the basis of the relationship of mutual trust which exists between Member States for one Member State to operate in that way? I think the practical difficulty, which I am sure could be addressed in relation to public policy, is simply that English lawyers are familiar with the defence of fraud to the enforcement of a foreign judgment. By fraud in this context of course we mean procedural fraud, that is to say the fact that a claimant in the foreign proceedings may fail to disclose evidence or may inflate its loss. The only way as it stands for allowing a court to deny enforcement to a foreign judgment on that basis is to employ the public policy exception. Public policy is broad enough to embrace fraud so I think if one were to dispense with public policy it would have to be on the assumption that fraud is otherwise dealt with specifically.

Q11 ***Chairman:*** Presumably the argument in relation to fraud is why should it exist as a ground for objecting at the recognition stage? Why should the party not go to the jurisdiction where the judgment was given and have the judgment set aside if it was given on the basis of fraud there?
Mr Fentiman: I would agree with that limitation. I think it is clear that if the defence of fraud is available in another forum then it is the other forum which should deal with the issue and that a defendant should not raise fraud in English proceedings as a defence. I think that is taken for granted. It is more to do with the possibility that fraud might be invoked in the limited circumstances where perhaps it was not possible to address the question of fraud in the court of origin.

Q12 ***Chairman:*** The public policy exception, although the European Court has said that it should be construed narrowly, still has some potential application. One example is perhaps if the foreign proceedings were in breach of a decision of the Member State where recognition was sought which declared that they should not be being pursued because they were in breach of an arbitration clause. That is an idea which has been floated.
Mr Fentiman: I suppose the answer would be that that is perhaps one of the least controversial of the proposals which has been put forward in relation to the reform of arbitration. That issue could be dealt with in a separate way.

Q13 ***Chairman:*** Perhaps a general observation might be that since the Commission points out that grounds of objection are rarely invoked—not just in relation to public policy but generally—what is the harm of allowing those which are already recognised to continue to exist?
Mr Fentiman: On balance I would certainly favour the *status quo*. It seems to me that there is no demonstrable need for change in this area.

Q14 ***Chairman:*** Can we go onto the question which we have already touched on which is the operation of the Regulation in the international legal order and the proposal that it should be extended in scope so as to cover claims against defendants domiciled outside Europe. At the moment basically it is concerned with defendants domiciled in Europe and, as you pointed out a moment ago, it is unclear whether this proposal is dealing with claims against defendants domiciled outside Europe solely by claimants domiciled inside Europe, in other words is it pretending to regulate the situation where there is some European connection

or is it also dealing with claims against third party defendants by third party domicile claims?
Mr Fentiman: I should say first of all that the excellent report by Professor Nuyts, which deals with the question of residual jurisdiction on which this proposal is based, of course ranges far more widely. It suggests a possible limitation by limiting these rules to cases where the claimant is domiciled in a Member State. It certainly does not come down in favour of that view and I am not aware that any policy decision has been made to do that. Certainly I think that it would be wrong for a number of reasons to limit any extension to the case where the claimant is also domiciled in a Member State. One obvious reason for that is that it is inconsistent with the position which already obtains under the Lugano Convention. The point about the Lugano Convention of course is that it extends in effect the rules of the European jurisdiction judgments regime to EFTA countries. The effect of this of course is that it is perfectly possible to have proceedings in an English court involving a defendant who is domiciled in Switzerland, those proceedings being based on jurisdiction under Article 5 of the Lugano Convention, and in that situation it is already possible for the claimant to come from a third state because neither the Brussels Regulation or Lugano Convention is limited in that way. In other words, we already have the prospect of the third-state claimant suing a third-state defendant, and in this context of course the Swiss defendant would be in European Community terms a third-state defendant. It is perfectly possible now to have this situation and it is not clear to me why things should be different under the Regulation. It is also worth saying that I suspect what lies behind the Commission's thinking, and the way in which it is expressed in the Green Paper, is that because it gives us a demonstrable community benefit, there is a reason to have rules which strengthen the position of persons established in a community. But that of course in no sense means that those rules should then be denied to those who are not; it simply means that the impetus for the change is that they would assist the Member State claimant.

Q15 ***Chairman:*** Yes, I was going to ask about that. The Commission's reasoning is that people suffer through the absence of common rules and the Commission suggests—because some states do not have such broad rules of jurisdiction as others—that you should have common or harmonised European rules. Does that follow? If people are lacking access to justice in some Member States is it not sufficient to provide for minimum rules of jurisdiction? Why provide for common rules of jurisdiction which may, in the case of other Member States, actually reduce access to justice?
Mr Fentiman: I think that question certainly goes to the issue of how this would be achieved.

Q16 ***Chairman:*** Is there a difference between harmonised minimum rules and harmonised rules above which you cannot go by given further access?
Mr Fentiman: I would favour a solution whereby we have an extended Regulation, that is to say it extends to third state defendants. Very broadly the rules of jurisdiction will be those comprised particularly in Article 5 and Article 6 of the Regulation. But I would not see that as being in any way inconsistent with the retention in Member States of the residual rules of jurisdiction which they already have. In other words, a claimant has the opportunity to invoke these rules and that gives them the minimum level of protection, so to speak. The claimant knows that those rules are available and that is without prejudice to any other rules which might also be available.

Q17 ***Chairman:*** I do not know whether you have done an analysis but if you restricted English jurisdiction by reference to rules along the lines of Article 5 of the present Brussels Convention in relation to third state defendants, there could be quite a number of cases where the English courts would no longer have jurisdiction.
Mr Fentiman: Indeed.

Q18 ***Chairman:*** I am not talking about the sorts of cases where a Japanese contracting party is sued at Ascot, I am talking about the more serious cases where you have a contract which is subject to English law or made in England which would not be a ground of European jurisdiction but which is not an infrequent ground of English jurisdiction.
Mr Fentiman: As I mentioned, my solution would be to leave those rules in place, and the equivalent rules in other Member States. I should say that I think that the easiest way to deal with this is to leave national law in place rather than to go down the alternative and perhaps rather more complex route of trying to provide some homogenised set of uniform community additional rules. I think it might be very difficult to achieve agreement on those.

Q19 ***Chairman:*** What would you say Europe's interest was if it sought to harmonise rules by setting maxima as well as minima criteria for jurisdiction?
Mr Fentiman: In a way it depends what we mean by Europe's interest. That can mean two things of course. It can go to the complex question about the Community's competence to legislate in this area. I do not think we need to discuss that because that is clearly established by the Lugano Opinion. The second question, assuming the Community has competence—that is to say if this is a problem which it can address by Community rules—is this: is it

appropriate in the particular circumstances, for example of Article 5, for Community rules to deal with the issue? I think my answer to that question is that the question as to whether the Community has an interest is actually no different from the question whether any Member State, including the United Kingdom, has an interest in dealing with situations where a defendant is foreign and the only link between the dispute and the court is the subject matter of the dispute. In English law as it stands, if we have a New York defendant it is perfectly possible for that New York defendant to be sued in the English courts on the basis that it breached a contract in England. That is to say that the English court would have subject matter jurisdiction. That is no different from saying that the established rules of the Regulation should operate in such a case. In other words, I think my answer to the question is that this simply depends on asking very familiar questions about jurisdictional competence; provided there is a subject matter connection between the dispute and England it seems to me there is no difficulty about the fact that the defendant—or even the defendant and the claimant—come from third states.

Q20 ***Chairman:*** The difficulty is perhaps likely to be that the common law has generally taken a broader view of international competence than the civil law. The civil law judges may decline jurisdiction in cases which London, as an international legal centre and commercial centre, regards as appropriate to be decided here.

Mr Fentiman: Yes, that is certainly true and I am very conscious of the fact that, if one suggests that national rules should be retained in addition to an extension of essentially Article 5, English law does very well out of that arrangement because our residual rules are so broad.

Q21 ***Chairman:*** One must assume that jealousy does not determine European policy. Moving on, the Commission suggests that the Regulation might contain provision for third state judgments to be recognised and enforced in the Community. Bearing in mind the recent failure of the Hague Conference negotiations to achieve any form of world-wide judgments convention, is that a realist suggestion? If so, under what conditions and subject to what protections might European courts consider extending recognition to third state judgments which could be anywhere from the United States with heavy punitive damages to Australia with quite restrictive damages for personal injuries to Indonesia where I do not know the position. Should this in any event only be on the basis of reciprocity?

Mr Fentiman: I do not see why the failure of the Hague Judgments Convention in its broad form should really be a difficulty because of course we are not suggesting here that there should be a reciprocal treaty between the Community and third states. In other words, the reaction of third states is not an issue. I think the difficulty really is this, that in order to have harmonised rules for the recognition and enforcement of third state judgments you could not of course make the same assumptions which we make when it comes to the enforcement of Member State judgments because of course there is no reciprocity. The principle of mutual trust does not operate between Member States and non-Member States. In other words, in order to make it work you would have to devise a set of rules which contain not merely defences to the enforcement of foreign judgments but also give you grounds on which you thought there was a sufficient jurisdictional connection between the defendant or the dispute and the foreign court in order to justify exercising jurisdiction. In other words, you would have to have rules of what English lawyers know as jurisdiction in the international sense. Although English law has very straightforward rules on that question I am not at all confident that it will be easy to find agreement on the conditions under which a sufficient connection existed where non-Member States justified enforcing one of its judgments.

Q22 ***Chairman:*** Just going back to the first part of that answer, is there not something slightly surprising about the proposition that we in Europe should give to the rest of the world recognition of their judgments without any *quid pro quo*, without any negotiation or agreement with them that they would give recognition to our judgments? That is going far further, as you pointed out, than the Hague Conference negotiations.

Mr Fentiman: I think my colleagues in other Member States might find that very surprising because they are used to a system where, the Brussels Convention and Regulation aside, the enforcement of judgments is achieved by means of either a principle of reciprocity or reciprocity expressed in a bilateral convention. For an English lawyer I do not think it is a surprising proposition that we do this without reciprocity because reciprocity does not for us form the basis of our common law rules for the recognition and enforcement of foreign judgments. It is simply the existence of a sufficient degree of connection between the dispute and the foreign court. In that sense perhaps this proposal is much easier for English lawyers to comprehend and endorse than for others.

Q23 ***Chairman:*** As long as the conditions are sufficiently fair and tight, which will be difficult, this is in principle not an objectionable proposition.

Mr Fentiman: No.

Q24 ***Chairman:*** Moving on to choice of court agreements and actions pending in two states (*lis pendens*) and related actions which exist in two states. Do the current rules in these areas give rise to significant problems?
Mr Fentiman: Emphatically yes. I think there are two problems which are conceptually distinct but in practice they tend to come together in particular cases. First of all there is the problem that Article 27, that is to say the simple *lis pendens* rules (which require a court in a Member State to decline jurisdiction in favour of another Member State where the other Member State is first seised) are activated even if the proceedings in the first state are of a tactical nature, principally of course if they are so-called "torpedo" proceedings, if they are brought typically for a declaration of non-liability. That is a general problem about the operation of Article 27 which is quite distinct from the separate problem (which I think is the problem which is perhaps foremost in the minds of English lawyers) which arises when that rule is exploited in those cases where the court second seised has jurisdiction by virtue of an exclusive jurisdiction agreement. I think there are two problems here. First of all there is the general problem of the very inflexible operation of Article 27, and then its particular application in cases involving exclusive jurisdiction agreements.

Q25 ***Chairman:*** What amendments or improvements would you favour?
Mr Fentiman: I was struck—and I must say surprised—by the suggestion in the Green Paper that one solution to the Article 27 problem would simply be to exclude negative declaratory relief from its scope. Over the years we have become very used to the fact that that is simply how the Regulation works. But those of us with long memories will recall that when the case which established that proposition went to the Court of Justice—the case of *The Tatry*—English lawyers argued strongly at the time that it was not appropriate to extend Article 27 in that situation. My feeling would be that that is a perfectly appropriate way forward because the effect would be, I assume, that all those cases would then fall within the remit of Article 28 which would give the court second seised a discretion to decide whether or not to allow proceedings to continue.

Q26 ***Chairman:*** Would that solve the problem? If you do adopt that course it means you have two sets of proceedings continuing: you have the proceedings in what an English lawyer might regard as the correct forum (perhaps the chosen forum, chosen by some contract clause) and you also have the proceedings of negative declaratory relief elsewhere. I suppose you could say that English law courts are generally quicker than many other courts—even if they are more expensive—and would resolve the matter quicker. It is not a very happy situation, is it?
Mr Fentiman: I take the remarks in the Green Paper suggesting that Article 27 might be reformed in this radical way as being an invitation to re-think in a radical way the operation of Article 27 and its relationship with Article 28. I am not suggesting that one should suddenly tolerate the possibility of parallel proceedings and irreconcilable judgments. What I am saying is that there is a much more flexible way of dealing with the problem of parallel proceedings and irreconcilable judgments than a rigid application of Article 27 and that way is to use the discretion which clearly exists under Article 28. We know, not from Court of Justice authority but from a famous opinion by the Advocate General in the case of *Owens Bank v Bracco*, that the grounds upon which the Article 28 discretion might be exercised include, for example, consideration of how far advanced the proceedings are in the first court and the second court, and the degree to which the two sets of proceedings are indeed related. I think what I am suggesting is simply to exploit a solution which the Regulation endorses in any event in those cases that fall within Article 28 and use that as the primary mechanism for resolving the problem of parallel proceedings.

Q27 ***Chairman:*** Can I press you on that? Perhaps I am missing something but I do not understand how it really resolves the problem because surely all that Article 28 applied in the way you are suggesting would mean was that if the court chosen by, for example, a choice of court clause happened to be second seised it could carry on with the proceedings but so could the first court so you would get parallel sets or proceedings in different countries. If the first court was chosen for tactical reasons as a court where proceedings go slowly then perhaps that would not matter because the second started proceedings would reach a result first. There is still the problem of parallel proceedings, is there not?
Mr Fentiman: I am not suggesting that this particular proposal would operate in a situation where the court second seised has jurisdiction by virtue of an exclusive jurisdiction agreement. It seems to me that that represents a distinct problem and there is a way to give that jurisdiction agreement a strong protection. I am thinking only of the situation where the two Member States exercise jurisdiction on, as it were, equivalent grounds rather than one court having exclusive jurisdiction. I think the answer to that is that there is of course a risk of parallel proceedings. There is of course the risk of irreconcilable judgments. However, in reality, it is unusual for two sets of proceedings to continue in

two jurisdictions on the same or closely related points and proceed to judgment simply because it is very unlikely that the parties in both sets of proceedings would have the resources to devote to fighting on two fronts. Although I do not wish to suggest an entirely radical rethink of the objectives of the Regulation, one thing which has always struck English lawyers is that in one sense the over-riding objective of avoiding irreconcilable judgments—and avoiding parallel proceedings because they lead to irreconcilable judgments—although it is theoretically very sound, is in a sense an unreal problem. That is to say it is so unlikely in practice that you would get the two sets of proceedings culminating in competing judgments that the more important objective is to have flexible mechanisms for reconciling the conflicts of fora at an early stage. I fully accept the theoretical risk of parallel proceedings and irreconcilable judgments but I am uncertain whether the risk is a real one.

Q28 ***Lord Bowness:*** You say it is an unlikely risk in the sense that perhaps it has not happened before, but if this was a case between two very large global organisations—some of which have resources now that we have not seen before—does it in fact become more likely if the stakes are high enough?
Mr Fentiman: In one sense of course it is more likely but I think one should never underestimate the willingness and the desire of parties—especially commercial parties who are investing large amounts of money in litigation—to resolve their differences by means of a settlement. I think the background to what I am saying here is that it is well-known that the purpose of litigation is not judgment, it is settlement; in other words the litigation process is the background against which the parties resolve their differences out of court. Yes of course the risk is in a sense greater but I think in practice it is much more likely that the parties will resolve their differences by other means.

Q29 ***Chairman:*** Perhaps the problem is that the courts see the cases where that is not the main intention of the parties.
Mr Fentiman: Yes.

Q30 ***Chairman:*** Can I just direct your attention to what appears to be the Commission's primary suggested solution, mainly focussing I think on cases where there is an exclusive choice of court agreement? The Commission seems to be suggesting that one might in some way reverse the present rule and not just release the court designated from its obligation to stay in the way you are suggesting but perhaps also go on to give it primary jurisdiction to decide over matters of jurisdiction and whether the choice of court clause covers the dispute in particular. What do you think of that proposal?
Mr Fentiman: I think it is certainly very important that the Commission has taken what many English lawyers regard as being one of the most glaring faults of the existing Regulation so seriously. I think there is also no doubt that the neatest and cleanest and most effective solution to the problem we are now discussing is simply to allow the named court to proceed. I think there is a broad consensus behind that proposal, the point being of course that again you may well say, "Does that not lead then to the possibility of parallel proceedings and irreconcilable judgments?" I think the effect of allowing a named court to proceed is simply that the incentive on the other party to launch pre-emptive proceedings somewhere else simply disappears.

Q31 ***Chairman:*** I think what you have just described is really a repetition of the previous point you were making and what the Commission was suggesting was going further and saying not only could the named court proceed but any other court should stay its proceedings. That would raise the question of how you would decide whether there was a named court which had the right to proceed, what is the test, that it looks *prima facie* as if there is? Very often the issue is whether the named court has been named or whether the clause is wide enough to direct this dispute to a particular named court and so on.
Mr Fentiman: I would say first of all that I think the suggestion is that the court first seised—the court in which the pre-emptive strike is made—has an obligation to stay. I would not argue against that; that is a sensible suggestion. However, it does not solve the problem which has so often arisen in the context of the Regulation which is that a party launches a pre-emptive strike, perhaps even in the knowledge that they have no legitimate grounds for asserting the jurisdiction of a named court, relying on the fact that it will take some time—perhaps a very long time in the case of some Member States—for the issue of jurisdiction to be resolved. To say that the court first seised has an obligation to stay is a sound proposition but how long is it going to take for the court first seised to be in the position of deciding whether or not it should stay? The mere fact that a party who is a party to an exclusive jurisdiction agreement is required to defend proceedings in another Member State is the difficulty. The fact that they may well win in a jurisdictional challenge is perhaps much more likely if there is an additional jurisdictional challenge which can be made. But that does not solve the problem of the pre-emptive strike totally.

Q32 ***Chairman:*** If you compare the present Brussels I regime in this area with the Hague Conference Convention on choice of court agreements which applies outside Europe, would you favour something

more akin to the Hague Convention approach in lieu of the present Brussels I regime, in other words a straightforward statement that courts designated an exclusive choice of court agreement to have jurisdiction; other courts, whether they are first seised or not, should always suspend or stay their proceedings.

Mr Fentiman: In essence that solution is no different in its practical application to the solution which we have just discussed; it is simply expressed in a slightly different way. The problem, if I may say so, about the Hague Choice of Court Convention to which you referred is that when it is in force that will give rise to a very special and technical difficulty. There will be certain circumstances in which the relationship between two Member States' courts, one having jurisdiction under a jurisdiction agreement, the other seised pre-emptively, will fall within the scope of the Hague Convention, and certain circumstances in which they will fall within the scope of the Brussels Regulation. As the Regulation stands now of course you get a completely different result depending on which you apply and that is why it is important I think—whether by using the same language is not material—to ensure that in future the substance of a solution provided by the Regulation replicates the substance of the solution in the Hague Convention.

Q33 ***Chairman:*** Going back to what you said at the very outset, one way of resolving some of the problems might be to look at the party's motivation, look at the extent to which it was manifestly clear that an exclusive choice of court agreement existed. That could be a relevant consideration or part of the test, could it?

Mr Fentiman: The idea of introducing what one might describe as considerations of good faith into the problem of parallel proceedings is attractive. To a greater or lesser extent of course the English courts traditionally have done this. The anti-suit injunction—not operational of course any longer in the European context—is animated by that idea. My sense is that a solution to this problem which came down to courts having to assess the motives of the parties is not one which would be attractive in other Member States where I think there is a strong feeling that those are questions which judges should not be asking. I think the solution is actually rather a different one, if I may say so. The question really is this: we need to be clear that the named court in exercising jurisdiction is doing it in circumstances where there is no realistic possibility of the court first seised assuming jurisdiction and exercising jurisdiction. That is a difficulty of course which is addressed in the report by Professor Hess and his colleagues by saying that one could have a standard form approved Euro jurisdiction agreement which, if used in a particular case, would guarantee, because of its very existence, that the court second seised would be entitled to take jurisdiction and the court first seised would be required to decline jurisdiction. That of course is a very neat solution because it does not require any further or more complex consideration of the validity of the jurisdiction agreement. That is one way of doing it. I think the difficulty with that suggestion is that in the context of complex commercial transactions (certainly financial market transactions) I am not at all certain that the parties to those transactions especially want to have the form of their jurisdiction agreement determined by somebody else. I think there are other difficulties of course and my impression is that what is contemplated here by the Euro standard form is a very simple form of bilateral jurisdiction agreement which is far simpler than the kind of jurisdiction agreement which is common in commercial practice. My conclusion is that it is actually very difficult to use that as a way of ensuring with absolute precision that the court second seised indeed has jurisdiction and the court first seised does not. At the end of the day we simply have to fall back on the position that was rather bravely taken by the Advocate General in the case of *Erich Gasser v MISAT* that there is a risk of parallel proceedings but the risk is actually a very small one because in reality the courts are unlikely to disagree that the court second seised indeed has jurisdiction under Article 23 and the court first seised does not.

Q34 ***Chairman:*** What about yet further alternative suggestions made by the Commission: direct communication and cooperation between courts and the possibility of strengthening the efficiency of jurisdiction agreements by the granting of damages for their breach. Do you want to say anything about that?

Mr Fentiman: I think every practitioner and every commentator has a long shopping list of possible changes of that sort which might strengthen the position of jurisdiction agreements and I think one could not say no to any of them if that is their effect. There are of course others, for example ensuring that a judgment given in breach of a jurisdiction agreement is not enforced. I think the difficulty with those, however, is that ultimately what you have to do is to remove any incentive on one party to launch pre-emptive proceedings and that is really only achieved simply by allowing the named court to exercise jurisdiction. As to the proposals that you began with, the idea of cooperation between courts and the notion of damages, I would say first of all that I think, like many people, I am actually rather puzzled as to what cooperation between courts might actually involve. I think it is a very nice idea but I wait to see any concrete proposals. As to the issue of damages, I think this is important and it ought to be possible—

although there are serious difficulties especially in the European context—to obtain damages for breach of a jurisdiction agreement but I am unsure that the provision of remedies for a breach of contract is really something which the Brussels Regulation should be addressing, however attractive the proposition.

Q35 ***Chairman:*** Also it might seem a little inconsistent with the general thrust of the Brussels Regulation which is that you do not interfere with the exercise of jurisdiction by other courts. If you then award damages against someone who has pursued proceedings before another court that seems to be a bit inconsistent.
Mr Fentiman: Indeed, yes.

Q36 ***Chairman:*** That is very helpful, thank you. How far does industrial property raise special problems? It certainly raised quite a number of the same problems but are there other problems?
Mr Fentiman: Fortunately perhaps this is one area of suggested reform where the problems are very familiar and are clearly and correctly identified by the Green Paper, and where the solutions equally have a broad consensus behind them. I think in one way these suggestions, in relation to industrial property—essentially patent litigation—are entirely unobjectionable. I am thinking in particular of the amendment to Article 22 and the change to Article 6(1). They would simply remove anomalies in the operation of those rules to bring them much more into line with the realities of patent litigation.

Q37 ***Chairman:*** Perhaps you could just summarise the proposals and Article 6(1), the possibility of suing connected defendants and Article 22, the related actions point.
Mr Fentiman: The difficulty is that Article 22 makes it clear that in matters affecting the validity of a patent the court of the place of registration is the court which has exclusive jurisdiction. The practical effect of that rule is that if one party sues another in England for the infringement of a patent, all the defendant has to do is raise an issue of validity at which point, as things stand, the English court is obliged to decline jurisdiction in favour of the court in the country in which the patent was registered. This of course is a very effective ploy which is sanctioned entirely by the present wording of Article 22 but is entirely at odds with the reality of patent litigation in which questions of validity arise almost invariably in the context of infringement proceedings.

Q38 ***Chairman:*** It is probably also in contrast with the reality of the situation which is likely to be a European patent.
Mr Fentiman: Indeed, and the suggestion here is that the court seised of infringement proceedings should henceforth have a discretion to stay its proceedings rather than an absolute obligation to do that, although perhaps for a limited period of time. That suggestion is broadly welcomed by those who practise in this area. As to Article 6(1), again the difficulty is that it involves a technical anomaly which is fairly easily solved. Article 6(1) is the provision which, in principle, allows a third party defendant—a co-defendant—to be joined in proceedings in one Member State in situations where a single defendant is orchestrating the infringement of a patent through its subsidiaries in other Member States. The obvious way to deal with that kind of situation where in effect the same patent—I do not mean that in a legal sense—is infringed in different Member States is to consolidate all the proceedings against the various defendants in the courts of the place of the parent company which is orchestrating the infringements. As it stands Article 6(1) does not allow you to do that but the suggested change to Article 6(1) (which is set out very helpfully in the Heidelberg Report) would allow consolidation of proceedings in that situation.

Q39 ***Chairman:*** Why does Article 6(1) not cover it?
Mr Fentiman: It does not cover it because an infringement of a patent in a Member State gives rise to a separate cause of action in each of those Member States. When you are suing the defendant—the parent company—in court X, necessarily each of the subsidiaries is actually a defendant in a different proceeding and cannot be viewed as a co-defendant in the Article 6(1) proceedings.

Q40 ***Chairman:*** They are related proceedings rather than co-defendants.
Mr Fentiman: Yes.

Q41 ***Chairman:*** We have discussed competing litigation both generally and in the context of choice of court clauses and industrial property, what about the situation where you have a competition between litigation and arbitration? The Commission has suggested that certain specific points relating to arbitration might be addressed "not for the sake of regulating arbitration, but. . . to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings". On that basis it suggests a partial deletion of the arbitration exception and the assignment of jurisdiction over various points relating to arbitration to the law and courts of place of arbitration. Do you agree?
Mr Fentiman: I should begin by saying that I think this is a very positive and welcome suggestion in that it makes respectable—if I can use that word—a possibility which at one time was regarded certainly amongst arbitration practitioners as being absolutely

unthinkable. If at one time you had said to arbitration practitioners that arbitration should in some sense fall within the scope of the Brussels Regulation they would have said no, and indeed in their replies to the questionnaire that was sent out to different Member States by the Heidelberg team they did say no. However, what is now clear—and became clear in the Heidelberg Report and is clear in the Green Paper—is that a fine line is going to be drawn and that the objective of this is simply to facilitate and not to regulate in an intrusive way the conduct of arbitration. I think the first thing to say is that this has put something on the table by the way it is expressed which I think previously many arbitration practitioners would have discounted. The question is, how successfully are the proposals in the Green Paper going to achieve that? The proposal that you support arbitral awards by providing expressly for the non-recognition of civil judgments inconsistent with those awards has been universally welcomed. That, in a very obvious sense, is a way in which the Regulation can support arbitration. I think less clear and much more controversial are the proposals for co-ordinating ancillary proceedings in different Member States in matters concerning arbitration. That is to say, in particular, attempting to regulate parallel proceedings in different Member States concerning the validity of an arbitration agreement. The suggestion is that essentially the civil courts of the country in which the arbitration is seated will have exclusive jurisdiction in that matter. In principle that is something which is hard to object to and in principle it achieves the harmonisation of a particular area of civil litigation, that is to say civil proceedings concerning arbitration, and in a sense of course it is supportive of arbitration by adding clarity to the validity of a jurisdiction agreement. The difficulty however is this—and it is a very serious difficulty—that if we in effect allocate exclusive jurisdiction in any matter to the courts of a particular country you do that because you make one of two assumptions. One assumption is that the courts of that country have some kind of unique interest in resolving the matter; the alternative assumption is that the issue involved (the validity of an arbitration agreement) is regulated by common rules to the extent that it does not really matter in a sense where that issue is resolved as long as you find an appropriate place in which it can be resolved. The difficulty is that the whole notion of exclusive jurisdiction (which is essentially what we have here) is predicated on one of those two assumptions but it is very unclear, and is widely doubted by practitioners, that either of those assumptions is actually correct. In other words, you are trying to establish an exclusive jurisdiction over the validity of an arbitration agreement where really there are no grounds for doing so. It may be because practitioners are very used to the idea of parallel proceedings involving validity but certainly in my experience practitioners in this area are not persuaded that the seat of the arbitration has any particular claim to resolve these issues. I think practitioners like to keep open the possibility of having the issues resolved in other countries where of course that would suit the interests of their own clients.

Q42 ***Chairman:*** Can I just ask you, the seat of the arbitration may be clearly defined by the arbitration agreement but not necessarily, surely?
Mr Fentiman: Indeed.

Q43 ***Chairman:*** An ICC arbitration does not necessarily tell you where it is going to take place.
Mr Fentiman: Indeed, and that gives rise to a further problem that in order to make this work the Regulation itself has to introduce rules which have the effect of telling you what the seat of the arbitration is, otherwise it does not work because there must be a degree of certainty about that. That of course is one of the difficulties because when you come to address that question it may be difficult to get agreement. I do not mean agreement between the parties, I mean agreement between Member States as to how the place should be located.

Q44 ***Chairman:*** I see in footnote 14 of the Green Paper suggests that if you cannot find agreement as to the seat in the contract then it is suggested to connect to the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement. That could lead to anything, could it not, depending on which head of jurisdiction you look at?
Mr Fentiman: Indeed. That is very much a default rule because it is necessary to have a rule rather than a default rule which actually expresses any particular connection between the arbitration and a Member State.

Q45 ***Chairman:*** It does not even necessarily lead to one state; several states could have jurisdiction under the Regulation.
Mr Fentiman: Indeed. This makes my point that it is very difficult in reality to argue for the position that there is one court which has a unique interest in resolving this dispute.

Q46 ***Chairman:*** Under the New York Convention arbitration awards are enforceable directly anywhere in the world without getting the *imprimatur* of the law of the seat of the arbitration. Could this proposal interfere with that?
Mr Fentiman: It could, although you could equally well say that it strengthens the enforceability of your award. I think there is a related question as well which

is the distinct one of whether or not there is any assurance that the courts of any Member State seised of the question of the validity of an arbitration agreement will come to the same answer on the question of validity. If that were the case then there may be some reason for saying that the question of jurisdiction should be allocated to a particular place such as the seat. In order to achieve a degree of certainty on the question of validity the Regulation in fact steps into the realms of choice of law by introducing a conflict of laws rule which essentially says that the law of the seat will govern. I think that causes real difficulty insofar as Member States differ markedly from each other, not simply in how they answer the question of which law governs the validity of an arbitration agreement, but also of course as to whether or not that is a justiciable issue anyway. In some Member States once the arbitration has started there is no question of challenging the validity of the arbitration agreement. I think that causes a difficulty, not simply a conceptual difficulty because this is a regulation trespassing into the realms of a choice of law in a sense, but my impression is that it would be very hard to get agreement between Member States (and agreement within the arbitration community) that this is the right approach to determining the validity of an arbitration agreement.

Q47 ***Chairman:*** I think what you have been referring to just now is that in some Member States arbitrators have competence to decide over their own competence.
Mr Fentiman: Indeed, yes.

Q48 ***Chairman:*** What about some rule which regulated the relationship between a European judgment or perhaps a worldwide judgment and an arbitration award if the judgment was given on a matter which was subject to an arbitration? Is that a desirable aim, a special exception to the recognition and enforcement of judgments if and when, contrary to an arbitration agreement or award?
Mr Fentiman: I think in principle it does have the effect of strengthening arbitration in a way which would be acceptable. I think the difficulty is in actually formulating the precise nature of the proposal.

Q49 ***Chairman:*** Do you agree with the Commission's analysis of problems about provisional measures and with its suggestions as to how they might be addressed? Do you have any further comments?
Mr Fentiman: I think I would certainly welcome the thrust of the Green Paper and the Heidelberg Report upon which it was based because there is a clear sense that provisional measures such as, for example, freezing injunctions, have to be supported and have to be made to work. In the Heidelberg Report there is an openness to allowing Member States to grant such relief as they recognise under their own law even if that is not widely recognised in other systems. To put it bluntly, there is a recognition that there is nothing inherently wrong with the English worldwide freezing injunction, nor the fact that it operates *in personam* and therefore can be granted even in situations where there are no assets in England. I welcome the general thrust of the Green Paper but I have two difficulties with it. One difficulty is the suggestion that instead of addressing the circumstances in which a court granting an ancillary injunction in support of proceedings in another Member State can do so—which is the way we look at things at the moment after the *Van Uden* decision—it is suggested that we should not worry about that issue any more, presumably with the effect that the courts of Member States can grant whatever relief is available under their own law on the assumption that the primary court—the court seised of the substance of the issue—will have a power to vary or discharge the order that has been granted in the secondary proceedings. In one sense that is a very neat solution because it assumes that there is no need for the secondary court, as it were, to worry about compliance with some Community principle for the grant of provisional measures. Instead the primary court regulates whether or not the secondary court's remedy is going to be effective. In one sense that is in conformity with principle because it recognises, so to speak, the primacy of the primary court. But I think it causes considerable uncertainty. One wonders why you go to court X for a remedy when there is the risk that the order which that court considers is valid and enforceable can be varied in some way or discharged by the primary court. It seems to me that that is a recipe for uncertainty. I would actually favour adopting the basic approach which the Court of Justice has adopted thus far which is saying that the secondary court can grant such relief as is available under its own law provided there is a sufficient link between the relief sought and the courts of that country. I would favour retaining that general approach but merely clarifying it, and in particular clarifying it to make it clear that that test is satisfied if a court grants an *in personam* order based on a defendant's personal connection with its jurisdiction.

Q50 ***Chairman:*** The Commission's suggestion might be thought to depart from the principle of mutual trust or at least non-interference with foreign courts' decisions.
Mr Fentiman: It does, but it also reflects a policy which one can see in various proposals in the Green Paper which is an attempt to ensure that for any particular issue there is one court and one court only which ultimately has responsibility for this. That idea

is hard to square with the notion of provisional measures in a secondary court.

Q51 ***Chairman:*** Just to wrap up, we have in mind a rather long list of other matters which the Commission has touched on. Perhaps I can deal with it by just asking you in relation to the areas identified in section eight of the Green Paper do you consider action is merited? Are there any particular ones which you want to highlight for us to look at?
Mr Fentiman: It did not seem to me that there was any matter which particularly needed attention. I suppose that is precisely why these matters are collected at the back of the Green Paper. There are perhaps three particular matters which I think are just worthy of note. The suggestion is that there should be a common definition of domicile. What this means of course is a common definition of domicile for natural persons because there is already in the Regulation a common definition of corporate domicile. In a way one has to say yes but I am not sure it is strictly necessary. My own experience is that although national laws may in fact differ in terms of idiom and terminology, the practical effect is actually the same. So yes, but it perhaps makes no difference. On a related theme is the idea that there should be a common definition of the seat of a corporation. I suppose in English law we are immediately struck by the impossibility of this since the concept of a seat is not one which exists in English law. I am not at all sure why that should be suggested because although we do not have a common definition of a seat we do of course have a common definition of corporate domicile already in the Regulation so one wonders why that should be thought to be of importance. I think the third thing which is striking is the reference to the possibility of awards made in support of fiscal authorities being embraced within the rules of recognition and enforcement. Of course such a thing—the enforcement of tax laws—is not something which we would normally regard as falling within the definition of a civil and commercial matter which is the normal scope of the Regulation as we understand it.

Q52 ***Chairman:*** That is quite a political subject.
Mr Fentiman: Very much so.

Q53 ***Chairman:*** I think they extend it to other sorts of penalties as well, not just fiscal.
Mr Fentiman: Yes.

Q54 ***Chairman:*** Unless there are any other questions by members of the Committee or points that you want to mention, we are very grateful for extremely fluent and clear evidence and it is going to help us a lot.
Mr Fentiman: Thank you.

Supplementary memorandum by Richard Fentiman[1]

Introduction

1. The Green Paper addresses many issues of importance. Some of its suggestions are uncontroversial, notably those relating to patent litigation. Others are more contentious, but are likely to be resolved without difficulty by discussion. Others, the subject of this note, raise more fundamental questions about the nature and scope of the European jurisdiction and judgments regime, and have significant practical implications, especially in the context of complex, high-value commercial disputes.

The European Regime and the International Legal Order

(i) Extension of the regime to third-state defendants

2. Such an extension is welcome on three grounds. *(a)* It is undesirable that a claimant is subject to different jurisdictional regimes in the same court depending on whether the Regulation or residual rules of national law apply. Article 5 of the Regulation, for example, provides that the courts of a Member State shall have jurisdiction *inter alia* in matters concerning a contract broken in that state or a tort committed there. But it applies only if the defendant is domiciled in a Member State. If such a connection is sufficient for exercising jurisdiction, why should the defendant's origin matter? *(b)* It is undesirable that a claimant cannot be guaranteed access to justice on equivalent grounds in all Member States because different rules of residual jurisdiction apply. *(c)* The Community has an interest in regulating jurisdiction in disputes the subject-matter of which is connected with a Member State, irrespective of the defendant's origin.

3. The solution is to extend rules equivalent to those of Regulation 44/2001 (especially *mutatis mutandis* Articles 5 and 6) to cases involving third-state defendants. But to guarantee equal access to justice in the Member States requires only that common rules apply in such cases, not that existing residual grounds of jurisdiction should be abolished. Any extension should be universal. It is discriminatory and perpetuates complexity to restrict any extension to cases involving claimants domiciled in Member States. It is also

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inconsistent with the established principle that Regulation 44/2001 operates irrespective of the claimant's domicile,[2] and with the current position under the Lugano Convention whereby a third-state claimant may sue a third-state (but Convention-domiciled) defendant in a Member State pursuant to the Convention.

4. Importantly, there should be additional requirements for the exercise of jurisdiction over third-state defendants. Such jurisdiction is an exorbitant jurisdiction. Such defendants are domiciled in states which by definition have not on behalf of their citizens submitted to the constraints of Community law. Nor is such a defendant a party to a dispute in which the courts of a Member State have a unique interest (as under Article 22 of the Regulation), or to which it has submitted by agreement (under Article 23). A third-state defendant might be protected in two ways: *(a)* By requiring a claimant to seek permission before serving the claim. *(b)* By requiring a claimant to demonstrate that a ground for jurisdiction clearly exists, that there is an arguable case on the merits against the defendant, and that the forum is a proper one for trial.

5. The last requirement means at a minimum that the defendant is not exposed to parallel proceedings in a third state and a Member State. Jurisdiction should also be declined if the courts of a third state have paramount jurisdiction, for example if the foreign court has a unique interest in the dispute (perhaps on grounds reflecting Article 22 of Regulation 44/2001), or where the parties have submitted to its exclusive jurisdiction. Arguably, to avoid unfairness, third-state defendants should be subject to the jurisdiction of a Member State's courts only where it is also established that they are an appropriate forum for determination of the issue in terms of fairness and efficiency.

6. The decision in *Owusu v. Jackson*[3] does not foreclose discussion of the role of discretion in the exercise of jurisdiction in this context. Concerns about uniformity expressed in that case are removed if the discretion is required by uniform rules. Again, in the present context the defendant is not domiciled in a Member State. Such a defendant has not submitted—and the state in which it is domiciled has not on its behalf submitted—to the constraints of Community law. Special care must be taken not to subject such a defendant to legal or financial prejudice in the courts of Member States.

(ii) Declining jurisdiction in favour of proceedings in third states

7. Whether or not the European regime is extended to third-state defendants it is important, following the decision in *Owusu*, to clarify the rules for declining jurisdiction in favour of proceedings in third states in cases where jurisdiction is conferred by the regime. Procedural efficiency and justice argue for harmonisation in this area, rather than remitting the question to national law.

8. As noted above, there are particular reasons why the courts of a Member State should decline to exercise jurisdiction over third-state defendants where those courts are not an appropriate forum for resolving the dispute. It is uncertain whether many would support the distinct but related proposition that national courts should have a residual power to decline jurisdiction on the basis that another court is a more appropriate forum, or (a different thing) on the basis that the court seised is an inappropriate forum. It is uncontroversial, however, that jurisdiction should be declined if the courts of a third state have paramount jurisdiction in the circumstances noted above. It may also be generally accepted that jurisdiction should be declined in cases involving identical or related proceedings in a third state.

9. It is inappropriate merely to extend Articles 27 and 28 (and perhaps 23) to cases involving alternative proceedings in a third state, or to require national courts to decline jurisdiction merely because the defendant is third-state domiciled. The Regulation's existing rules for declining jurisdiction are inapt opposite a third state's courts, for two reasons. *(a)* The Regulation's rules for declining to exercise jurisdiction are designed to operate within a reciprocal system. No such reciprocity exists as between the courts of a Member state and those of a third state. A court in a Member State cannot accept jurisdiction in the knowledge that the courts of a third state will desist—and cannot decline knowing that such a court will hear the case. *(b)* As between Member States and third states the objective of preventing conflicting judgments does not arise. That objective relates to a specific function of the Regulation, namely the automatic mutual enforcement of judgments between Member States. As between Member States and third states, inconsistent judgments may be undesirable, but they do no damage to any overarching enforcement regime.

10. Given these fundamental differences, the rules governing cases involving third states should have two elements. *(a) Flexible rules regulating parallel proceedings.* The difficulties associated with Article 27 of the Regulation are familiar even in cases involving Member States alone. They should not be replicated in cases involving third states. The model might be found in the discretion conferred by Article 28. *(b) Rules safeguarding access to justice.* As between the courts of a Member State and a third state there is a risk that the latter will not exercise jurisdiction where the former has declined jurisdiction. There is a further risk that

[2] *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] ECR I-5925.
[3] C-281/02, [2005] ECR I-1383.

the claimant will be prejudiced in the foreign court to a degree that it is denied effective access to justice. For example, its claim may be time-barred, or subject to summary dismissal, or defeated by the public policy or mandatory rules of the foreign court, or unsustainable given the cost of proceedings. National courts should not decline jurisdiction unless it is clear that the alternative forum will accept jurisdiction, and unless it is clear that the claimant will not suffer a disadvantage amounting to an injustice. An appropriate model might be found in the second limb of the *Spiliada* test familiar to English lawyers.[4]

(iii) Implications of the Hague Convention on choice of court agreements

11. The treatment of jurisdiction agreements under any extended Regulation cannot be isolated from the 2005 Hague Convention on Choice of Court Agreements. When in force in Member States the Convention will require national courts to decline jurisdiction in favour of any agreement to the exclusive jurisdiction of a third-state which is also a Contracting State. It will also require national courts to exercise jurisdiction pursuant to a jurisdiction agreement notwithstanding the existence of parallel proceedings in a third state. But it extends only to bilateral, exclusive jurisdiction agreements in favour of Contracting States. Independent rules applicable in all other cases remain necessary. Such rules should not, however, replicate those of the Convention without qualification. The Convention assumes reciprocity between Contracting States. The safeguards indicated above are required in cases not involving Contracting States.

(iv) Enforcing third-state judgments

12. There is no reason not to consider this possibility further. A new enforcement regime for third-state judgments would be unilateral not reciprocal, and would not encounter the difficulty of achieving agreement with third-states which have in the past undermined initiatives to harmonise the enforcement of judgments worldwide. Given this lack of reciprocity such a regime would require *(a)* more extensive grounds for non-enforcement than apply to the judgments of Member States; *(b)* rules for establishing pre-conditions for enforcement, so as to protect defendants from the exercise of exorbitant jurisdiction, such as the presence of the defendant in the state of origin, and submission to its jurisdiction by agreement or appearance.

Lis pendens and choice of court

13. The issues of *lis pendens* and choice of court concern the Regulation's primary tools for allocating jurisdiction between Member States and are best considered together. Two principal problems arise. *(a)* Articles 27 and 28 are engaged by pre-emptive proceedings for a declaration of non-liability, encouraging pre-emptive forum-shopping for tactical purposes.[5] *(b)* Article 23 is subject to Articles 27 and 28, extending the risk of such tactical proceedings to cases where the court second seised has exclusive jurisdiction pursuant to a jurisdiction agreement.[6]

14. The Green Paper suggests excluding negative declaratory proceedings from Articles 27 and 28. This is a radical but effective solution. It means in practice the abolition of Article 27, in so far as Article 27 only operates in cases where a claim of liability in one state is answered by a challenge to the existence of liability in another State. Article 28 would remain to regulate parallel actions which are related not identical. This is desirable in so far as it allows the court second seised to exercise discretion in assessing the risk of irreconcilable judgments, in the manner suggested by Advocate-General Lenz in *Owens Bank Ltd. v Bracco*.[7]

15. This radical solution would not entirely remove the threat to jurisdiction agreements from pre-emptive proceedings. It would not safeguard Article 23 where one party initiates pre-emptive proceedings other than for a negative declaration. Arguably, the court second seised should exercise its Article 28 discretion not to stay its proceedings. But it would be preferable to provide explicitly that the second court must exercise jurisdiction in such cases.

16. If the present machinery of Articles 27 and 28 is unchanged, the Regulation should be amended to ensure that the court second seised must exercise Article 23 jurisdiction notwithstanding the existence of prior proceedings in another Member State. Other options are canvassed in the Green Paper, and provide welcome additional protection for jurisdiction agreements. None is likely to be as effective in deterring pre-emptive forum-shopping as ensuring that Article 23 prevails over Articles 27 and 28. This solution creates at least the notional risk of parallel proceedings in two Member States, which might be removed in two ways: *(a)* by providing that the named court can proceed only if the jurisdiction agreement is in an approved standard form; *(b)* clarifying any remaining uncertainty concerning the validity and effect of an Article 23 agreement. (a) is unattractive, at least in the context of commercial litigation. The standard form is likely to be a simple one

[4] *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] A.C. 460 (HL).
[5] C-406/92 *The Tatry* [1994] ECR I-05439.
[6] C-116/02 *Erich Gasser GmbH v MISAT* [2003] ECR I-14693.
[7] C-129/92 [1994] EUECJ.

and it is uncertain that it would be acceptable, certainly in substantial financial transactions, or that market practitioners would favour having their jurisdiction agreements drafted by others.

17. Implementation of the Hague Choice of Court Convention will ensure that the court second seised must exercise jurisdiction in cases involving exclusive, bilateral jurisdiction agreements involving one or more third-state parties.[8] Otherwise the Brussels Regulation governs. Consistency requires that the Regulation is made to conform to the position under the Convention. It is undesirable that whether a jurisdiction agreement in favour of a Member State is threatened by parallel proceedings in another Member State depends on the origin of the parties.

Provisional measures

18. It is uncontroversial that the free circulation of provisional measures should be improved. The Green Paper suggests unobjectionably clarifying the status of *ex parte* measures, to ensure that such measures can be recognised and enforced, provided that the defendant has the opportunity to contest the measure subsequently.

19. Beyond this, the Green Paper does not articulate precisely the problems concerning provisional measures familiar to English lawyers. Particular difficulty surrounds the powers of a court to grant collateral provisional measures in support of primary proceedings in another Member State. The matter is governed currently by Article 31 of the Regulation, as interpreted by the Court of Justice in *Van Uden Maritime BV v Firma Deco-Line.*[9] Three issues arise, each of which should be addressed in any future Commission proposal: *(a)* In what circumstances may a court grant collateral provisional measures, in support of proceedings in another Member State? May it do so merely because they may enforced by contempt proceedings against the defendant or a third party? *(b)* What is the permitted extent of such remedies? Does Article 31 permit provisional measures affecting assets in other Member States? *(c)* How are provisional measures enforceable against assets in other Member States? In particular, by what mechanism may orders *in personam* be made effective against such assets?

20. The desirable solution is that collateral relief should be permitted whenever it may be enforced effectively by the secondary court; that it should be available against assets in other Member states; and that the rights thereby created should be recognised in other Member State, and enforced there by the award of such local *in rem* relief as may be available in the enforcing court.

21. The Green Paper contemplates that a secondary court should in future grant such relief as is available under its local law, without the need to comply with any requirements of Community law. Instead, the scope of collateral relief will be controlled by the court having primary jurisdiction, which is empowered to discharge, modify or adapt a provisional measure granted by the secondary court. This reflects the principle that the secondary court's role is merely supportive. But it introduces uncertainty and potentially destabilises the relief granted by the secondary court. It is preferable to clarify the circumstances in which the secondary court may act, and require courts elsewhere to give effect to any order properly made. The 'sufficient connection' test should be retained, but clarified.

Arbitration

22. The Green Paper should be applauded for promoting a meaningful discussion of the arbitration exception. Previously there has been much hostility to the idea of deleting or weakening the exclusion, based on the principle that arbitration is so far as possible a private matter, governed by contract not legal rules. There were serious concerns that the Regulation might seek to regulate the arbitral process (as distinct from civil proceedings ancillary to arbitration), or that it would regulate ancillary proceedings in a manner harmful to arbitration. It is clear that the Commission is sensitive to these concerns, and that any change is intended to facilitate not regulate arbitration (or civil proceedings ancillary to arbitration).

23. The question is whether this can be achieved. One proposal is likely to attract widespread support. To guarantee the recognition of arbitral awards throughout the Community, by denying enforcement to a civil judgment irreconcilable with such an award is clearly supportive of arbitration. Less certain is the status of proposals intended to coordinate ancillary proceedings. It is suggested that parallel ancillary proceedings in different Member States should be avoided, thereby eliminating inconsistent findings in different States on the validity of an arbitration agreement. This would be achieved by allocating jurisdiction in ancillary proceedings to the courts of the Member State of the place of arbitration, and requiring the courts of any other state to decline parallel jurisdiction.

[8] Article 5(2) of the Convention.
[9] [1998] ECR I-7091.

24. This is desirable in principle, but encounters serious difficulties. To confer exclusive jurisdiction on a particular court for any purpose makes one of two assumptions. It assumes either that the court is uniquely competent in the matter (such as the court of the *situs* in matters affecting land), or that the issues before it will receive a uniform answer in any state.

25. Where ancillary proceedings concern the validity and effect of arbitration agreements both assumptions are problematic. Any suggestion that the courts of the seat of arbitration are uniquely placed is confounded by the difficulty of determining the location of the seat. It is perhaps undermined entirely by the suggestion that the seat should be equated with the country whose courts would have had jurisdiction had the matter been litigated. The second assumption is in turn undermined by the lack of any uniform approach to the validity of arbitration agreements. The Green Paper suggests the introduction of a uniform choice of law rule for this purpose, whereby the law of the arbitral seat governs. This is, however, problematic in so far as the location of the seat is problematic. It is also uncertain that Member States will lightly surrender their national approaches to the question, and that such a choice of law rule is properly within the scope of a regulation concerned with jurisdiction and judgments. Moreover, many may consider that such a rule is intrusive, and purports to regulate not facilitate arbitration. Indeed, it may demonstrate that the goal of supporting arbitration without regulation is unachievable.

Conclusion

26. The Green Paper invites a radical review of international civil procedure in the Member States. It provides an opportunity to effect three especially important changes: *(a)* to cure the inflexibility of the existing Regulation in cases involving parallel proceedings in the Community; *(b)* to rationalise the exercise of jurisdiction over defendants in national courts irrespective of their origin; and *(c)* to address the problem of declining jurisdiction in cases involving third states.

27. The Green Paper promises two significant improvements to the current law. First, the protection afforded to jurisdiction and arbitration agreements may be enhanced. Secondly, national courts may be permitted in future to exercise greater flexibility in addressing the complexities of transnational litigation than the current regime allows.

June 2009

WEDNESDAY 24 JUNE 2009

Present: Blackwell, L; Bowness, L; Burnett, L; Mance, L (Chairman); Norton of Louth, L; O'Cathain, B; Rosser, L; Wright of Richmond, L

Examination of Witnesses

Witnesses: Lord Bach, a Member of the House, Parliamentary Under Secretary of State, Ministry of Justice, and Mr Oliver Parker, Senior Legal Adviser, gave evidence.

Q55 ***Chairman:*** Thank you very much for coming to see us, Minister. You know the procedure, I am sure. We are on the air and there will be a transcript made of the proceedings. You will have an opportunity of looking at it afterwards and if there is anything you or Mr Parker want to add please do in writing afterwards. As regards declarations of interest, they are available on the register. I declare straight away my particular involvement as a member of the Law Chancellor's Advisory Committee on Private International Law which is due to meet on Friday to consider this. As I mentioned outside, I have not looked at the papers, except that I received a draft of one of them and that was a deliberate decision, but we shall be very interested to hear what you have to say, I know, in advance of that meeting. Is there anything you would like to say by way of opening remarks?

Lord Bach: If I may. The Committee knows Mr Oliver Parker who is by my side. He is a legal adviser at the Ministry of Justice with particularly responsibility for private international law. I am very pleased on a number of counts that he is by my side. One of them is relief because, as I think you know, I was a criminal practitioner for many years. That ended many years ago and the matters that we are discussing this afternoon never actually came across my desk or did not come across it very frequently. I hope the Committee will forgive me if Mr Parker takes on some of the answers on behalf of the Government. I will do my best to deal with the others. Can I make three quick opening remarks? The first is to emphasise that the Government is fully aware of the significance of the review of the Brussels I Regulation currently being undertaken by the Commission. This instrument plays an important role, particularly in relation to commercial litigation, where the legal services provided here in London support this country's prominent global position as a centre for international dispute resolution with all the benefits that represents for our economy. In the light of this, it is particularly important that we do our best throughout the review to ensure that proper attention is paid to our own concerns and that the best possible solutions are adopted to address them. The second is really to praise the Commission by expressing appreciation for the work done by the Commission in its report and the Green Paper. They have identified all our major concerns and in terms which are encouragingly open minded. That builds some confidence that the Commission's legislative proposals which, as you know, will be published in the first half of next year are likely to be broadly satisfactory and therefore represent a good beginning to the ensuing negotiations both in the Council and in the European Parliament. My final point concerns our continuing consultations on this exercise. You have mentioned the North Committee already which I am looking forward to attending on Friday. Of course they are meeting on Friday to advise on this project and therefore what they are going to say is not currently available to the Government. I should also add that other important stakeholders here such as the Bar and the Law Society have yet to respond too. We intend to let the Commission have the UK Government's comments by the end of next month, July, so in the light of this it would be inappropriate for me to say anything today which would preclude a proper consideration of the views we still have to receive. Our contribution must perhaps inevitably stop short of identifying any particular solution to the problems raised in the Commission's paper. This will be a refrain that perhaps runs through some of our answers to the questions put by the Committee. I hope we can rely on the Committee's understanding for a degree of reticence at this stage on the part of the Government. Thank you for inviting us to the Committee this afternoon.

Q56 ***Chairman:*** The first question relates to the general comments which I think you have touched on already. The Report describes the Regulation's operation as a highly successful instrument. Do you agree with that general assessment? Are there areas of the regime not mentioned in the Green Paper which in your view would merit further consideration?

Lord Bach: We would not disagree with the general assessment by the Commission, although that is without prejudice to the significant problems which have arisen as a result of certain decisions of the Court of Justice, which I am sure we will be discussing later on. These problems we think have been fairly raised by the Commission in its two documents. Subject to views which may still be submitted to us as Government, it appears that all the most significant problem areas in the Regulation have been raised by the Commission. This reflects we think the very thorough academic studies instigated by the Commission, which I believe in turn rested on substantial input from practitioners throughout the Member States.

Q57 ***Chairman:*** By the decisions we are thinking, are we, primarily of cases like *Erich Gasser* v *MISAT, Turner v Grovit*, *Owusu v Jackson*, the Lugano opinion perhaps?
Lord Bach: Those are the cases, yes, and others too.

Q58 ***Chairman:*** Let us take a particular and perhaps slightly separate head, the proposal relating to the possibility of the abolition of *exequatur*. That would mean direct enforcement in any UK court or, in the case of a UK judgment, in any other EC court of a European Community judgment without any intermediate proceedings, without it having to go through a particular process or a particular court. Do you consider that desirable and feasible at this stage in history and, if so, would safeguards be necessary and what might they be?
Lord Bach: These are issues on which we have yet to form a concluded view. From what we have heard so far from consultees, this does not appear to be an area where the current rules create significant practical problems for litigants, but as the question perhaps suggests there is a distinction to be made between the abolition of *exequatur,* which we in principle are in favour of, and how provision should be made to safeguard the legitimate interests of judgment debtors and defendants in these cases. We are in principle in favour of abolishing *exequatur* although a decision on its application in relation to any particular instrument must be considered on its own merits. It may well be there would be a benefit in abolishing *exequatur* in terms of simplifying the procedure of course on enforcement and reducing costs. On your question whether any and if so what safeguards should remain, we are still assessing the views of consultees. Safeguards must concern the need for adequate service on the defendant in the country where the original proceedings took place, the absence of any other judgment which conflicts with the judgment in question and the need to ensure that the judgment does not breach the principle of public policy. Although it may be that some or all of these may in some way have to be provided for in any revised Regulation, it is possible that these could be done differently from the current rules. For example, I am told that there is precedent in the European Enforcement Order for the requirement of adequate service to be certified in the country of origin rather than determined by a court in the country where enforcement is sought.

Q59 ***Chairman:*** I suppose the risk of that is that it is a bit unlikely that a court which has given a judgment is going to do anything other than certify that there has been adequate service. In other words, it may be that that would not be much of a protection to get a certificate along with the judgment.
Mr Parker: That must be one of the things that we have to consider when deciding how the safeguards should be properly implemented. It is even more strongly a point in favour of retaining some safeguard relating to public policy in the country where enforcement is sought. I think that could not safely be left to the country where the original proceedings took place.

Q60 ***Chairman:*** I was not clear, reading the Commission's Report, whether it was proposing it but I think it was hinting at the possibility of abolishing the public policy exception to enforcement.
Mr Parker: It was. You can take it that there is considerable caution in Government about going that far.

Q61 ***Chairman:*** That is very helpful. Is there any concern about a process which would mean that you could turn up in any court in England and Wales or Scotland or Northern Ireland with a foreign judgment; whereas at the moment they have to go through a formal process which can be channelled through particular courts?
Lord Bach: I think that is where the safeguards clearly come in. We have no definite views yet. We know there must be safeguards if *exequatur* is to be abolished but we have not definite views as to the extent of those safeguards. We consider them to be fairly important for the reasons that you state in order to protect defendant debtors.

Q62 ***Chairman:*** Shall we move on to more central matters? Under the heading of the operation of the Regulation in the international order, the Commission has addressed first of all the question of defendants domiciled abroad. The Regulation it says is basically concerned with defendants domiciled in Europe and we know from *Owusu v Jackson* that it is taken to confer jurisdiction against them irrespective of the competing claims of legal systems or courts outside Europe, so that provided you can find

someone domiciled in France, even if the matter is overwhelmingly concerned with New York, it can be litigated here. Should the Commission be considering some modification of the position established by *Owusu v Jackson*?
Lord Bach: The short answer would be yes, it should consider such a course. In *Owusu*, as the Committee knows, the Court of Justice decided that whatever jurisdiction is assumed under the Regulation that basis of jurisdiction is mandatory in nature, excludes our common law doctrine of *forum non conveniens* and the possibility for the courts in the UK to decline the jurisdiction in situations where they consider the courts of the third country would be more appropriate for the trial. We regret the inflexibility inherent in this decision and the significant restriction we feel it imposes on the availability of a valuable, procedural mechanism to deal with cases which should be more appropriately dealt with elsewhere. In some ways we intend to seek its reinstatement—that is, the common law principle—at least in situations where no other Member States can assume jurisdiction under the Regulation and where it is available under the national law of the Member State in question. We are going to answer later one of your questions stressing jurisdictional flexibility as a concept that we approve of and I am afraid the *Owusu* judgment was one that was in our view too inflexible. We hope to see some change.

Q63 ***Chairman:*** That suggests that you are going to cover all three of the following situations: firstly, where there are grounds for what would normally be regarded as exclusive jurisdiction in the foreign court if it concerns foreign land for example, or there is an exclusive choice of court in favour of New York. That would be the clearest situation, I suppose. Secondly, a situation where there is simply someone domiciled in France but there is also competing litigation going on in New York. Thirdly, you just said the third situation would be where, although someone is domiciled in France, the matter obviously should be decided in New York because it is all about for example a New York traffic accident or something like that. You are intending to go the whole way?
Lord Bach: That is our response at the moment, although on all these matters we are waiting to see what our consultees say. That is our view at the moment.

Q64 ***Chairman:*** I think it is right, is it not, that the Commission does not actually really address this aspect at all in its papers?
Mr Parker: I think it addresses some of the latter situations that you mention, where it is possible to envisage quite specific rules relating to exclusive jurisdiction and international *lis pendens*. There very helpfully they do identify the possibility of change. What is more difficult for the Commission I think is the more general, *Owusu* type discretion which will indeed be more difficult to get in the negotiations. We may have in those negotiations to think about two possible ways of approaching this. One would be to preserve the availability of such a national mechanism where it is available under the law of the Member State in question. That could be criticised as being inconsistent with the principle of the Regulation which is to provide uniformity. That would obviously not be a uniform solution. The alternative kind of proposal would be to say we need some discretion similar to *forum non conveniens* but it would have to be applicable by all the Member States and that I think would inevitably result in something that was significantly less flexible than our common law.

Q65 ***Chairman:*** The Commission's paper and Report address the position of claims against defendants domiciled outside Europe solely by considering, as I read it, claimants domiciled in Europe. In other words, they say that that should be regulated but they do not seem to consider the position of claimants domiciled outside Europe suing defendants domiciled outside Europe in Europe. Do you have any view as to whether or not that is covered by what they are discussing or whether it should be covered?
Mr Parker: Of course we are still consulting on this. There is no final view, but our feeling at the moment is that we have no fundamental objection to such an extension of jurisdiction, provided that it is done in the right way. That is the all important proviso. We are aware that the current situation is not entirely satisfactory by any means for third-state defendants. At the moment they can be sued in a Member State pursuant to any exorbitant rules of jurisdiction available in any of the Member States with the resulting judgment then put into circulation for enforcement throughout the European Union. A potential advantage of uniform Community rules of jurisdiction in relation to third-state defendants is that any such exorbitant rules would in principle be eliminated. Another advantage of the Commission's proposals is that there would be a benefit in terms of greater legal predictability for claimants based in the EU. We think that there could in principle be advantages to such an extension but it has to be on the right terms. We are still reflecting on what those terms should be.

Q66 ***Chairman:*** As I understand it, such an extension would mean that you would cover claims against defendants domiciled outside Europe both by claimants domiciled in Europe and by claimants domiciled outside Europe?

Mr Parker: We would not necessarily have to go that far. Again, this is an area where we have not made up our minds. If you are covering third-state defendants, there may not be much to be said for retaining this relatively small area of national jurisdiction in respect of claimants coming from outside the European Union. One can see that if you just focus on claimants coming from within the European Union you are in principle more in the kind of territory envisaged by Article 65 of the EC Treaty which is concerned with the proper functioning of the internal market; but it may be that such a small reservation of national law would be generally thought to be an undesirable complexity, whereas a comprehensive Community scheme of jurisdiction might be quite a lot more straightforward.

Q67 ***Chairman:*** Does it not depend for its impact on what the new comprehensive scheme of jurisdiction would be? An English lawyer would be conscious that litigation frequently takes place under our system of jurisdictional rules in cases which it could not do in other European countries. For example, just to take two examples, in the case of contracts subject to English law or contracts which happen to be made in England or through an English agent, those not being European heads. Could there be quite significant impact on the possibility of suing in London in such cases if we agree some harmonised scheme? Would not the harmonised scheme almost inevitably be considerably narrower than our jurisdictional rules?
Mr Parker: That might be the case. If it turned out that the resulting rules of Community jurisdiction were going to be very significantly narrower, that would be a factor in the acceptability of such a new scheme. I think there might be difficulty in preserving national rules of jurisdiction in addition to Community rules. This is just in terms of negotiability because a lot of other Member States would regard that as particularly favourable to the United Kingdom because of our tradition of very broad grounds of jurisdiction and it might be difficult to get agreement on these.

Q68 ***Chairman:*** What is the need for harmonised maximum rules as well as minimum rules? Would it not be sufficient to achieve legal certainty for claimants within the EC, which seems to be the Commission's focus, if you had harmonised minimum rules of jurisdiction?
Mr Parker: I think it would. As a matter of negotiability, if we got to that point, there might be a general feeling amongst the Member States—we might not agree—that we should take the final step and produce an entirely comprehensive regime. We might not wish to support that but that could be an outcome that one could envisage. If you go that far, the final step might be one that most Member States would want to take.

Q69 ***Baroness O'Cathain:*** Are you suggesting that you should go just part of the way, not the whole way and people on Brussels I want to go the whole way to cover both ends? You are suggesting—or am I getting wholly the wrong end of the stick?—that it need not be necessary. If it is not necessary, why do people want to do it? Is it that they just want to create more jobs for people living in their lovely ivory towers in Brussels?
Mr Parker: It reflects the nature of Regulations where uniformity is the underlying principle. At the moment we have quite a large area that is still reserved to national law. If that area is very substantially reduced, I think there could be a feeling that it would be much easier to produce a comprehensive scheme. I am not saying that we would support that. We do not have at the moment a strong interest in including jurisdictional grounds in relation to claimants domiciled outside the Union. They are not in principle connected to the internal market in the same way. I am flagging up that this could be one of the realities in the negotiations.

Q70 ***Baroness O'Cathain:*** Could it be something that the British Government might adopt in terms of so far, no further? There is nothing wrong with our law, is there?
Mr Parker: We have an initial decision to take at the beginning of the negotiations as to whether we opt in under the protocol to Title IV of the EC Treaty. If we do opt in, we are bound by the final result.

Q71 ***Chairman:*** There is a policy decision to be made there. One of the questions is obviously why Europe might be interested in maximum harmonisation if one is talking about foreign claimants and foreign defendants. Leaving that policy issue in the air, if one were to have that degree of regulation, would you need some let out, some qualifications for example, if justice was not available elsewhere, if it appeared that this was the only jurisdiction in which suit could sensibly be brought for reasons related to the home countries of the particular parties?
Mr Parker: This would be something that we would try and achieve through our desire to reinstate the *forum non conveniens* decision in some form.

Q72 ***Chairman:*** *Forum non conveniens* is an exception to jurisdiction. Here we are talking about the possibility that the present English jurisdiction might be limited and one would be therefore talking about situations in which you would want to extend it to the traditional extent if justice was not available elsewhere perhaps?

Mr Parker: Yes. That is something we could certainly reflect on.

Q73 ***Chairman:*** Assuming that one were to have rules relating to defendants domiciled outside Europe enabling them to be sued in Europe, there are going to be no rules equivalent to the *lis pendens* rules or concurrent jurisdictional rules, Articles 27 and 28, in relation to third states. Does not this mean that there is going to be an increase in the risks of competing litigation going on in and outside Europe, an increase in the risk of forum shopping, people trying to start proceedings here in Europe quickly to pre-empt foreign proceedings and so on?
Mr Parker: Yes. I entirely agree with what you are suggesting. I think therefore it would be particularly important to achieve some of the flexibility that we have already been talking about, the reflexive effect in relation to foreign proceedings and cases where the subject-matter more properly belongs to be determined by a foreign court. The more broadly the grounds of jurisdiction are extended, the more important it is that some proper degree of flexibility is included as well.

Q74 ***Chairman:*** Let us move on to the next question which is another aspect of relations with third states. That is the Commission's proposal that the Regulation might provide for judgments in third states to be recognised and enforced in the Community. We know that not too many years ago the Hague Conference was unable to agree on a worldwide convention. What emerged was the Choice of Court Convention which was a good thing but much more limited. How would a provision for third state judgments be recognised and enforced in the Community work? How would it relate to existing bilateral treaties and so on?
Mr Parker: Our view, subject to further consideration in terms of the views that we still have to receive, is that to extend the Regulation to cover the recognition and enforcement of third state judgments should not be supported. The current arrangements whereby such recognition and enforcement is left to national law appear broadly satisfactory, bearing in mind our common law rules on the subject and the extensive web of bilateral agreements that we have with Commonwealth countries. Further, we think it is likely to prove to be difficult to achieve agreement within the Community on what any uniform rules should be. This at least partly reflects the need for any such rules to lay down indirect grounds of jurisdiction which must have been fulfilled in the court of origin. It is clear as far as we are concerned that any proper review of the Regulation will already have to solve several difficult issues which give rise to significant problems in practice. To add this thorny topic as well appears unjustified and risks overburdening an already substantial reform agenda. Finally, there may well be tactical advantages to negotiating multilaterally in this area at the Hague Conference in order to achieve the best chance of an optimal solution that would perhaps secure a prohibition on certain exorbitant grounds of jurisdiction around the world.

Q75 ***Chairman:*** Reciprocity, in other words, might yield better and more fruitful results with some benefits?
Mr Parker: Yes.

Q76 ***Chairman:*** As well as accepting that one would be getting back something?
Mr Parker: Yes.

Q77 ***Chairman:*** Do you know if there has been any work identifying this as a real problem area?
Mr Parker: I am not aware of any, no.

Q78 ***Chairman:*** Is it identified in the Heidelberg Report, which I have as having given rise to representations?
Mr Parker: Subject to correction, I am not aware of that.

Q79 ***Chairman:*** We can move on to choice of court agreements and competing litigation, *lis pendens* and related actions. You have probably partly already covered the next question: are there significant problems with the current rules on competing litigation, *lis pendens,* and related actions?
Lord Bach: Yes.

Q80 ***Chairman:*** What amendments or improvements would you favour?
Lord Bach: The significant problem in practice is that it has undermined the ability of commercial parties effectively to select a jurisdiction to resolve their disputes. Secondly, it has created opportunities for tactical litigation of course in jurisdictions that have not been agreed by the party. A satisfactory resolution of this problem is an important priority for the UK in the current review. Its commercial significance is fully appreciated by us. The essential element in a satisfactory solution will be to ensure a court validly chosen is not subject to the *lis pendens* rule and should be able to continue to hear its proceedings notwithstanding that it is seised second in time. Other amendments have been suggested by the Commission—in particular, that any court seised first in time which has not been chosen should be required to stay its proceedings until the jurisdiction of the chosen court is established and provision for cooperation between the two courts concerned. These ideas and others are worthy of consideration. We have no concluded view except that the *Gasser*

decision has had the effect of creating significant problems for the UK in particular. Can I make one last observation? The 2005 Hague Conference agreed a useful Convention to strengthen the legal position of exclusive commercial choice of court agreements. The Community has signed this agreement and there is every prospect of its ratification in due course, we believe. It also looks like this agreement may be a success at the world level too. In the light of all that, it seems desirable to us in principle that in relation to such agreements the equivalent provisions in this Regulation, when it appears, should so far be aligned with the Convention. It is really aligning ourselves with the Hague Conference's decisions in this area.

Q81 ***Chairman:*** That is extremely helpful and informative. On a point of further information, you said that the Hague choice of court agreement looks as if it is going to be ratified and looks as if it may have success at a world level. Can one put a timescale on that?
Lord Bach: My notes say there is every prospect of it being ratified. I think probably deliberately it does not say when.

Q82 ***Chairman:*** Did you mean ratified by a sufficient number of states to bring it into force?
Mr Parker: Yes and I am thinking particularly of the United States of America which is well known to be keen on this agreement. I think it looks very clear that they will indeed ratify it. I cannot give you a timescale on it now but that would make a massive difference. A combination of the United States and the European Union both ratifying this agreement would do much to ensure its success around the world. There would be no prospect of ratification by the European Union until the current review of Brussels I is concluded but that seems sensible because it gives us then an opportunity to produce the kind of alignments that Lord Bach was speaking of.

Q83 ***Chairman:*** Is it only ratifiable by the Union rather than by individual countries?
Mr Parker: Yes. There is agreement on that.

Q84 ***Lord Burnett:*** Are all Member States in favour of the priority that should be given to a commercial agreement that a particular jurisdiction be the one that has priority and there is no opportunity for other litigation to sideline?
Mr Parker: Yes. I am not aware of any country that is opposed to that proposition. There may well be disagreement as to what the best solution should be but I think there is a general agreement that it should not be possible to get round exclusive choice of court agreements in the commercial area by tactical litigation involving torpedoes launched in other jurisdictions which take a long time to reach a conclusion.

Q85 ***Chairman:*** Is there general agreement that it is not good enough to say that it is up to the court wrongly seised to solve the matter? That is precisely what enables torpedoes to be effective.
Mr Parker: That is also generally agreed.

Q86 ***Chairman:*** Although it must be a sensitive matter for some courts?
Mr Parker: They have been keeping their heads down so far.

Q87 ***Chairman:*** Perhaps also there is general agreement that it is not enough to say that courts should collaborate together to sort these things out, whatever that means. For a common law judge, it is an uncertain concept.
Mr Parker: It is something that perhaps one finds more frequently in Hague Conventions in terms of cooperation between courts. We are not clear what this really means but we are open minded if it may have some value.

Q88 ***Chairman:*** I make it absolutely clear that in a general sense of course common law courts are delighted to try and produce some harmonious international results, but the actual practical idea of the telephone call to sort out a case with a judge abroad is much more difficult to conceive of as a really practical way, I would suggest to you. I do not know if you agree with that?
Mr Parker: It has had more value perhaps in the family law area than in the commercial area.

Q89 ***Chairman:*** We have covered the position very clearly, if I may say so, in relation to choice of court clauses. Can I just take the second situation where there is not a choice of court clause but nonetheless proceedings are started in a country which may not be the obvious country, perhaps for torpedo reasons and perhaps the proceedings may be for negative declaratory relief. The second set of proceedings which are for the substantive relief are started in the country which is the more obvious country. At present the latter country has to absolutely stay its proceedings under Article 27 and defers to the former. Would you favour any modification of that position? Would you favour any modification or perhaps even abolition of Article 27?
Mr Parker: My impression, based so far on the views that we have received, and also my impression of where other Member States are or are likely to be in the negotiations is that there is no general concern about the *lis pendens* rule, leaving aside the particular *Gasser* problem. I think most Member States and many English practitioners in fact regard the *lis*

pendens rule with some general equanimity. It may not be perfect; it may not be our traditional way, but I think people have learned to live with it. I do not detect any general enthusiasm for wholesale change to it, which is not to say that there cannot be minor improvements round the edges, but I think wholesale reform is probably unlikely.

Q90 ***Chairman:*** What I was really identifying was that the Commission itself had suggested that the procedure of gaining jurisdiction and priority by a claim for negative declaratory relief might be reconsidered. Do you think that merits reconsideration?
Mr Parker: Yes. I think that certainly deserves consideration. Article 28 with its discretionary approach is more akin to our way of doing things. We have had quite a lot of responses saying negative declaratory relief is not necessarily a bad thing. In order to determine whether it is, you would have to look pretty extensively at all the surrounding facts. That might create a degree of legal uncertainty which could be unwelcome. I think it is a possibility but it is certainly not an absolutely pressing priority.

Q91 ***Chairman:*** One can think of cases where claims are brought to set aside contracts, to avoid them for non-disclosure, which are in a sense negative claims but entirely understandable.
Mr Parker: Yes.

Q92 ***Chairman:*** One can think of claims in the patent area, the intellectual property area, where there is a declaration that you will not be infringing a patent if you put something on the market, which is entirely legitimate.
Mr Parker: Yes.

Q93 ***Chairman:*** It is your view that it may be difficult to follow the Commission's line of thinking?
Mr Parker: Yes. I certainly think that using Article 28 as a sort of primary means of resolving concurrent proceedings is probably not a runner. I think that would be too bold a step.

Q94 ***Chairman:*** Shall we move on to industrial property which raises quite a number of the same problems? Do you agree with the Green Paper's identification of the problems in this area? Are there any greater problems? There was quite an extensive discussion by the Court of Appeal in a case called *Research in Motion UK Ltd v Visto* in 2008.
Mr Parker: We think that the Commission in its two particular suggestions certainly has identified two of the most obvious problems with the way in which the Regulation operates at the moment. We have studied the Court of Appeal judgment and its reference to the complexity and special nature of international patent litigation which perhaps reflects the particular nature of patents, the fact that they are in many ways national monopolies, territorially restricted in scope and exercises of national sovereignty. These are issues which I think account to some extent perhaps for the lack of trust between Member States as to exactly how patents should be dealt with, particularly issues of validity. We are still very much reflecting on what we should say about that. We have not yet had detailed comments from the Intellectual Property Office. What I can say is that we think that, where clear improvements can be made in the review of Brussels I, they should be made and we would not want to postpone any improvements until we get a new agreement for a unified patent jurisdiction in the European Union. We think that such a postponement would be making the best the enemy of the good.

Q95 ***Chairman:*** It has taken a pretty long time already in discussion and not yielded any unified patent system. Perhaps that is an understandable position. Just summarising, you would be in favour, would you, of a rule which allowed infringement proceedings under different patents in different states to be combined in one state? Would you be in favour of any variation of the rule that any issue about the validity of a patent has to go off to be determined by the courts of the state of registration of the patent?
Mr Parker: That is a slightly more difficult one. I think the first idea is perhaps less contentious. The idea of the infringing court dealing with an issue of validity would be controversial. I really would not want to commit us in any way to that proposition. The more limited proposition, which is that issues of infringement could be continued to be raised and determined even though an issue of validity has been raised—there may be circumstances in which those infringement proceedings might be allowed to continue, rather than at the moment automatically transferring to the court of registration, which can undoubtedly produce a lot of delay and expense.

Q96 ***Chairman:*** If one is going to combine patent infringement actions deriving from different patents in different countries in one country, is there not a real risk that the claimant is going to have a very wide range of options? If there is the same patent in ten different European countries, the claimant can bring an action against an alleged infringer in whichever of those countries he likes maybe against a consumer, a manufacturer or a supplier in that country. Then he can join in all the other actions and all the other defendants in that country. Does that not give rather a wide scope for forum shopping? Would one not need some rules to define which countries?
Mr Parker: I entirely agree. You may have touched on some of the broader problems which this review may not completely solve. That remains to be seen. It

may be that a fully satisfactory and comprehensive solution will have to await a specialist instrument in this area, but we will certainly seek to achieve straightforward improvements in the review so far as we can.

Q97 ***Chairman:*** Let us move on to the Regulation and arbitration. Do you see a problem arising from the inter-relationship of the two at the moment?
Mr Parker: Yes indeed. This, along with the *Gasser* problem, is the most important of the commercial difficulties produced by decisions of the Court of Justice.

Q98 ***Chairman:*** This is the other decision, *West Tankers*?
Mr Parker: Yes. As a result of this decision, English courts are no longer able to support arbitration proceedings in this country by issuing anti-suit injunctions to prevent competing court proceedings which have been brought in another Member State. The effect of bringing the latter proceedings is to destabilise the arbitration. Such torpedo tactics are analogous to those used in the *Gasser* case and serve only to undermine proper agreements by commercial parties to resolve their disputes in a particular way in a particular jurisdiction. The consequent problems are also similar, namely legal uncertainty and additional, unwarranted expense and delay. The Government fully understands the commercial importance of arbitration and the key role played by London as the global centre for such dispute resolution. That in summary is our understanding of the problem. We do not have any concluded views on how best to solve it. The trick will be to modify the existing exclusion of arbitration from the scope of the Brussels I Regulation but not to abrogate it any further than is necessary to solve the existing problem. We certainly agree with the Commission that we do not want to bring arbitration fully within the scope of the Brussels I Regulation. In principle, it probably belongs and should remain under the New York Convention of 1958.

Q99 ***Chairman:*** It would be crying for the moon, would it, to hope to reverse the *Front Comor* and restore the jurisdiction to give anti-suit injunctions where foreign litigation is started in patent breach of an arbitration clause?
Mr Parker: Our assessment is that that is very unlikely.

Q100 ***Baroness O'Cathain:*** Why not go for it? If, as I am told, arbitration is one of the great things that goes on in London and if we now have a situation where this is in effect being sidelined, using non-legal language, we are going to see some of the strengths of the London legal situation just vanish or be disregarded. We cannot buy into that, surely?
Mr Parker: We entirely share your concern and we will do whatever we can to address the problem caused by *West Tankers*. The problem with the anti-suit injunction solution is that it is widely seen amongst the other Member States—it is not available there, under their legal systems—as being contrary to the principle of mutual trust that underlies the Regulation as a whole. It is most unlikely that we will get agreement to restoring the anti-suit weapon.

Q101 ***Baroness O'Cathain:*** Perhaps we should not buy into any of this then.
Mr Parker: That is a much broader question.
Baroness O'Cathain: From the point of view of the great British public—

Q102 ***Chairman:*** The answer is that we are party to the Brussels regime and there is no question of us ceasing to be. This is a matter in relation to which we do have a right on the amendment as to whether or not to opt in, if there were a proposal?
Mr Parker: Yes indeed.

Q103 ***Chairman:*** To that extent, bearing in mind what you have said, it is extremely unlikely that we will not play the most positive and energetic part in its further pursuit?
Mr Parker: This review is something that we welcome because I think we have more to gain from it than otherwise in principle. If we were not participants in this review, we would be stuck with the existing Regulation with all its problems.

Q104 ***Baroness O'Cathain:*** If this goes according to the way they want it to go, does it mean that our business in arbitration in London is going to cease?
Mr Parker: No. We hope and believe that a solution to the *West Tankers* problem exists which does not necessarily involve the reinstatement of the anti-suit injunction. We are looking for solutions that work with the scheme of the Regulation as far as possible and we are hopeful that we can find a solution that will be fully satisfactory.

Q105 ***Chairman:*** The Commission's solution, which is the way we need to work, is to give jurisdiction by a slight modification of the arbitration exception to the law in the courts of the place of arbitration and to say that that is the country which decides whether the arbitration clause is valid, whether it covers the dispute and whether the arbitration should have priority?
Mr Parker: Yes.

Q106 ***Chairman:*** Instead of the foreign court having that role, it would be the court of the place of arbitration. While welcoming the general sentiment behind it, could there be problems about identifying the place of arbitration or any other problems that you perceive?
Mr Parker: There certainly are in principle problems with what we understand are a significant number of arbitrations where the place is not clearly identified, or perhaps where the litigation arises before the identification is made. That is another area which we need to look at very carefully. The solution to that is perhaps not entirely straightforward.

Q107 ***Chairman:*** Are you receiving representations from the arbitration world on this?
Mr Parker: We are.

Q108 ***Chairman:*** Assuming the worst, which might happen, that you still have an arbitration award but at the same time you have irreconcilable court proceedings and an irreconcilable court judgment elsewhere, should the Regulation as revised address that situation?
Mr Parker: This is a slightly separate problem from *West Tankers*, because it was not caused by *West Tankers*. I think there is undoubtedly a problem here, at least in principle. How often there is in practice I am not so sure. Certainly this is something we could look at carefully and with sympathy, to make sure that proper arbitration awards are not trumped by improper court judgments that are inconsistent with them.

Q109 ***Chairman:*** There has been at least one case in a consumer context in relation to Germany, has there not, where English courts said that the matter should go to arbitration? The German court said no; the arbitration clause is invalid under German consumer law and then the question could arise—I cannot remember whether it did arise—as to whether the German judgment should be recognised, bearing in mind it was inconsistent with an English arbitration.
Mr Parker: Yes. There certainly are possibilities for difficulties under the existing rules and we will be looking carefully at an appropriate solution there as well.

Q110 ***Chairman:*** Is there anything more you want to say on arbitration?
Mr Parker: No.

Q111 ***Chairman:*** Can we move to provisional measures? The present rule under the Regulation is that courts without jurisdiction over the substance of a case may still grant provisional or protective measures such as interim injunctions, provided there is a sufficient connection. I think there is an idea in the Commission's papers that the requirement of sufficient connection might be relaxed or removed but instead there should be a provision that the court with jurisdiction over the substance of the matter should have the possibility of discharging any provisional or protective measures made by another court. Do you approve of that idea?
Lord Bach: We are unable to indicate the Government's final position on the Commission proposals that you have just mentioned to improve the operation of provisional measures. What I can say is that we are fully aware of the commercial importance in practice of such measures and the need to ensure that nothing is done which would in any way undermine the efficacy of the relief currently given by our own courts. Our general impression of the views so far received—and there may be more to come here—is that the current rules on provisional measures, although capable of improvement perhaps, do not routinely give rise to significant problems in practice. As you say, there are two proposals. I just speak about the *ex parte* measures. It could be clarified that such measures should be recognised and enforced under the Regulation if the defendant subsequently has the opportunity to contest the measures in question. We think this idea could be attractive to commercial litigators. I am going to ask Mr Parker to deal with the point about the connecting link.
Mr Parker: This is the second of the Commission's proposals.

Q112 ***Chairman:*** Yes. I did not touch on the first.
Mr Parker: This would involve being much more relaxed about the court without jurisdiction as to substance granting interim relief, but only on the basis that the court with jurisdiction can modify or discharge the resulting relief granted. We have an open mind but I can tell you that there has been quite a lot of criticism of that idea from the people who have responded so far to us. I think there is a general feeling that that kind of double bite at the cherry would create a lot of legal uncertainty and indeed represent an unjustified interference with our court orders. I am not sure that that is going to find favour, but we have not closed our minds yet.

Q113 ***Chairman:*** The first step which leads to that proposal, which is to relax the requirement of any connection, seems to move in a contrary direction to the usual direction of making more concrete grounds of jurisdiction.
Mr Parker: Yes.

Q114 ***Chairman:*** Would anyone apply for an interim order in a state if they knew that it was always subject to being set aside or revisited in the state with

jurisdiction over the substance of the matter? What would happen regarding costs and things like that?
Mr Parker: These are real difficulties.

Q115 ***Chairman:*** Broadly, leave as is?
Mr Parker: Yes.

Q116 ***Chairman:*** With the possible exception that *ex parte* orders might be recognised on the basis that the defendant is given adequate opportunity to set them aside?
Lord Bach: That would be the safeguard, yes.

Q117 ***Chairman:*** As a defendant necessarily is under proper procedures?
Lord Bach: Yes.

Q118 ***Chairman:*** Can we turn to other issues concerning the scope, jurisdiction and recognition and enforcement? There is a whole list of potential issues in section eight of the Green Paper. Some of them involve adding matters to the Regulation's scope, like maintenance. Some of them involve definitional questions like the definition of domicile or the company's seat. Some of them involve the question whether there should be additional grounds of jurisdiction like the site of movable assets and so on. Some of them involve extension of jurisdiction including outside the commercial civil field to enforcement of penalties or fines, which seems an important but rather different area of law. Are they envisaging speeding fines, parking fines and so on being brought within this Convention? Have you any points you want to make on any of these areas? Do any of them merit attention and, if so, which of them would you prioritise?
Lord Bach: I am sure they are all worthy of serious consideration but here we are going to rely really on the argument that there are a number of possible changes that are there. We are looking forward to consultees talking about them to us but we do not believe they have in great numbers at this stage. They are worthy of serious consideration and we intend to ensure that this is indeed given in the context of our submission to the Commission to be sent by the end of July. We do not think, subject of course to what the Committee says, it would be appropriate today for us to single out any of the proposals for special mention, but I am sure they will be part of our response in a month's time.

Q119 ***Chairman:*** I did single out in my question the circulation of judgments for penalties or fines which sounds as if it could be a very relevant topic to be tackled at European level, but does it really belong in this Convention?
Mr Parker: Of course it is outside scope at the moment. Civil and commercial matters as explained by the Court of Justice in its case law would certainly exclude such things from scope. I think this would be a very significant change. I am not sure what lies behind it and I think it would be undoubtedly pretty controversial. I would not think that that extension of scope was likely to happen.

Q120 ***Chairman:*** It is one which Europe ought to consider, is it not, outside the scope of this Convention?
Mr Parker: Perhaps in a special instrument.

Q121 ***Lord Blackwell:*** Listening to this evidence, it is clear there are a lot of complexities here arising from such differences in the different jurisdictions. If you take the matter that this instrument is aimed at, commercial law and increasing the free circulation of judgments, are there in this area sufficient differences in the legal traditions and precedents in each country so that a litigant would expect to get a different answer to a case, depending where it is heard? If so, particularly thinking about the UK common law jurisdiction, what is the effect of increasing the free circulation of judgments?
Mr Parker: Certainly the view from Brussels would be that the kind of differences that you suggest might exist have recently been significantly reduced because of the recent Rome I and II Regulations which provide uniform choice of law rules in contract and non-contractual obligations, tort principally. That means that in all those matters falling within the scope of those instruments all Community courts will apply in principle the same law to any subject area within the scope of those Regulations. In principle that creates a great deal of extra uniformity. In relation to contracts of course, we started on that course back in 1980 with the Rome Convention but with Rome II there was no uniformity until the Rome II Regulation came into operation at the beginning of this year. That applicable law development has created greater uniformity. Of course there are still important differences between the practice of the national courts and that remains.
Lord Bach: There is also the order in which they look at issues like jurisdiction and merits. In some cases we would look at jurisdiction first, as I understand it and, when that is decided, look at the merits. Other courts might take a different view or look at the two together. Some courts, as we have been talking about in terms of torpedo and *Gasser* in particular, may take longer than other courts in coming to a view which may of course affect the parties adversely.

Q122 ***Chairman:*** One subject, I suppose, that might be within the scope of the Regulation as revised might be the procedural subject, might it, as to the order in

which issues are addressed? In other words, it would be possible, would it not, for Europe to say that where a jurisdictional issue arises under the Convention that should be addressed first of all rather than await the argument and decision even as to the merits?
Mr Parker: That certainly could address the torpedo problem to some extent. I think we would want to consider carefully whether we would want to invite the Community into areas of procedure. They would not necessarily be slow to go there but we would want to make sure that this was a good development.

Q123 ***Chairman:*** Yes, the same applies, does it, to the argument which goes to substance that the Community might bless the idea of damages for breach of jurisdictional clauses?
Mr Parker: That is most unlikely because I think that would really be seen as a kind of first cousin to an anti-suit injunction and an improper attempt to influence jurisdictional decisions by courts in other states.

Q124 ***Chairman:*** What about the further suggestion, which again has a substantive flavour to it, that the Community might bless certain types of standard jurisdiction clause and they might receive special recognition under the revised Regulation?
Mr Parker: That is certainly an option. Perhaps I can also say that that idea has not been met with huge enthusiasm from the people who have sent us their views so far. They certainly would not wish agreements that did not conform in that way to be in any way damaged as a result.

Q125 ***Chairman:*** One understands that, having seen the extreme variety of clauses which businessmen use, sometimes in no more than three words and sometimes in three paragraphs. I think that has been very helpful. I do not know whether there is anything more that arises or anything more that you would like to say. Thank you very much both of you.
Lord Bach: Thank you very much, Chairman and your Committee, and particularly may I thank Mr Parker.

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