

The Brussels I Regulation - Jurisdiction

- Geert Van Calster
- gavc@law.kuleuven.be
- Blog at www.gavclaw.com





Wednesday 5 December 2012 from 15.00 to 18.30 hrs
Room A3E2 - European Parliament - Brussels

EPP Group Public Hearing on

COMMON EUROPEAN SALES LAW

A Balanced Proposal Between Consumers and Traders?

Chaired by **Hans Peter-Mayer** MEP
with **Viviane Reding**, Vice-President of the European Commission
responsible for Justice, Fundamental Rights and Citizenship



Background to Brussels I Regulation

- Background to the 'Brussels I' regulation: Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, 'EEC', ECF 1 February 1973; successive MSs joined up: hence it became a re-re-re-amended text
- ECJ did not originally have jurisdiction to interpret: 1971 Luxembourg protocol amended this
- As this was a Convention (see also Lugano): no E(E)C *travaux préparatoires*; these Conventions work with 'reports', prepared by officials with a little help from academics; for jurisdiction: *Jenard Report*, [1979] OJ C59/1 but also Schlosser, Evrigenis, Cruz, Jennard & Moller
- Somewhat bizarrely therefore, the non-Community /EU instruments often have an IP source which is easier to handle than those of Community /Union instruments

Background to Brussels I Regulation

ctd

- *Jenard* report continues to be referred to by the Commission and the ECJ as being an authoritative source of interpretation, exclusion made of course for these instances where the Regulation differs from the Convention
- 'Lugano' convention: initially developed in parallel to the Brussels Convention (from 1988 onwards), and still in force between EU MSs and EFTA minus Liechtenstein: now Iceland, Norway and Switzerland only; note was also open to non-EU MSs (e.g. Poland which joined before being EU MS)
- New Lugano Convention: 30 October 2007

Background to Brussels I Regulation ctd

- Which of these applies? Domicile of the defendant
- Note particular place of Denmark solved in 2007 with accession to Brussels I;
- Note that the provisions of the Regulation on jurisdiction and enforcement of judgment apply irrespective of the domicile of the defendant: the important issue there is the ID of the court which gave the judgment , plus of course the exclusions of Article 1 (see below)

Overriding principles

- Overriding principle : mutual trust : C-116/02, Gasser, at 72:
 - *it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary [sic - to?] the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments."*
- Idem in Turner, C-159/02, at 24
- The Regulation assigns jurisdiction to a MS - internal CoL not a matter for the EU: C-364/93 Kleinwort Benson
- The Regulation harmonises jurisdiction and R/E only, not characterisation and choice of law: this is a substantive matter of national law (C-26/91 Jakob Handte) however of course now increasing harmonisation of choice of law, too

Overriding principles ctd

- General rules of IP emerging from the ECJ :
 - A provision derogating from the basic rule (domicile of the D, see below): strict IP (eg Case C-220/88 *Dumez France* and C-364/93 *Marinari*)
 - As the Regulation aims to favour easy enforcement of judgments in other MSs, rules which mandate non-recognition of judgments are given restrictive IP, those which prevent parallel litigation are construed widely (Case 144/86 *Gubish Maschinenfabrik*)
 - As noted before: mutual trust: *Gasser*
- See below: domicile of the defendant is crucial , application of the Regulation is not (generally) dependent on the claimant being domiciled in a MS

Jurisdiction: Matrix

- The most specific and exclusive first:
 - 1 . Exclusive jurisdiction , regardless of domicile: Article 22
 - 2 . Jurisdiction by appearance: Article 24
 - 3 . Insurance, consumer and employment contracts : Articles 8-21
 - 4 . Agreements on Jurisdiction: Article 23
 - 5 . General jurisdiction: defendants domiciled in the MS where a court is seized: Article 2
 - 6 . 'Special' jurisdiction: defendants domiciled in another MS: Articles 5-7
 - 7 . 'Residual' jurisdiction: defendants not domiciled in any MS: Article 4
 - 8 . Loss of jurisdiction: *lis alibi pendens* and related actions: Articles 27-30
 - 9 . Applications for provisional or protective measures: Article 31
- A quick word on each of these

Exclusive jurisdiction , regardless of domicile: Article 22

- 22(1): rights in rem, and tenancies of, immovable property
- 22(2): companies (but see *BVG*, Case C-144/10)
- 22(4): intellectual property

Voluntary appearance: Article 24

Protected categories

- Insurance, consumer and employment contracts
- Limited room for manouvre for choice of forum clauses
- Position of insured... as plaintiff is the distinguishing feature
- 'consumer' contracts: 'directed at' criterion: see *Pammer Alpenhof* joined cases C-585/08 C-144/09

Choice of court: Article 23

- Particularly relevant is verification of consent
- Standard terms and conditions? OK if reference to them at the front (*Segoura* Case 25/76). Quid internet?

General rule: Article 2: Domicile

- Domicile 'defined' in Arts.59-60

'Special' jurisdiction: Arts 5-7

- Defendant domiciled in another Member State
- Opens extra forum over and above Article 2
- Article 5(1): contracts (with harmonisation of 'place of performance' for sales of goods, and of services)
- Article 5(3): torts: locus delicti commissi and locus damni (*Bier*) – but for the latter only limited jurisdiction. Application in internet and defamation context: *Shevill*; *Kylie Minogue (eDate Advertising – Olivier Martinez)*
- Joinders: Article 6 (use of anchor defendants)

Residual jurisdiction: Article 4

Loss of jurisdiction: Article 27 ff

- Strict lis alibi pendens rule and race to court
- Article 27: 'identical' cases; Article 28: 'related' actions

Provisional measures: Article 31

- See more below

The Regulation in practice

- The Regulation is heritage-heavy. No easy step-in. Only knowledge of precedent helps understand the true meaning of many of the jurisdictional rules.
- Race to court and 'torpedoes' have been a particular problem.
- Principle of mutual trust had led to the exact opposite.
- The ECJ has had the tendency to micro-manage. That might now be slowly changing.
- On the other hand, the ECJ is bumping into the limits of harmonisation of EU private law. Since qualification entails categories of private law, many of the Regulation's concepts need fine-tuning. See e.g. most recently in *Corman-Collins*, Case C-9/12 re 'concession' agreements: 'service' or 'contract' viz Article 5(1)(b)?

Changes to the Regulation

- Recast Regulation: 1215/2012: OJ [2012] L 351/1
- Application as of 10 January 2015
- Preceded by 'Heidelberg' Report, Green Paper, EP Resolution, Reports etc.
- Heidelberg report did not reveal too many complications, however one or two things have changed rather drastically

International impact of the Regulation

- Commission Proposal: 'international impact = equality in the position of plaintiff' (cf outside impression: 'international impact = extensive jurisdictional rules which amount to extraterritoriality)
- EC: proposed to
 - remove residual jurisdictional grounds of Article 4
 - removal of condition of domicile for all special jurisdictional rules (including the protected categories but also contract, tort, etc.)
 - introduction of assets rule
 - introduction of forum necessitatis

International impact of the Regulation

- EP, Council and Regulation:
 - Article 4 retained (now Article 6)
 - Neither assets rule nor forum necessitatis
 - No general extension of special jurisdictional rules to defendants outside of the EU
 - Protected categories: not the insureds, however consumers and employees may sue (iow act as plaintiff) even if defendant is not domiciled in the EU (! important link with Rome I)

Choice of court (ex protected categories)

- Domicile of at least one of the parties no longer required to have choice of court clause in favour of an EU court
- Forum prorogati to get priority in accepting (or not) jurisdiction: torpedoes blocked
- Choice of court clause specifically withheld as separate agreement; Legality of the choice of court clause to be reviewed under lex fori prorogati (however including renvoi: recital 20)
- Existence of 'Agreement' remains problematic: how about consideration? Misrepresentation? Fraud? etc.

The exclusion of 'arbitration'

- Supposedly clear, however became very unclear and controversial with *Van Uden* and *West Tankers*
- New article and consideration 12 not very helpful at all:
 - *(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*
 - *A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.*
 - *On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ("the 1958 New York Convention"), which takes precedence over this Regulation.*
 - *This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.*

Provisionary and protective measures

- Article 35: unchanged:

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

- The measures have to be provisional (Case C-261/90 *Reichert*, not – as in casu – the *actio pauliana*); there has to be a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the State of the court before which those measures are sought: C-391/95 *Van Uden*

Provisionary and protective measures

- Quid measures ex parte? Case 125/79 *Denilauler*: *THE CONVENTION IS FUNDAMENTALLY CONCERNED WITH JUDICIAL DECISIONS WHICH, BEFORE THE RECOGNITION AND FORCEMENT OF THEM ARE SOUGHT IN A STATE OTHER THAN THE STATE OF ORIGIN, HAVE BEEN, OR HAVE BEEN CAPABLE OF BEING, THE SUBJECT IN THAT STATE OF ORIGIN AND UNDER VARIOUS PROCEDURES, OF AN INQUIRY IN ADVERSARY PROCEEDINGS.*

- New Regulation:

- R/E of judgments limited to those taken by a court which has substantial jurisdiction under the Regulation: recital 33:

Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. (...) Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

Provisionary and protective measures

- Slight amendment of Denilauler criteria: recital 33 again:
 - *Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law.*

Blog at www.gavclaw.com

- Wahl AG in Unamar: national gold-plating of Union law does qualify as lois de police under the Rome Convention
- *'Establishment' within the meaning of the Insolvency Regulation: the Court of Appeal in Olympic Airlines*
- Insolvency Regulation protects bona fide third parties, even when they are being used by male fide debtor: Kokott AG in van Buggenhout /van de Mierop
- *Pinckney: Jääskinen AG suggests 'focus and target' as criterion for jurisdiction*
- *Applicable law and arbitration clauses – lex arbitri, lex curia, lex contractus – The English view in Sulamerica*