Jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Recast

2010/0383(COD) - 14/12/2010 - Legislative proposal

PURPOSE: to recast Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I").

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: Regulation Brussels I is the basis for civil judicial cooperation in the EU. It applies in a broad range of matters, covering not only contractual but also delict and proprietary claims. It identifies the most appropriate jurisdiction for solving a cross-border dispute and ensures the smooth recognition and enforcement of judgments issued in another Member State. While the Regulation is overall considered to work successfully, the consultation of stakeholders and a number of studies revealed deficiencies in the current operation of the Regulation which should be remedied. Essentially, four main shortcomings can be identified:

- the procedure for recognition and enforcement of a judgment in another Member State (" **exequatur") remains an obstacle** to the free circulation of judgments. It entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market;
- access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU. With some exceptions, the current Regulation only applies where the defendant is domiciled within the EU. Otherwise jurisdiction is governed by national law. The diversity of national law leads to unequal access to justice for EU companies in transactions with partners from third countries: some can easily litigate in the EU, others cannot, even in situations where no other court guaranteeing a fair trial is competent. In addition, where national legislation does not grant access to court in disputes with parties outside the EU, the enforcement of mandatory EU law protecting e.g. consumers, employees or commercial agents is not guaranteed;
- the efficiency of choice of court agreements needs to be improved. Currently, the Regulation obliges the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first. This rule enables litigants acting in bad faith to delay the resolution of the dispute in the agreed forum by first seizing a non-competent court. This possibility creates additional costs and delays and undermines the legal certainty and predictability of dispute resolution;
- the interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Regulation. However, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.

LEGAL BASE: Article 81 (2) (a), (c) and (e) of the Treaty on the Functioning of the European Union (TFEU).

IMPACT ASSESSMENT: the Commission analysed the costs and benefits of the main aspects of the proposed reform in its Impact Assessment which accompanies the proposal.

CONTENT: the objective of the proposal is to remove the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition.

The proposed elements of the reform are as follows:

Abolition of the intermediate procedure for the recognition and enforcement of judgments (exequatur): today, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States. The proposal therefore abolishes the exequatur procedure for all judgments covered by the Regulation's scope **with the exception of judgments in defamation and compensatory collective redress cases.** The abolition of exequatur will be accompanied by procedural safeguards which ensure that the defendant's right to a fair trial and his rights of defence are adequately protected. The proposal outlines **remedies available to a defendant** to enable him to prevent, in exceptional circumstances, a judgment given in one Member State taking effect in another Member State. These safeguards address the situations which are currently addressed by certain of the existing refusal grounds, in particular in order to ensure the protection of the rights of the defence, with the key difference that control of substantive public policy is abolished. As such, the time and costs of the exequatur procedure will be saved while the protection of defendants is ensured.

The proposal also contains a **series of standard forms** which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the exequatur procedure as well as the application for a review under the procedure safeguarding the rights of defence. These forms will facilitate the enforcement of the judgment by the competent authorities, in particular where interest and costs have to be calculated. They also reduce the need for a translation of the judgment and ease the application for a review of the judgment by the defendant who has to act in another Member State.

Extension of the jurisdiction rules of the Regulation to disputes involving third country defendants: this amendment will generally extend the ability of companies and citizens to sue third country defendants in the EU because the special rules of jurisdiction which e.g. establish jurisdiction at the place of contractual performance become available in these cases. More specifically, the amendment will ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. The proposal further **harmonises the subsidiary jurisdiction rules and creates two additional fora** for disputes involving defendants domiciled outside the EU:

- it provides that a non-EU defendant can be sued at the place where moveable assets belonging to him are located provided their value is not disproportionate to the value of the claim and that the dispute has a sufficient connection with the Member State of the court seised;
- the courts of a Member State will be able to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned ("forum necessitatis").

The proposal introduces a **discretionary lis pendens rule** for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country. A court of a Member State can exceptionally stay proceedings if a non-EU court was seised first and it is expected to decide within a reasonable time and the decision will be capable of recognition and enforcement in that Member State. This amendment aims at avoiding parallel proceedings within and outside the EU.

Enhancement of the effectiveness of choice of court agreements: the proposal includes two amendments with this in mind:

- where the parties have designated a particular court to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised. Any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction;
- the proposal introduces a harmonised conflict of law rule on the substantive validity of choice of court agreements, thus ensuring a similar outcome on this matter whatever the court seised.

Improvement of the interface between the Regulation and arbitration: the proposal obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. This modification will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics.

Better coordination of proceedings before the courts of Member States: the proposal contains the following provisions:

- it aims at improving the general lis pendens rule by prescribing a time limit for the court first seised to decide on its jurisdiction. In addition, the amendment provides for an exchange of information between the courts seised of the same matter;
- it facilitates the consolidation of related actions by doing away with the requirement that consolidation has to be possible under national law;
- regarding provisional, and protective measures, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – measures which have been granted ex parte. By contrast, the proposal prevents the circulation of provisional measures ordered by a court other than the one having jurisdiction on the substance. Given the wide divergence of national law on this issue, the effect of these measures should be limited to the territory of the Member State where they were granted, **thereby preventing the risk of abusive forum-shopping**;
- if proceedings on the substance are pending in one court and another one is asked to issue a provisional measure, the proposal requires the two courts to cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted.

Improvement of access to justice for certain specific disputes: provisions include:

- the creation of a forum for claims of rights in rem at the place where moveable assets are located;
- the possibility for employees to bring actions against multiple defendants in the employment area. This will benefit employees who wish to bring proceedings against joint employers established in different Member States;
- the possibility of concluding a choice of court agreement for disputes concerning the tenancy of premises for professional use, and
- the mandatory information of a defendant entering an appearance about the legal consequences of not contesting the court's jurisdiction. and
- clarification of the conditions under which provisional and protective measures can circulate in the EU.