# CURRENT DEVELOPMENTS

## PRIVATE INTERNATIONAL LAW

Edited by Wendy Kennett

## THE BRUSSELS I REGULATION

### *Introduction*

On 22 December 2000, the Council of the European Union finally adopted Regulation 44/2001, which transforms the Brussels I Convention into a Community law instrument, pursuant to Arts. 61(c) and 67(1) of the EC Treaty. The basic framework of the Regulation remains similar to that of the Convention, although there are numerous changes on points of detail and some on matters of substance.

The UK, Ireland and Denmark are the subject of special arrangements in relation to Title IV of the EC Treaty, as set out in Protocols to the Treaty. The UK and Ireland have given notice of their wish to take part in the adoption and application of the Regulation, but Denmark has decided not to participate.[1] For this reason Art. 1(3) of the Regulation states that "in this Regulation the term 'Member State' shall mean Member States with the exception of Denmark."[2] This reflects the fact that all references to Contracting States in the Brussels I Convention have been amended to refer to Member States in the Regulation.

The Regulation is the fruit of renegotiations that began in 1997. The original plan was to amend the Brussels and Lugano Conventions while retaining the parallelism between the two. Agreement was reached in 1999. The course of events since that time has, however, led to greater divergence between the two instruments. The entry into force of the Amsterdam Treaty brought with it the expectation that the new instrument regulating jurisdiction and enforcement would be a Regulation and would pass through the Community law legislative procedures. This led, in particular, to lobbying by those involved in e-commerce and to conflicts between the Justice and Home Affairs Directorate-General and other Directorates-General. A further eighteen months of negotiation and reflection have been necessary before agreement on a text could be reached.

Given that the Regulation was building on the Brussels I Convention (the Convention), which has been in force for nearly thirty years, the conflict over amendment is not a particularly promising omen for the speed of progress towards a European Judicial Area (EJA), heralded at the Tampere summit in

1. Denmark has, however, expressed an interest in the conclusion of an agreement allowing it to apply the rules laid down in this Regulation.

2. Certain provisions of the Brussels I Convention that are only applicable to Denmark are therefore absent from the Regulation.

October 1999. Far more radical measures are foreseen as necessary to create the EJA.[3]

### *Structural considerations*

Although much of the Regulation is the same as the Convention, the similarities are partly obscured by structural changes. Renumbering was inevitable in the light of some of the changes made and will lead to initial confusion. The matters regulated in the Protocol to the Convention have been brought into the main text of the Regulation at various points. Other changes have been made with a view to simplifying the structure of the instrument (e.g. the procedure for appeals) but again complicate comparisons between the Regulation and the Convention. The lists of exorbitant heads of jurisdiction (Art. 3), competent authorities to which an application can be made for a declaration of enforceability (Art. 39) and courts to which an appeal can be made (Arts. 43 and 44) are contained in Annexes to the Regulation. This is, at least in part, for ease of later amendment.

The various Titles of the Convention are found as Chapters in the Regulation.

## CHAPTER I—SCOPE OF THE REGULATION

The scope of the Regulation *ratione materiae* (Art. 1) remains the same as in the case of the Brussels I Convention.

## CHAPTER II—JURISDICTION

### *General jurisdiction*

The rule of general jurisdiction in Art. 2 of the Regulation—that a defendant should be sued at his domicile—remains unchanged, as do the majority of rules of specific jurisdiction contained in Art. 5 and 6 (and note that Art. 6a has become Art. 7).

Determination of the domicile of a natural person is governed by Art. 59 of the Regulation which is in the same terms as Art. 52 of the Convention. The domicile of a legal person is to be determined by Art. 60 of the Regulation (ex Art. 53), which provides an autonomous rule, rather than referring the matter to the private international law rules of the court seized. The autonomous rule is, however, in wide terms.

> 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
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> (a) statutory seat, or
> (b) central administration, or
> (c) principal place of business.
>
> 2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. See the "Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters" (O.J. C12 of 15.1.2001).

The rule in relation to the domicile of a trust remains unchanged.

It may be of interest to note, with reference to the reasoning in *re Harrods (Buenos Aires)* that the preamble to the Regulation states at point (8) that "there must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States." The emphasis on the application of common rules by the Member States, rather than on the resolution of potential conflicts between Member States.

Article 4 now includes a reference to Arts. 22 and 23, thus clarifying the scope of Art. 23 (ex Art. 17).

*Specific jurisdiction*

There are three changes in the rules on special jurisdiction in Arts. 5–7 of the Regulation. Art. 6(1) has been modified to conform to its interpretation by the European Court in Case 189/87, *Kalfelis* v. *Schröder*.[4]

More radical change has been wrought in Art. 5(1). The new text provides that:[5]

A person domiciled in a Member State may, in another Member State, be sued:

1.

(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

(c) if subparagraph (b) does not apply then subparagraph (a) applies.

The Explanatory Memorandum attached to the Commission's earlier proposal for a Regulation (COM (99) 348) notes that if para (b) leads to designation of non-Member State, para (a) will be applied.

There is no longer any specific reference to employment contracts in Art. 5(1) because all provisions relating to employment contracts have been grouped together in a new Section 5 which is considered further below.

Article 5(3) has been modified to provide for the case of threatened torts, a change which has long been sought.

*Matters relating to insurance*

Chapter II Section 3 of the Regulation, dealing with jurisdiction in matters relating to insurance, has been the subject of certain clarifying amendments. Art.

4. [1988] E.C.R. 5565.

5. The final text is little changed from a proposed version that was the subject of comment in (2000) 49 I.C.L.Q. 503–504.

9(1)(b) (ex Art. 8(2)) now provides that an insurer domiciled in a Member State may be sued "in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled". This brings the text into line with the principle of protecting the weaker party by expanding the *forum actoris* to include the insured or a beneficiary rather than just the policyholder.

Reference to large risks that are excluded from the restrictive provisions on jurisdiction agreements in Art. 13 (ex Art.12) of the Regulation is expanded in Art. 14 (ex. Art. 12A) to include "all 'large risks' as defined in Council Directive 73/239/EEC" as amended and as amended in the future.

### *Consumer contracts*

Chapter II Section 4 of the Regulation has to be read in the light of the statement made by the Council of the European Union at the time the Regulation was adopted. The creation of a *forum actoris* for the consumer is fiercely resisted by the e-commerce lobby as a factor that will inhibit development of this new form of economic activity.[6] Frankly it is difficult to see why the fact that it is easier for producers to market their (potentially substandard or dangerous) products in countries in which they have no support infrastructure should mean that consumers are less deserving of protection than they were before. Nevertheless, the dispute has provided a catalyst for new developments in consumer dispute resolution, a matter which has been on the Commission agenda for some time.

### *The statement reads:*

> 1. The Council and the Commission are aware that the development of electronic commerce in the information society facilitates the economic growth of undertakings. Community law is an essential if citizens, economic operators and consumers are to benefit from the possibilities afforded by electronic commerce.
>
> They consider that the development of new distance marketing techniques based on the use of the Internet depends in part on the mutual confidence which may grow up between undertakings and consumers. One of the major elements in this confidence is the opportunity offered to consumers by Article 16 of the Regulation to bring possible disputes before the courts of the Member States in which they reside, where the contract concluded by the consumer is covered by Article 15 of the Regulation.
>
> The Council and the Commission point out in this connection that for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.
>
> In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.

6. A reaction that is also being reproduced in the context of proposals for European rules on choice of law in non-contractual matters, apparently with little regard for the fact that the present national law rules are also predominantly pro-consumer.

> 2. The Council and the Commission take the view that in general it is in the interest of consumers and undertakings to try to settle their disputes amicably before resorting to the courts.
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> The Council and the Commission stress in this connection that the purpose of the Regulation, and in particular of Articles 15 and 17 thereof, is not to prohibit the parties from making use of alternative methods of dispute settlement.
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> The Council and the Commission accordingly wish to reiterate how important it is that work on alternative methods of dispute settlement in civil and commercial matters should continue at European Community level, in keeping with the Council's conclusions of 29 May 2000.
>
> They are aware of the great significance of this work and stress the useful complementary role represented by alternative methods of dispute settlement in civil and commercial matters, in particular with regard to electronic commerce.
>
> 3. Pursuant to Article [73] of the Regulation, the Commission is to submit a report on the application of the Regulation, accompanied, if need be, by proposals for adaptations, to the European Parliament, the Council and the Economic and Social Committee.
>
> The Council and the Commission consider that in preparing the report especial attention should be paid to the application of the provisions of the Regulation relating to consumers and small and medium-sized undertakings, in particular with respect to electronic commerce. For this purpose, the Commission will, where appropriate, propose amendments to the Regulation before the expiry of the period referred to in Article [73] of the Regulation.

The amendments to the text of Section 4 reflect changes in business practice. There is also some generalisation of the wording to refer simply to "consumer contracts", rather than contracts for the supply of goods or of services. The principal change is to be found in Art. 15(1)(c) (ex Art. 13(3)). The Explanatory Memorandum explains the revisions as follows:

> The criteria given in Art. 13(3) of the Brussels Convention have been reframed to take account of developments in marketing techniques. For one thing, the fact that the condition in old Art.13 that the consumer must have taken the necessary steps in his State has been removed means that Art.15, first paragraph, point (3), applies to contracts concluded in a State other than the consumer's domicile. This removes a proved deficiency in the text of old Art.13, namely that the consumer could not rely on this protective jurisdiction when he had been induced, at the co-contractor's instigation, to leave his home State to conclude the contract. For another, the consumer can avail himself of the jurisdiction provided for by Art. 16 where the contract is concluded with a person pursuing commercial or professional activities in the State of the consumer's domicile or directing such activities towards that State, provided the contract in question falls within the scope of such activities.
>
> The concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. The contract is thereby treated in the same way as a contract concluded by telephone, fax and the like, and activates the grounds of jurisdiction provided for by Art. 16.
>
> The removal of the condition in old Art.13(3)(b) that the consumer must have taken necessary steps for the conclusion of the contract in his home State shall also be seen in the context of contracts concluded via an interactive website. For such contracts, the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract and the consumer's State. The philosophy of new Art. 15 is that the co-contractor creates the necessary link when directing his activities towards the consumer's State.

The exclusion of transport contracts has also been amended in Art. 15(3) (ex Art. 13). The Article does cover "a contract which, for an inclusive price, provides for a combination of travel and accommodation."

Articles 16 (ex Art. 14) has also been amended to allow a consumer to bring proceedings in the court for the *place* where he is domiciled, rather than merely in the *Member State* where he is domiciled. It was thought that this change was justified by the need to ensure that consumers can sue as near to their home as possible.

### *Employment contracts*

A new Section 5 has been introduced into Chapter II (Arts. 18–21) to bring together all provisions on employment contract, and to harmonise their treatment with that accorded to insurance and consumer contracts (e.g. by providing that an employer not domiciled in a Member State, but who has a branch, agency or other establishment in a Member State shall be deemed to be domiciled in that Member State in relation to disputes arising out of the operations of that establishment; by providing for jurisdiction in relation to counterclaims).

### *Exclusive jurisdiction*

A few amendments can be found in Art. 22 (ex Art. 16). The second paragraph of Art. 22(1) has been amended to adopt a compromise position between the wording of the Brussels and Lugano Conventions. The derogation from the general principle of the exclusive jurisdiction of the *situs* applies to short-term lets where the *tenant* is a natual person and the *landlord and tenant are domiciled in the same Member State*.

Art. 22(2) has been modified to remove an ambiguity in its wording. The courts of the Member State in which seat of a legal person is found have exclusive jurisdiction "in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, *or of the validity of* the decisions of their organs."[7]

Furthermore the final sentence of Art. 22(2) provides that "in order to determine that seat, the court shall apply its rules of private international law." The autonomous rule for determining the domicile of a legal person, set out in Art. 60 does not, therefore, apply in this context.

As part of the process of moving provisions from the Protocol to the Convention into the main body of the Regulation, Art. Vd of the Protocol (concerning jurisdiction in relation to a European patent) has been appended to Art. 22(4).

### *Jurisdiction agreements*

There are three significant modifications of the provisions relating to jurisdiction agreements. The first is that Art. 23(1) (ex Art. 17(1)) now provides for non-exclusive jurisdiction agreements. Instead of providing that the chosen court

7. See the discussion in *Newtherapeutics Ltd* v. *Katz* [1991] Ch. 226.

shall have exclusive jurisdiction, it merely provides that that court shall have jurisdiction. A second sentence then adds: "Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

A new Art. 23(2) makes specific provision for contracts formed by electronic communication. It states that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'."

The new version of Art. 23 no longer includes any reference to agreements for the benefit of one party, presumably because the main relevance of this provision was to allow for non-exclusive jurisdiction agreements, which are now explicitly permitted.

Other changes to Art. 23 are a consequence of the relocation of the provisions relating to employment contracts and do not alter the substance of the text.

*Examination as to jurisdiction and admissibility*

Minor revision of Art. 26 (ex Art. 20) has taken place to take account of the new Service Regulation (Reg. (EC) 1348/2000).

*Lis pendens—related actions*

Two amendments have been made to Art. 28 (ex Art. 22) to improve the unsatisfactory wording of the original version. First, the new version makes it clear that a stay of proceedings can only take place when both actions are pending at first instance. Otherwise the parties might lose the benefit of an appeals procedure. Second, the question of which law must permit the consolidation of actions has been clarified. The original version provides that a court other than the court first seized may decline jurisdiction "if the law of *that* court permits the consolidation of related actions and the court first seized has jurisdiction over both actions." It has frequently been pointed out that the relevant question is whether the court *first* seized permits the consolidation of related actions, so that both actions can in fact be heard together. This approach is now reflected in the wording of Art. 28 which allows any court other than the court first seized to decline jurisdiction "if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof."

More radical is a new Art. 30, which seeks to introduce an autonomous interpretation of the concept of seisin. It states:

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The intention is to deal with a long running problem of interpretation which arises from differences in the procedural laws of Member States. In some states proceedings are started by means of lodging a claim with the court, which may

then become responsible for serving the document instituting the proceedings on the defendant, or, as in the case of England and Wales, may permit the plaintiff to take the necessary steps to effect service. In other states the court is not involved in proceedings at all until after the claim form has been served. An independent "officer of the court" may be competent to draw up and serve a claim form. A definition of seisin that requires the document to have been served disadvantages the former states. A definition of seisin that requires the claim form to have been lodged with the court disadvantages the latter states.

Article 30 seeks to provide a compromise. It is the first step taken to commence proceedings that is relevant—whether this involves presentation of the relevant documentation to the court, or to the authority responsible for service. The court will be deemed to be seised at that point, provided that the plaintiff thereafter takes the necessary steps to continue the proceedings. This represents a decisive move away from the European Court's definition of seisin such that proceedings must be "definitively pending".[8]

This still may place some jurisdictions at what might be considered an "unfair" advantage in comparison with other jurisdictions, in the sense that documentation may be lodged with the court or other competent authority several months before service actually takes place—as is the case in relation to the issue of a claim form in England and Wales. A plaintiff may seek to continue negotiations with the defendant secure in the knowledge that they have already seised their local court and only later actually inform the defendant of this. Perhaps Art. 30 should have imposed a time limit within which further steps in the proceedings should be taken.

### *Provisional, including protective, measures*

In spite of considerable debate about possible reform of the rules relating to provisional measures, the text of the Regulation remains the same as that of the Convention.

## CHAPTER III—RECOGNITION AND ENFORCEMENT

In theory the most radical reform wrought by the Regulation should be in the context of recognition and enforcement. In its proposals for reform, and most recently in COM (1999) 348, the Commission has taken the view that the court procedures relied on for the grant of a declaration of enforceability, which in many jurisdictions make the process slow and unwieldy, should give way to a much more rapid and purely administrative procedure. The competent authority would not undertake an investigation of possible grounds for non-recognition of the judgment or authentic instrument. It would merely check that the applicant has presented the required documentation. Any dispute on matters of substance would therefore be deferred for later *inter partes* proceedings. Furthermore it would be possible for Member States to identify a single competent authority to grant declarations of enforceability for the whole jurisdiction. Since this is to a large extent the approach already applied in the United Kingdom, the change would not be felt to the same extent in this jurisdiction.

8. Case Case 129/83, *Zelger* v. *Salinitri* [1984] E.C.R. 2397.

It is unclear how far this desire has found expression in the resulting Regulation. Although some of the structure of Chapter III accords with the Commission's proposals, there are also some differences. The extent of any reform depends ultimately on the nature of the competent authorities nominated by the Member States to deal with applications for a declaration of enforceability. These are listed in an Annex to the Regulation (Annex II). At present the Annex lists the same competent authorities that can be found in the Convention. *Plus ça change*. The Regulation nevertheless makes provision for the Annexes to be amended.[9] and thus facilitates a move towards more streamlined procedures over time.

The new Chapter III adopts substantially the same framework as the Convention, although harmonising the appeals procedures so that one set of rules is applicable to both applicant and defendant.

Section 1 on Recognition is the same in its formal approach as the Convention, but contains modifications of the grounds of non-recognition. These grounds are contained in Art. 34 (ex Art. 27). The public policy exception has been retained, but with the requirement that recognition must be *manifestly* contrary to public policy.[10] Article 34(2) (ex Art. 27(2)) which has been a serious obstacle to recognition of the judgments of other Member States has been modified. There is no longer a requirement of "due" service on the defendant, but only service "in sufficient time and in such a way as to enable him to arrange for his defence." A further amendment has been made along the lines previously argued for in *Minalmet GmbH* v. *Brandeis Ltd*.[11] If the defendant was unable to arrange for his defence the judgment shall not be recognised "unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so". It should now therefore no longer be possible for a defendant who has in fact had notice of proceedings pending in another Member State to ignore them in the knowledge that they will not be recognised in his home state (subject to the ingenuity of lawyers in determining when it is "possible" for a defendant to challenge a judgment).

The former Art. 27(4) does not find a place in the Regulation. Status issues are primarily a matter for the Brussels II Regulation and any future European legislation dealing with problems of family law. Article 34(4) (ex Art. 27(5)) removes an anomaly found in the Convention whereby there was provision for non-recognition of a judgment that was irreconcilable with an earlier judgment of a non-Contracting State, but not for the non-recognition of a judgment that was irreconcilable with an earlier judgment of another Contracting State. Both situations are now dealt with in the same way.

Article 35 of the Regulation corresponds to Art. 28 of the Convention. It does not include the new Section 5 on employment matters within its scope, apparently because it is anticipated that the applicant for enforcement will normally be the employee.[12]

9. See further below.
10. See for this gloss on the former Art. 27(1), Case C–7/98, *Krombach* v. *Bamberski*, *The Times*, 30 March 2000.
11. Case C–123/91, [1992] E.C.R. I–5661.
12. Explanatory Memorandum.

The procedure for obtaining a declaration of enforceability, as set out in Arts. 31–36 of the Convention is now to be found in Arts. 38–42 of the Regulation. Article 39 (ex Art. 32) identifies the "court or competent authority" for the grant of a declaration of enforceability by referring to the list of authorities in Annex II. The jurisdiction of this authority is determined "by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement." The place of enforcement can therefore now be a head of jurisdiction irrespective of the domicile of the party against whom enforcement is sought.

Article 40 (ex Art. 33) provides inter alia for the giving of an address for service. The proposal for a Regulation in COM (99) 348 includes a paragraph removing this requirement if the competent authority is an administrative body. This paragraph does not find a place in the final version. Quaere whether this is a significant omission.

When applying for a declaration of enforcement, the applicant has to present a copy of the judgment, and a certificate produced by the court or competent authority in the State of origin (Art. 40(3), Art. 53). The certificate must accord with the form reproduced at Annex V to the Regulation (Art. 54). The certificate contains information about the service of the document instituting the proceedings and about legal aid, removing the need to present further documentation on these issues in the State addressed as currently required by Arts. 46 and 47 of the Convention. Nor is it necessary to show that the judgment has been served. The Regulation provides for the possibility of service of the judgment after a declaration of enforceability has been obtained.

According to Art. 41 of the Regulation "the judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35 [ex Arts. 27 and 28]." This emphasises the fact that the grant of a declaration of enforceability should be routine and not delayed by any consideration of matters of substance.

Article 42 (ex Art. 35) provides for the notification to the applicant of the decision on the application. It also provides for the service of any declaration of enforcement on the "party against whom enforcement is sought, accompanied by the judgment, if not already served on that party."[13]

The procedure for an appeal against this decision, by either party, is regulated in Arts. 43–46 (ex Arts. 36–41). Despite structural differences, the substance remains the same as under the Convention. An appeal is, however, the first opportunity for a court to examine the merits of any objections to enforcement, and thus reference to the possible grounds for appeal (those listed in Arts. 34 and 35) is to be found in Art. 45 (ex Art. 34). The courts to which an appeal may be made are listed at Annex III, while those to which a further appeal on a point of law may be made are listed at Annex IV. The time limit for appealing runs from the date of service of the declaration of enforceability. In the French version of the text this has been rendered as the date of *signification* (formal service) rather than the date of *signification ou notification*. This has sparked off a lively debate in

13. There is no reference to action being taken by "the appropriate officer of the court" in the new version, which is in keeping with a possible shift of responsibility to an administrative authority.

French circles about whether the Regulation should be interpreted as requiring formal service of the declaration.

The availability of protective measures pending enforcement receives modified, although rather ambiguous, treatment in the Regulation. Article 47 of the Regulation contains the same wording as Art. 39 of the Convention (with reversed paragraph order), but also has a new first paragraph that reads:

> 1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

This raises the question whether a judgment of another Member States constitutes a *titre conservatoire*—an instrument that entitles the person in whose favour it was issued to protective measures. Under Belgian law, for example, a foreign judgment is regarded as a *titre conservatoire*. A judgment creditor may rely on it to approach an enforcement agent directly, without court intervention, to adopt protective measures pending further steps in the enforcement procedure. One reading of the first paragraph of Art. 47 would indicate that any judgment of a Member State that is entitled to recognition should function as a *titre conservatoire* in the State addressed. An alternative, more limited reading, is simply that the judgment creditor can apply to a court in the State addressed for such protective measures as are available under its law, and that the existence of a foreign judgment should be given full weight in this process.

### CHAPTER IV—AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Minor textual amendments align this Chapter with Chapter III. The certificate required for an application for a declaration of enforceability of an authentic instrument must be drawn up by the competent authority in the State of origin at the request of any interested party. The form of the certificate is provided in Annex VI. The form of certificate for court settlements is that in Annex V.

### CHAPTER V—CHAPTER VII

The remainder of the Regulation provides rules on the determination of domicile,[14] incorporates provisions of the Protocol to the Convention, deals with transitional matters, and sets out the relationship of the Regulation to other instruments.

As to the articles of the Protocol, it may be worth noting that Art. IV has been omitted, since it deals with service of documents which is now regulated by the Service Regulation.[15] It may also be worth noting that the Luxembourg exception (Art. 63/ex Art. I) is on its way out. It now applies in more restricted circumstances, and only for a period of six years after the Regulation enters into force.

14. Considered above in the context of jurisdiction.
15. Council Reg. 1348/2000 (O.J. 2000 L 160/37).

The principles contained in the transitional provisions are the same as for the Convention—although special provision is made to ensure the recognition of judgments handed down in proceedings to which either the Brussels I or the Lugano Convention was applicable.

The main point worthy of note in connection with the relationship between the Regulation and other instruments is that now jurisdiction and enforcement fall within the competence of the European Union, and it is a competence that has been exercised, so individual Member States no longer have the competence to negotiate conventions in this area. Thus although Art. 71 (ex Art. 57) retains the priority of other conventions on specific matters over the general rules of the Regulation, this only applies to existing conventions. There is no provision for conventions to which Member States "will be" parties. Similarly, Art. 72 maintains respect for any conventions entered into on the basis of Art. 59 of the Brussels I Convention, but does not make provision for the negotiation of any such new conventions.

The rule establishing the relationship between the Regulation and other Community law instruments, which was found in Art. 57(3) of the Convention, is now given greater prominence at Art. 67.

## CHAPTER VIII

The final provisions of the Regulation deal with its future monitoring and amendment. As with other Community instruments, provision is made for a report on its application no later than five years after its entry into force. There is also provision for the amendment of the Annexes to the Regulation—Annexes I-IV by the Member States whose laws and courts are referred to in those Annexes, and Annexes V and VI by the Commission assisted by a committee (comitology procedure).

The Regulation is due to enter into force on 1 March 2002.

## INTERPRETATION OF THE REGULATION

Since the European Court has already interpreted the Convention as a Community law instrument,[16] its transformation into a Regulation is unlikely to produce any significant changes of approach. As a Community law measure adopted under Title IV of the EC Treaty, however, it is now subject to a new regime for preliminary references to the European Court. Article 68 EC modifies the application of Art. 234 EC by restricting references to questions of interpretation that arise "in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law". Article 68 does, however, provide for a *pourvoi dans l'intérêt de la loi* along the lines of the Protocol to the Brussels I Convention.[17]

16. See in particular Case C–398/92, *Firma Mund & Fester* v. *Firma Hatrex Internationaal Transport* [1994] E.C.R. I–467.

17. Under Art. 68 a reference may be made by the Council, the Commission or a Member State.

## CONCLUDING REMARKS

Many of the changes to the Brussels I Convention wrought by the new Regulation are of a fairly minor nature, although some will have an immediate impact on litigation in English courts. Nevertheless the real interest of the adoption of the Regulation lies in the decisive shift of competence in this area to the European institutions. It is seen as an early stage in a much more comprehensive package of measures. The structural differences between Member States are such that there must be considerable scepticism as to any rapid progress in adopting those measures, but nevertheless the adoption of the Regulation is not the end of the matter, but only the beginning.[18]

18. See further W. Kennett *Enforcement of Judgments in Europe* (OUP 2000)

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