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Position Paper of the German Bar Association (Deutscher Anwaltverein)

by the Legislative Committee on Civil Procedure Law

on the

**Proposal of the Parliament and the Council of the European Union
on a Regulation on jurisdiction and the recognition and enforcement of
judgments in civil and commercial matters (KOM(2010) 748)**

(Recast)

General Approach of the Council, 1. June 2012

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Introduction

The German Bar Association (Deutscher Anwaltverein – DAV) is a professional body comprising more than 67,000 German lawyers. Being politically independent, the DAV represents and promotes the professional and economic interests of the German legal profession.

Executive Summary

After analysing the proposal as published by the Council on June 1st, 2012 for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) - 2010/0383 (COD), the German Bar Association (DAV) globally finds the proposal in its current form a well-fit approach to substantially simplify the circulation of judgments in civil and commercial matters, in line with the principle of mutual recognition.

The current version of this Regulation had already made the practice of international dispute resolution much easier, but left several questions unanswered. The new approach gives answers to some of these questions, especially by simplifying the recognition and the enforcement of decisions throughout the European Union.

However, unfortunately, it misses to clarify several points of uncertainty regarding the determination of the competent jurisdiction in international civil and commercial matters:

A. Summary

1. The DAV welcomes the inclusion of **interim measures** into the scope of the Regulation with the exception of cases where the defendant has not been summoned to appear. However, this widening of the scope of the Regulation has to come with a sufficient protection of the rights of the defendant by guaranteeing certain possibilities to appeal against the judgement, to ask for refusal of enforcement of the judgment and to apply for limitation of the enforcement proceedings.

2. Regarding **arbitration**, the German Bar Association finds it regrettable that the new version of the Regulation does not contain any provisions for a better coordination between arbitration procedures and trials before the national courts, since arbitration is becoming an important instrument of dispute resolution which should be promoted.
3. The German Bar Association further emphasises that the **special jurisdiction** rules of article 5 and also the rules regarding **choice of courts agreements** in article 23 should be clarified since the practice has shown many difficulties for the interpretation of these important rulings of this Regulation.
4. Furthermore, a **subsidiary jurisdiction** rule should be reintegrated into the Regulation to guarantee the right of the parties to access to justice.
5. Regarding the solution for pending cases before a court of Member States and a court of a **Third Party State**, the propositions in the articles 34 and 34-0 are highly welcomed to avoid parallel proceedings. However, the rules need some more clarification, especially regarding the terms of “a reasonable time” and “required for the proper administration of justice”.
6. As expressed before, the German Bar Association highly welcomes the **abolition of the exequatur procedure**, but emphasises again the necessity of the introduction of a **reservation** in relation to Member States whose judicial system provokes substantial and reasonable doubts.
7. Regarding **collective procedures** and **defamation cases**, the German Bar Association wishes for further clarification how they should be handled throughout Europe, since they are not excluded anymore from the abolition of exequatur and they are treated very differently in each Member State.
8. The new rules on **translation** and **servicing** of the judgements are also highly welcomed by the German Bar Association.

9. Furthermore, the simplification of the rules on **legal remedies** against the recognition and the enforcement of a judgment and the introduction of the possibility to contest the judgment for reasons of the violation of **public policy rules** are essential elements to guarantee a fair trial and preserve the rights of the defendant.
10. Finally, the German Bar Association supports the provisions foreseen in article 66 regarding the problems of **not corresponding enforcement measures** of the different Member States.

B. Detailed Remarks

I. Scope

1. Article 2 – interim measures

The German Bar Association had proposed to exclude from the scope of application of the Regulation provisional measures ordered without the defendant being summoned to appear. The Council has dealt with that problem of lack of protection of the defendant by adapting article 2.

However, according to the new proposal, the exclusion of the Regulation is limited to cases where the judgment has not been served to the defendant prior to enforcement. Consistently, article 42 of the new version foresees the obligation of the applicant to provide the proof of service of the judgment. Moreover, it is now foreseen in article 42-2 that the certificate issued pursuant to article 64-1 shall be served on the debtor prior to the first enforcement measure. Such service shall, after the recital to be added according to the footnote, be made “in a reasonable time before the first enforcement measure”.

From the DAV point of view, the service of such judgments is only sufficient to protect the rights of the defendant if :

- his right to appeal the judgment is guaranteed in each Member State

- he keeps the right to apply for refusal of enforcement of the judgment, as provided by article 48 f.
- and he keeps the right to apply for limitation of the enforcement proceedings to protective measures or making the enforcement conditional on the provision of a security or for suspension of the enforcement proceedings, as provided by art. 44.

In case only one of these possibilities was deleted in a further version, the rights of the defendant in the enforcement of provisional measures ordered without the defendant being summoned to appear would be weakened in an unacceptable way.

2. Article 1 – arbitration

The rules on the relation between arbitration and court proceedings have been intensely discussed within the proposal. As expressed in our previous position paper the DAV welcomes the aim that within the European Union the courts proceed in a unified way when the parties bring forward an arbitration agreement. According to the rules in force, a party can simply undermine an arbitration agreement, creating parallel proceedings which may lead to irreconcilable resolutions to one dispute, by challenging an arbitration agreement before a court. Therefore we supported article 29 paragraph 4, foreseeing that a court seized of a dispute should stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seized of the case.

The DAV acknowledges that the New York Convention is the foundation for the recognition and enforcement of awards globally. While the DAV also understands the concerns regarding the establishment of a new set of rules on a European level, it would have seen value in a rule that would have addressed the issue of parallel proceedings. Therefore, the DAV would have welcomed a rule that would have addressed the conflict between parallel arbitration and litigation proceedings at an early stage, as suggested by article 29 paragraph 4.

II. Jurisdiction

1. Article 4a

Regarding the jurisdiction of the courts of the Member States over litigations against defendants who are not domiciled in a Member State, the Commission had proposed a universal application of the Regulation by the courts of the Member States.

The German Bar Association had supported this approach, which would have provided for a better legal security for European companies who would not be confronted with a totally unknown legal system when searching to bring claims against commercial partners from third party states.

This approach certainly was ambitious and delicate regarding the sovereignty of third party states.

However, according to the new proposal of the Council, no national rules may be applied any longer by Member States in relation to consumers (article 16) and employees (article 19) domiciled outside the EU. As it has been before, the uniform rules of jurisdiction will also apply in relation to parties domiciled outside the EU in situations where the courts of the Member States have exclusive jurisdiction under the future regulation (article 22) or where such courts have had jurisdiction conferred on them by an agreement between the parties (article 23).

Considering that the Regulation provides in recital 13 that there are three groups of persons who should be protected by “rules of jurisdiction more favourable to his interests than the general rules provide”: the weaker parties of insurance, consumer and employment contracts, Chapter II provides in sections 4 to 6 special rules for these categories of persons.

However, the new proposal of the Council does not include in article 4a insurance contracts whereas all other provisions of the new proposal that refer to the special protection of consumers and employees also include a reference to “the policyholder,

the insured, the injured party or a beneficiary of the insurance contract”, see articles 24 (2), 32(4) and 48(1) lit e. (i).

The reason why consumers and employees should be treated differently regarding the application of the Regulation in relation to third party states than the weaker party of an insurance contract escapes us. This article should be adapted.

2. Article 5

The case law of the ECJ and other courts of Member States clearly show that the interpretation of this article is far from easy. The determination of the forum is clearly defined only for two types of contracts: sale of goods and services. It is highly desirable to clarify the provisions of this article with the opportunity of the recast of the Regulation.

For this purpose it should be proposed to include in article 5 of the Regulation additional rules for the determination of the jurisdiction regarding certain “standard” contracts. For this purpose, we would strongly suggest to choose the types of contracts already mentioned by article 4 of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I), where rules are provided for the determination of the law applicable to these contracts. These are franchise, distribution, contracts for the sale of goods by auction, contracts concluded within a multilateral system on buying and selling interests in financial instruments. The place of jurisdiction should be harmonized with the law applicable.

This would not only mean a harmonization of the rules on the jurisdiction and the law applicable in international relations, but also a clarification of the most often used types of contracts besides the contract on sale of goods or provision of services.

3. Article 23

This provision causes as many problems in its practical application as article 5 of the Regulation.

One source of divergence so far has been the question of the law applicable to the validity of the choice of court agreement. The ECJ has opted for an autonomous definition of the formal requirements for the conclusion of such an agreement. These formal requirements include a minimum of consent of the parties. According to the Report on the Application of the Judgement Regulation in the Member States by Hess/Pfeiffer/Schlosser, the practice in the Member States reveals that the courts mostly refer to national law as to the question of the formation of the consent between the parties. Though the laws of the Member States refer to different laws applicable (*lex fori* and *lex causae*).

Even if we find it regrettable that our proposal as well as the proposal of the CCBE in this regard has not been taken into consideration, the new proposal might offer an adequate solution for this problem. It leaves the question of substantial validity to the national laws of the Member States chosen in the agreement, clarifying the role of article 23 and opting for a neutral forum: the one “chosen” by the parties. This solution is in line with the Hague Convention on Choice of Courts Agreements (article 5(1)).

In accordance with article 3(d) of that Convention, the Council furthermore proposes to include in article 23 of the Regulation a clarification regarding the independence of choice of courts agreements to the rest of the contract.

It is already positive that the new proposal includes the two mentioned clarifications. Unfortunately it leaves one crucial question unanswered. This question regards the frequent case where two agreements on the choice of courts defer to different jurisdictions. Two solutions could be envisaged: both agreements are invalid and the general rules of the Regulation have to be applied or both agreements are valid and the party who first seizes the courts has the choice. In any way, a uniform solution to this question would be highly recommended in order to avoid long disputes.

4. Article 24

The modifications regarding this article, ensuring that the weaker defendant has been informed of his right to contest jurisdiction, are highly welcomed, ensuring the preservation of the rights of the defendant in an appropriate way.

5. Article 25 and 26

The German Bar Association had highly welcomed the proposal of the Commission to include a subsidiary jurisdiction rule to guarantee the right of the parties to access to justice and a fair trial. Unfortunately, these new provisions have been deleted in the new version of the Regulation. From a practical point of view this elimination is regretful. It should therefore be proposed to reintegrate a subsidiary jurisdiction rule in the Regulation.

6. Article 32

To give choice of court agreements their full effect, article 32 grants priority to the court designated in the agreement to decide on its jurisdiction by committing any other court to stay its proceedings until the decision of the court seized on the basis of the agreement has decided over its jurisdiction.

This proposal foresees the obligation to stay the proceeding and not – as originally proposed by the Commission – the general incompetence of the court of other Member States. This approach is much clearer and in accordance with the other lis pendens rules of the Regulation.

7. Article 34 and 34-0

The solution regarding pending cases before courts of Third States is appropriate to avoid parallel proceedings and irreconcilable judgments. The court of a Member State still has the possibility to continue the proceeding if it is necessary for the proper administration of justice.

The proposal does not interfere with the authorities of the courts of Third States, since the courts of the Member States are not authorised to control the procedure as such. Instead it gives the possibility to avoid parallel proceedings.

Nevertheless the effectiveness of this disposition can be questioned since it leaves the courts of the Member State a large margin of appreciation. It should therefore be

clarified (in a recital), at least regarding the interpretation of “a reasonable time” for the conclusion of a proceeding and in what type of cases the continuation of the proceedings is “required for the proper administration of justice”.

III. Recognition and Enforcement

In general, the abolition of the exequatur procedure is an important step forward for a free circulation of judgments. Nevertheless the German Bar Association already expressed some doubts regarding the free circulation of judgements from Member States where it is not guaranteed that the judicial system provides for a trial according to the rules of a free democratic legal order.

The DAV therefore had recommended the introduction of a reservation that allows the Member States to maintain the necessity of an exequatur procedure for at least a transition period in relation to those Member States whose judicial system provokes substantial and reasonable doubts.

Not only this suggestion hasn't been taken into account: the new proposal goes further by deleting all limitations which were provided before. On this point, the new proposal goes clearly too far.

1. Previous exceptions

In the proposal of the European Commission, judgments in defamation cases and judgments given in collective compensatory proceedings were excluded from the suppression of exequatur. Such exception was justified by the fact that the existing mechanisms to compensate a group of victims harmed by illegal business practices of victims of defamation vary widely throughout the EU.

Even if the exequatur procedure would be abolished regarding these kinds of judgements, it is likely that they still will be treated differently in each Member State (by the control of the violation of public policy rules).

The Regulation should therefore clarify how collective procedures and defamation cases should be handled in a harmonized way throughout the EU.

2. Article 38.2

It is in the interest of the person invoking a judgment that he can – according to the new proposal – apply for a decision declaring that there are no grounds for refusing the recognition of the judgment.

This proposal will facilitate the enforcement and give the invoking person certainty regarding the prospect of success of the enforcement of the judgment.

3. Article 39

The rules on translations integrated in article 39 are also highly welcomed. Such translation might be necessary not only for the protection of the rights of the defendant, but also for the authorities to be able to understand at least the tenor of the judgement.

It is furthermore positive that the new proposal also foresees in article 69 the necessary precisions regarding the language of the translation and that the translation has to be done by a qualified person.

4. Article 42-2

The proposition of the Council for an obligation to serve the certificate issued pursuant to article 64-1 on the defendant in reasonable time before the first enforcement measure is also highly welcomed as it assures a minimum protection of the defendant.

5. Article 48

Very positive is also the simplification of the legal remedies against the recognition and the enforcement of the judgement. Especially the introduction of the possibility to contest the judgement of the courts of another Member State for its incompliance with

substantives and procedural public policy rules is essential to the preservation of the rights of the defendant.

The Council even goes one step further by giving that right to contest to every “interested” party. It will lie upon the ECJ to clarify which party has an interest in contesting the recognition of a judgment.

Furthermore the DAV had recommended the addition of an ex post control of the compliance with the rules of jurisdiction of the regulation itself. The Council has included in article 48 such a control regarding the rules of special jurisdiction for insurance, consumer and employment contracts.

The remedies available especially to the defendant seem - in combination with the obligation to serve the certificate foreseen in article 64-1 before the first enforcement measure - to provide a sufficient protection of the rights of the defendant.

6. Article 54

It is to be welcomed that the court seized with a contestation of the recognition or the enforcement of a judgment is obliged to decide “without delay”.

Nevertheless, this expression will be interpreted differently in every country. It is therefore desirable to ask for some precisions or at least a maximum duration in order to avoid unjustified delays or delays which would be damaging for parties involved.

7. Article 66

Finally, the new provisions of article 66 might solve the problem of not corresponding enforcement measures foreseen under the various national laws. It respects the differences of the national laws of the Member States and offers a technical solution in a flexible way.

Since any party has the possibility to contest the adaptation of the measure, the rights of the person concerned are adequately preserved. The DAV welcomes these new provisions.

8. Article 71-1

For the benefits of a practical, efficient and accurate enforcement of authentic instruments and court settlements, the DAV had recommended to provide standardized guidelines for the formulation of enforcement orders.

The Council did not exactly follow that recommendation but provided the possibility for the competent authority of the Member State of origin to issue – at the request of any interested party - a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement. This will surely be useful.