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David McIntosh QC (Hon)
Chairman

11 February 2011

Jean McMahon
Ministry of Justice
102 Petty France
London
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Dear Sirs

Revision of the Brussels I Regulation - How should the UK approach the negotiations (the "Consultation Paper")

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the questions raised by the Consultation Paper has been prepared by the CLLS Litigation Committee. That Committee has seen in draft the response of the CLLS's Financial Law Committee to the Consultation Paper. The Litigation Committee notes the agreement between the two Committees that the UK should opt in to the Commission's proposal, and also notes the difference in emphasis on certain other issues arising from their differing perspectives.

Question 1: Is it in the national interest for the Government, in accordance with its Protocol to Title V of the Treaty of the Functioning of the European Union, to seek to opt in to negotiations on the revised Brussels I Regulation? If not, please explain why.

The CLLS Litigation Committee considers that the UK should opt in to negotiations on a revised Brussels I Regulation. The proposal by the Commission addresses in a welcome manner the two major concerns about the current Regulation, namely the ECJ's decisions in *Gasser v MISAT* and *Allianz v West Tankers*, which undermine effectiveness of jurisdiction and arbitration agreements. Participating fully in the

negotiations, including having the ability to vote in the Council, is likely to prove the best means of securing a satisfactory resolution for the UK on these two issues.

If the UK were not opt in to the negotiations, it will remain subject to the current Regulation, or perhaps to the Brussels Convention, which will result in the continuation of the two problems identified above. The knowledge that this is the case is bound to affect the UK's ability to influence, from outside the formal process, the content of a revised Brussels I Regulation, and may, therefore, affect the ability of the UK to secure the most favourable outcome on these issues, even if it is likely that the UK would opt in once a new Regulation is adopted. The process started by the Commission is the best, probably the only, hope of correcting these significant problems in the Regulation. The UK should maximise its influence in order to achieve this goal.

Question 2: What are your views on the specific issues raised in the Consultation Paper which concern the changes proposed by the Commission in the draft Regulation?

Exequatur: The CLLS Litigation Committee is sceptical about the Commission's figures quoted in the third bullet point in paragraph 19 of the Consultation Paper, and is also doubtful as to whether the need to obtain a declaration of enforceability is really a significant obstacle to a litigant who has already taken the trouble to obtain a judgment. Nevertheless, the CLLS Litigation Committee supports, with some reservations, the abolition of exequatur. In particular, it will be important for the courts to scrutinise carefully applications for the enforcement of a foreign judgment to ensure that it is appropriate to do so. It would, for example, be unfortunate if the first a defendant knew about a default judgment entered against him was that his bank accounts had been frozen, preventing him from paying the salaries of staff. Perhaps there should be a requirement that a default judgment be served on the judgment debtor before any enforcement measures can be taken.

The CLLS Litigation Committee agrees with the Government that is necessary to reflect further on whether the proposed safeguards are fully adequate. The abolition of the exequatur procedure does not of itself justify the removal of any of the protections in the Regulation, each of which requires individual consideration. In particular, the CLLS Litigation Committee is doubtful whether the public policy ground for refusing enforcement should be removed. Public policy may not be relied on frequently, but potentially it provides a valuable protection.

The operation of the international legal order: The CLLS Litigation Committee shares the Government's doubts as to whether the Commission has made a convincing case for this reform. There may, perhaps, be grounds for simplifying what is a complex area, but it is not clear either that the inequalities identified by the Commission have any real effect on the internal market or that it is right in principle to rely primarily as against parties domiciled outside the EU on special rules of jurisdiction designed to operate within the EU, where member states are required to display mutual trust and to enforce each other's judgments. Where that mutuality does not exist, EU parties could be placed at a significant disadvantage if they were forced to litigate outside the EU.

The removal of the ability of the English courts to take jurisdiction over a non-EU defendant in a dispute arising from a contract governed by English law is of particular concern. In some business lines, including letters of credit, it is rare to include provisions as to jurisdiction. The ability to use the governing law to found jurisdiction is

important, not least because it is generally preferable for matters of English law to be determined in the English courts.

The CLLS Litigation Committee supports in principle the Commission's proposal that EU courts should have the ability stay proceedings in favour of more appropriate non-EU courts, though we agree with the Government's concerns about whether, as currently formulated, the Commission's proposal offers sufficient flexibility (eg the ability to stay proceedings should not be available only if the non-EU court is first seised). In this regard, the CLLS Litigation Committee also considers that there should be an express provision requiring EU courts to stay proceedings in favour of courts outside the EU, save in exceptional circumstances, if the parties have agreed that the courts of a non-EU court should have exclusive jurisdiction. Currently, this is achieved in the English courts by the so-called *effet reflexe* of article 23, but article 34 in the Commission's proposal might call into question whether this approach remained available. Party autonomy should be respected, both inside and outside the EU.

Proposed changes in relation to choice of court agreements: As we have said above, the failure of the current Brussels I Regulation to uphold effectively parties' agreements on the courts that should determine their disputes is one of the two most significant problems in the current Regulation. The effect of the ECJ's decision in *Gasser v MISAT* is to force a party to rush to start court proceedings in order to ensure that the chosen court is first seised, which incurs costs and may harden commercial attitudes, or risk greater delay and expense if a court other than the one chosen is first seised of the dispute. This problem is magnified if a court determines a jurisdictional challenge at the same time as dealing with the substance of the dispute, an approach taken by courts in many EU member states.

In these circumstances, the CLLS Litigation Committee support the Commission's proposal, which rightly gives priority to a court chosen or allegedly chosen to determine the validity and scope of a jurisdiction agreement. There may be some technical issues (eg it may be alleged that the dispute is subject to different jurisdiction agreements), but the Commission's proposal removes the prime ground of abuse under the current Regulation. Any issues that may arise from the Commission's proposal are likely to be minor in comparison to those arising from the current Regulation.

Proposed changes to improve the interface between the Regulation and arbitration: This represents the other major issue with the current Brussels I Regulation. By removing the ability of the English courts to uphold the integrity of arbitral proceedings, the ECJ in *West Tankers* undermined party autonomy. The CLLS Litigation Committee therefore supports the Commission's proposal, which it sees as reinforcing, rather than undermining, the member states' existing obligations under the New York Convention.

Proposals designed to ensure the better coordination of legal proceedings before the courts of member states: The CLLS Litigation Committee supports the imposition of a time limit on courts to determine issues of jurisdiction. This time limit should be combined with an obligation to take jurisdictional challenges as preliminary issues, and should apply to any court facing a jurisdictional challenge, whether or not first seised.

We agree with the Government regarding the other proposed measures, but would add that we consider that it is unlikely that Commission's proposal to confine the effect of interim measures to the territory of a court granting those measures in support of

substantive proceedings elsewhere will have much practical effect. We are also doubtful about the proposals for communication between courts with regard to interim measures.

Proposals aimed at improving access to justice: We have no specific comments on these proposals.

Question 3: Do you agree with the tentative impact assessment? If not, please explain why not.

We have no comments beyond those already made above.

Question 4: Are there any other specific comments you may wish to make.

Not at this stage of the process, save to confirm that the CLLS Litigation Committee regards it as being in the UK's best interests to opt in to the negotiations.

Yours faithfully

Simon James
Chair, CLLS Litigation Committee

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Richard Clark	Slaughter & May LLP
Tom Coates	Lewis Silkin LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
Tim Hardy	CMS Cameron McKenna LLP
Willy Manners	Macfarlanes LLP
Rory McAlpine	SNR Denton
Arundel McDougall	Ashurst LLP
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Stefan Paciorek	Pinsent Masons LLP
Joanna Page	Allen & Overy LLP
Kevin Perry	Edwards Angell Palmer & Dodge UK LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP
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