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Dear Sirs

Financial Law Committee of the City of London Law Society response to the Ministry of Justice's consultation paper (CP18-70) on "Revision of the Brussels I Regulation – how should the UK approach the negotiations" dated 22 December 2010

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. We have seen the response of the Litigation Committee of the City of London Law Society in near-final draft. We note that both Committees support the simplification of the exequatur rules, but we have a number of additional concerns regarding this process, which are addressed in this paper. On other aspects we have only minor differences of approach.

This response addresses topics of particular relevance to the financial markets and the parties to financial transactions. The absence of comment on a particular proposal or issue should not be taking as indicating the Committee's approval of, or opposition to, that proposal or issue.

The Financial Law Committee's views on questions posed in the Consultation Paper are as follows:

Question 1:

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

In the Committee's view it is in the national interest for the Government to opt in to the negotiations. From the view point of participants in the financial market the proposal contains a number of important and welcome changes (in particular, the proposals relating to choice of

jurisdiction and arbitration agreements). It would be unsatisfactory to arrive at a situation where English courts would continue to apply the "old" Regulation (with its flaws resulting in the undermining of jurisdiction and arbitration agreements) and the rest of the EU would apply the "new" Regulation.

The only aspect of the proposed changes that seems to us, potentially, to be of sufficient concern to call into question a decision by the UK to opt-in to the recast Brussels I Regulation are the proposals for abolition of the *exequatur* procedure, which, as currently formulated, lack adequate protections against fraud, appear to provide a method to circumvent the right of a consumer to bring proceedings in his or her home State and to provide a basis for evading the application of the fundamental policies and laws of the place of enforcement, contrary to general principles of EU law. In opting in, the UK Government should be confident that it can obtain additional safeguards in those areas.

Question 2:

What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?

The Committee has considered and comments upon the Commission's proposals and the Government's initial views, in so far as they are of particular relevance to the financial markets and to financial institutions operating in those markets:

Abolition of exequatur

1. The Committee supports a simplification of the exequatur procedure, with a view to minimising delays and costs. However, it is important that it is ensured that the defendants' interests are proportionately protected, as well as those of asset holders (such as banks) who may be faced with orders to remit assets abroad. The Committee has the following significant concerns in relation to the Commission's proposal, which they consider has not effectively considered the protection of defendant's rights in relation to judgments in other EU countries, so that they are substantially more vulnerable than in relation to judgments against them in the courts of their home States:

   As currently drafted, the only redress of a judgment debtor faced with execution measures on a default judgment of another EU court is to apply to the court that issued the judgment, with the need to find lawyers in that jurisdiction and to deal with linguistic and procedural differences, in order to satisfy the originating court that they have not participated in the proceedings on one of the very limited grounds set out in Article 45 and also have not been able to challenge the judgment where it was possible for them to do so.

   If they were aware of the proceedings or judgment prior to enforcement, then there is no redress, except for the possibility to apply to the court in the place of enforcement for relief on the grounds that "recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial" (Article 46). This would seem to turn on an examination of the processes of the originating court measured against those principles, but does not seem to encompass the possibility of non-participation because the judgment debtor rightly thought that they could only be sued in another forum (in particular, if they are a consumer entitled to the protections in Section 4 of the Regulation). Nor does it protect the judgment debtor against the violation of his substantive human rights, or the enforcing Member State against a requirement that it give effect to a judgment that violates the fundamental public policy rules of its legal order. For example, many Member States will not enforce judgments in relation to gaming debts or the supply

of hard core pornography or certain prohibited drugs, but some others will. The proposed rules would, for example, require enforcement of a judgment in relation to a gaming debt in a jurisdiction which would consider such contracts to be immoral and contrary to its mandatory requirements in the interests of its society. This goes far beyond the abolition of exequatur and into the area of subsidiarity and national cultural distinctions recognised in the EU Treaties. Further, given that the Member State of origin may still give overriding effect to its own public policy, the removal of the exception at the enforcement stage may be thought to invite forum shopping, contrary to the aims of the Regulation.

There is also no protection at all if a judgment has been obtained by fraud unless this impinges on the trial process.

To address these defects we recommend that the UK Government should press for the following

a. *There should be a requirement that the applicant serve on the defendant an extra-judicial notice of his intention to enforce a judgment under the Regulation outside the Member State of origin which must be produced to the enforcing court.* In the case of evidence of dissipation of assets, the enforcing court should have discretion to take provisional measures without such notice, but not to allow any irrevocable enforcement measure until a specified time limit for reviewing the judgment and/or challenging enforcement has expired and any challenge/review has been resolved. It may be helpful if the notice and any communication to the enforcing court is required to state whether the judgment is a judgment in default of defence or after a full inter-partes hearing for reasons given below;

   This seems very important, particularly in the case of default judgments, as a measure which could prevent fraudulent abstraction of assets with irrevocable adverse consequences for the defendant. Default judgments are those most likely to involve failure to follow due process, fraud or mistaken identity. In this regard we doubt that consideration has been given to the proper balance in relation to the right to enjoyment of property safeguarded by the ECHR, where it is manifest that the defendant may have not had any real opportunity to defend the claim.

b. *There should be the right in the case of a default judgment for the enforcing court to decline to enforce where the defendant can show that he had good cause not to participate in the proceedings, in particular because they were brought in a forum lacking jurisdiction under the Regulation or because there has been mistaken identity or clear evidence of fraud*. Identity theft is ever increasing and there is also increased chance of mistaken identity where linguistic differences exist: we understand there have been some notable difficulties in relation to the application of the European arrest warrant with regard to mistaken identity. In financial claims there are considerable incentives to misuse the system, far more than in identifying criminals;

c. *Consumers protected by Section 4 should be entitled to an automatic stay of execution in relation to a judgment entered by a court not competent under Section 4 and all issues (including those in Article 45) should be decided by the enforcing court, so as to afford to the consumer (and those holding consumer assets) the protections they should expect as a result of the provisions of Section 4*;

d. *Banks or other asset holders against whom execution measures may be taken and who will face applications for remittance of substantial personal assets abroad and be exposed to potential claims from their customers should be entitled to apply to the enforcing court for a stay of remittance of assets abroad or for security of their own motion.* This is particularly important where the defendant has notified the bank that

they are seeking a review of the judgment or a stay of execution, but the execution measures would require assets to pass into the absolute control of the applicant in advance of that process being completed;

e. *All defendants should be entitled, in addition to the issues of a fair trial, to raise before the enforcing court any public policy law which would prevent recognition and enforcement of the judgment, [and any over-riding EU or international obligation which would have that effect]*. The Committee is opposed to the dropping of public policy, as a bar to recognition and/or enforcement of a judgment. The matters covered by the public policy exception are generally ones which are outside the competence of the EU institutions (or, if not, should only be changed by specific harmonisation measures which address the abrogation of the particular rule). It must be important to the UK and to other Member States that these national competences, protected by the Treaties, are not overridden by EU legislation made for a different purpose and it is not in the interest of the EU institutions to pass legislation open to challenge because it exceeds the powers in the Treaties. These public policy laws could range from foreign unilateral foreign policy measures (eg preventing enforcement of contracts with certain States or their nationals) to contracts in breach of FSMA 2000 (including UK implementation of EU law, where regulatory responsibilities are assigned to authorities in different Member States, so that the relevant regulatory rule would not necessarily be applied in the State of the originating court) to those supporting important social policies (eg related to pornography, drugs or gambling). We also note that, if the public policy exception were to be retained, there would be no need for special rules for defamation as are proposed. There seems no need, in order to improve enforcement of ordinary commercial judgments, to enable the enforcement in every Member State of contracts which some (even all but one) but not all, Member States consider illegal or morally repugnant;

f. *It should be clarified that third parties who may have claims against the assets upon which enforcement is claimed are in no better or worse position in the event of execution of a judgment of another EU court than in the case of a judgment by the enforcing court.* This is important to reassure financial institutions which may have charges, liens or other rights over assets against which enforcement is sought, whether assets the subject of the dispute or assets against which execution of a monetary judgment is sought;

g. *The provision dealing with cases where the judgment sought to be enforced conflicts with an earlier judgment between the parties, including one of the enforcing court or a court in a third country, must apply to recognition as well as enforcement situations.* Again this is important to prevent fraud and vexatious litigation. The absence of such a provision would leave a vacuum, which could be exploited, creating unnecessary cost.

The operation of the Regulation in the international legal order

2. The Committee opposes the Commission's proposal to extend the jurisdiction rules to non-EU defendants in replacement of current national rules. The Committee agrees with the Government's initial view that, in order to ensure reciprocity and in the interest of international comity, harmonisation of jurisdiction rules beyond the EU should be pursued on a multilateral basis, preferably within the ambit of the Hague Conference on Private International Law. Certainly this should be the case as regards commercial matters, even if it may be considered useful to give consumers rights to bring proceedings in their home State against third country suppliers operating from outside the Community (although this has to be balanced against the risk of conflicting judgments).

3. In the Committee's view the national jurisdiction rules are working well and there is no compelling reason to substitute these for a (narrower) set of Regulation rules. The following are examples of important jurisdiction rules used under English law:

   a. the right to join a defendant as a "necessary and proper" party to a claim (CPR PD 6B para 3.1(3)). Puzzlingly, the proposed drafting of Article 6 does not extend the equivalent Regulation rule to non-EU domiciled defendants, thereby treating such defendants more favourably than their EU counterparts;

   b. the right to bring contract claims in English courts where the contract was made or breached in the jurisdiction or contains an English choice of law clause (CPR PD 6B para 3.1(6)). By contrast, Article 5 provides only for the jurisdiction of the courts at the place(s) of performance of the contract.

4. The Committee is concerned that the extension of the special jurisdiction rules to non-EU defendants would extend the effects of the ECJ's decision in *Owusu v Jackson* (Case C-281/02) and would extinguish the English courts' discretion to stay proceedings based on *forum non conveniens* grounds. The Committee endorses the European Parliament's view that it would be preferable if *Owusu* were reversed and a *forum non conveniens* rule was introduced into the Regulation.

5. The Committee opposes the extension of the protective jurisdiction rules in Sections 3 (insurance contracts) and 5 (employment contracts), in so far as this will further restrict the parties' ability to enter into choice of court agreements. The Committee agrees with the Government's preliminary view that this is particularly unmerited for insurance contracts where both parties are acting in a commercial capacity.

6. The Committee welcomes the introduction of a *lis pendens* rule which allows for a discretionary stay of proceedings brought before an EU court where there are concurrent earlier proceedings before a third state court. The Committee agrees with the Government's preliminary view that this rule should be extended to cover related actions, although not necessarily actions commenced after the EU court proceedings. This would bring the "new" *lis pendens* rule in line with the existing rule relating to competing EU proceedings.

7. Further, it is the Committee's view that it is important that Article 23 (exclusive jurisdiction clauses) is given full "reflexive" effect. EU Member State courts should be able to decline jurisdiction where there is a valid exclusive jurisdiction clause in favour of a third state court. The Commission acknowledges the importance of giving jurisdiction agreements maximum effect and this should apply to all jurisdiction agreements regardless of whether they provide for the jurisdiction of Member State or third state courts.

Proposed changes in relation to choice of court agreements

8. From the view point of the participants in the financial markets this issue and the issue relating to the strengthening of arbitration agreements are the most important issues covered in the Commission's Proposal. It is essential that effective steps are taken to support and protect the exercise of party autonomy with respect to dispute resolution processes. In particular, it is the Committee's view that the Community should accede at the earliest possible opportunity to the Hague Convention on choice of court agreements.

9. In light of the above the Committee welcomes the proposed introduction of a rule which disapplies the "first seised" rule in the case of exclusive jurisdiction clauses (in favour of Member Sate courts) and gives priority to the chosen (Member State) court to decide upon its jurisdiction, but questions whether Article 32(2) is currently worded in a way which achieves this.

10. The rules on time to decide on jurisdiction should apply to any court considering that issue (not just the court first seised). It would be helpful if the Regulation could encourage all Member States to treat jurisdiction as a preliminary point, as this would avoid the defendants' dilemma: either not to challenge an action started in breach of contract, or to risk the costs of pleading to the merits twice and facing considerable delay in order to get a judgment. It should be clarified that a need to complete pleadings on the merits under the courts procedural rules is not a special reason for delaying a decision on jurisdiction for more than 6 months. This would further encourage courts in all Member States to treat jurisdiction as a separate preliminary issue. It seems wrong that greater respect should be accorded to a choice of arbitration for dispute resolution than to the parties' choice of court.

The interface between the Regulation and Arbitration

11. Arbitration provides an important, and increasingly used, method of dispute resolution in financial and commercial transactions. Whatever changes are made to the Regulation the objectives should be to maintain the Community's standing as a venue for arbitration, and enhancing party autonomy as already emphasised above in relation to choice of court agreements.

12. There are merits in the Commission's approach, but to avoid conflict with the 1958 New York Convention (to which all Member States are party) it is the Committee's view that the suggested rule to provide priority to the courts at the seat of the arbitration should be extended to disputes where there is an arbitration agreement with an arbitral seat outside the EU, at least where the seat of an arbitration would be in a New York Convention country. For the same reasons set out above in relation to choice of court agreements the Committee believes that arbitration agreements should be given maximum effect regardless of where the arbitral seat is located. A provision which reinforces the existing Treaty obligations of Member States should not be controversial.

Proposals designed to ensure the better coordination of legal proceedings before the courts of Member States

13. The Committee welcomes the rule in Article 29(2) which requires the first seised court to come to a conclusion on its jurisdiction within 6 months.

14. The Committee has no concerns about the exchange of information between courts relating to parallel proceedings, if this is limited to the matters mentioned in Article 29(2) and does not cause delay to proceedings. However, the Committee is sceptical about the requirement that the court with substantive jurisdiction and any courts seised with applications for provisional measures seek information from one another, especially where this may result in delays in granting urgently required protective measures. This concern applies in particular to the second sentence of Article 31.

15. The intention of Article 30(2) relating to "related actions" is not entirely clear. If Article 30(2) aim is to cover collective actions and to compel the first seised court to take jurisdiction over related actions regardless of whether its national rules on collective redress allow this, it is the Committee's view that this is an issue which should be considered and resolved as part of the separate consultations which are being carried out by the Commission. Meanwhile, it should be excluded from the Regulation.

16. The Committee welcomes the extension of the recognition and enforcement rules to provisional measures which have been granted *ex parte* and the inclusion of (protective) orders for the collection of evidence within the scope of the Regulation. It is the Committee's view that it would also be helpful if any new drafting would clarify that a "real connecting factor", in addition to requirements contained in national laws, was not

required, as this aspect of the Court of Justice's case law has given rise to considerable difficulty.

17. The Committee does not agree with the exclusion of provisional measures granted by courts without substantive jurisdiction from the Regulation's recognition and enforcement rules. There is no justifiable reason to take such measures out of scope. They are enforceable under the current rules and should remain enforceable.

Proposals aimed at improving access to Justice

18. The Committee sees some merit in including a rule of special jurisdiction for proceedings to recover possession or control of *tangible* moveable assets in favour of the courts of the place where the asset is physically situated. However, there is scope for such a rule to be manipulated and it is the Committee's view that it may be beneficial to exclude situations where the assets have been moved to a Member State solely or principally to establish jurisdiction. Further, it is the Committee's view that *intangible* moveable assets (e.g. debts, securities, *choses in action*) should be excluded from the scope of this rule given that the assignment of a *situs* to intangibles is artificial and that there are both international treaties and proposed Community rules aligned to the Unidroit Geneva Convention on Substantive Rules for Intermediated Securities under discussion as regards intermediated assets. In respect of other intangibles the bases of jurisdiction already included in the Regulation appear to work effectively at present.

Question 3:

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

19. The Committee agrees with the Government's tentative impact assessment subject to the following additional or qualifying points:

Abolition of exequatur

20. Although there will be a cost saving as a result of not having to register a judgment for enforcement, local legal advice will still be required in relation to local enforcement methods and legal and court costs will need to be incurred in the country of enforcement when taking enforcement steps. Also, enforcement of judgments from EU Member States will no longer be channelled through a stipulated court in the country of enforcement and judiciary and court staff will need to be trained more widely in relation to the enforcement of EU judgments. The cost savings may therefore not be that considerable.

21. As mentioned above, it is the Committee's view that the safeguards provided for are insufficient and require to be strengthened to avoid injustice and the increased risk of fraud. It may be questionable whether, assuming those safeguards are put in place and taking into account the costs referred to above, whether exequatur is not as efficient in the UK as the proposed alternative. If no additional safeguards are provided for, the increased risk of a denial of justice to innocent defendants may render any economic gain illusory.

The operation of the Regulation in the international order

22. The Committee remains unconvinced that a case has been made out for an extension of the jurisdiction rules to non-EU defendants. Under the Commission's Proposal claimants' ability to sue non-EU defendants in English courts would be more restricted (see above for examples). Even if claimants where given the ability to take advantage of the protective jurisdiction rules, due to a lack of reciprocity, there is a significant risk of parallel

proceedings and that judgments obtained in a Member State court may not be enforced in third state countries.

Choice of court agreements

23. The Committee welcomes the Commission's proposal, save that provision should also be made for court agreements in favour of non-EU courts. Such a rule would bring the Regulation more closely in line with the Hague Convention on choice of court agreements and would avoid confusions resulting from differing regimes.

Interface between Regulation and Arbitration

24. It seems to the Committee important that the proposed changes fully reflect the existing obligations of Member States under the New York Convention.

Better coordination of legal proceedings before the courts of the Member States

25. The Committee has no further comments and refers to its comments made above.

Improving access to justice

26. The Committee has no further comments and refers to its comments made above.

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

27. Steps will need to be taken to bring the Lugano and EC-Denmark Conventions in line with any recast Regulation to avoid significant differences between the Brussels and other European regimes.

Follow-up

Please refer to Dorothy Livingston (Chairman of the Financial Law Committee, dorothy.livingston@herbertsmith.com if you would like to discuss any aspect of this paper. Special thanks are due to Andrew Dickinson (Clifford Chance LLP), Tolek Petch (Slaughter and May) for their input to the drafting of this response, and to Pamela Kiesselbach (Herbert Smith LLP) for her preparatory work.

Should the MoJ wish to publish this response, we have no objection.

15th February 2011