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Ms Jean Mcmahon
International & Property Branch
Civil Law & Justice Division
Ministry of Justice
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By email: jean.mcmahon@justice.gsi.gov.uk

Dear Jean

Re: Brussels 1 - European Commission's Report on its Review of the Regulation & Accompanying Green Paper

The City of London Law Society ("CLLS") represents approximately 13,000 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 is the response of the Financial Law Committee of the City of London Law Society to the European Commission's Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"). The response addresses topics of particular relevance to the financial markets and the parties to financial transactions. The absence of comment on a particular proposal should not be taken as indicating the Committee's approval of, or opposition to, that proposal.

Question 1:

Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

In the Committee's view, the existing requirement to obtain a declaration of enforceability from a designated national court in the Member State of enforcement serves a valuable purpose in the protection of the judgment debtor's rights and in ensuring the effective assimilation of a judgment from one Member State into the legal order of another Member State. Cross-border cases do raise different considerations (e.g. geographical remoteness and differences in language and legal culture) from domestic cases and the prospect of a review *ex post facto* by the court in which an enforcement measure

has been sought seems unlikely to provide sufficient protection. The Committee agrees, however, that the existing procedures could be improved with a view to reducing costs and delays, and would support the streamlining of national procedural arrangements to enforce judgments in one or more Member States, using information technology where appropriate.

Further, in the Committee's view, the existing grounds (Art. 34) for objecting to recognition or enforcement under the Regulation should remain, albeit that they should receive a narrow interpretation in accordance with the ECJ's existing case law. In particular, the fact that the Regulation contains rules on *lis pendens* designed to avoid irreconcilable judgments does not exclude the necessity also to deal with issues of irreconcilability with other Member State court or third country judgments at the recognition/enforcement stage. In particular, the ability to object to recognition or enforcement on grounds of public policy or default of service should remain, subject to existing restrictions.

If, contrary to the view expressed above, "*exequatur*" is abolished, it will be vital to ensure that the judgment debtor's interests are protected. For example, subject to the possibility of obtaining provisional or protective measures without notification, it should in this case be a requirement that the judgment creditor serve on the judgment debtor in accordance with the Service Regulation an extra-judicial notice of his intention to enforce a judgment under the Regulation outside the Member State of origin.

Question 2:

Do you think that the special jurisdiction rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

In the Committee's view, the development of rules concerning jurisdiction and the recognition and enforcement of judgments affecting third countries, or their nationals, should be pursued through the exercise by the Community of its external competence in concluding bilateral or multilateral agreements with third countries. We would therefore welcome the Commission being given a mandate by the Council to conclude such bilateral or multi-lateral arrangements. For the time being, and such until efforts have been made to reach an internationally acceptable solution, the legal and practical case for a significant expansion of the Regulation's scope appears very weak. No compelling "necessity" for new rules of this kind, to facilitate the functioning of the internal market, has been demonstrated. Nor is there any evidence in practice that Member States have failed to address the issues adequately.

Question 3:

Which of the above suggested solutions, or any other possible solutions, do you consider most appropriate in order to enhance the effectiveness of choice of court agreements in the Community?

From the viewpoint of participants in the financial markets, this Question and Question 7 below concerning arbitration proceedings are the most important topics addressed in the Green Paper. It is essential that effective steps should be taken to support and protect the exercise of party autonomy with respect to dispute resolution processes.

In terms of building an international consensus on these issues, the Committee would urge the Community to accede at the earliest possible opportunity to the Hague Choice of Court Convention and

to extend its application to non-exclusive choice of court agreements. To avoid different treatment of choice of court agreements in "intra-Community" situations, Art. 23 of the Regulation should be amended so that it is compatible with the Hague Convention, provides effective protection for party autonomy in choice of court agreements and deters tactical litigation designed to frustrate such agreements. Such amendments should include *either* the adjustment of the priority rule that currently exists under Art. 27 of the Regulation, by requiring any Member State court other than the court (apparently) chosen to stay its proceedings until the court (apparently) chosen has decided whether to accept jurisdiction *or* a stronger rule excluding the jurisdiction of other Member State courts unless the court or courts (apparently) chosen have declined jurisdiction (cf. Art. 23(3)). The Committee favours the latter solution where both parties are pursuing a commercial activity as this provides the greatest legal certainty and minimises the risk of collateral bad faith litigation.

Of the other solutions proposed in the Green Paper, the Committee would comment that greater communication and co-operation between courts is greatly to be desired, but cannot of itself provide a solution to the problems that have manifested themselves and may serve only to increase costs. The Committee agrees, however, that a rule requiring Member State courts to decide issues of jurisdiction separately from consideration of the merits and within a specified time limit would be beneficial. Finally, the Committee would support the development of standard form wording for jurisdiction clauses outside the legislative framework of the Regulation, to encourage familiarity with such clauses and their use in contracts between parties using different languages in their negotiations. Such wording should not, however, attract a different or more favourable regime from other choice of court agreements satisfying the formal requirements in Art. 23 of the Regulation.

Question 4:

What are the shortcomings in the current system of patent litigation you would consider to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

As this Question raises matters outside the Committee's remit, the Committee does not respond.

Question 5:

How do you think that the coordination of parallel proceedings (lis pendens) before the courts of different Member States may be improved?
Do you think that a consolidation of proceedings by and/or against several parties should be provided for at Community level on the basis of uniform rules?

In the Committee's view, putting to one side situations involving choice of court agreements, the *lis pendens* provisions in the Regulation work reasonably well in practice and are not in need of a radical overhaul. In particular, the Committee sees no need to discriminate against applications for negative declarations, which may serve a legitimate purpose and no compelling case for harmonised rules on the consolidation of actions.

The possible reform of Art. 6 in the context of collective redress procedures should be addressed as part of an overall package of measures designed to solve the particular problems that arise (for example) in the enforcement of EC consumer and competition law, and should not form part of the present review of the Regulation.

Question 6:
Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?

The Committee would support a clarification of the definition of "judgment" in the Regulation so that all provisional measures may be enforced in other Member States, subject to the grounds of objection in Art. 34.

As to the proposal that the court having jurisdiction over the substance of the dispute may set aside a provisional measure granted in another Member State, the Committee is concerned that this could well be problematic and, in particular, may unduly impinge on national judicial sovereignty. A better solution would be to facilitate greater communication between Member State courts and to require courts granting or faced with an application to discharge provisional measures to take into account the views of the court having jurisdiction over the substance.

Question 7:

Which action do you consider appropriate at Community level:

- *To strengthen the effectiveness of arbitration agreements;*
- *To ensure a good coordination between judicial and arbitration proceedings;*
- *To enhance the effectiveness of arbitration awards?*

Arbitration provides an important, and increasingly used, method of dispute resolution in financial and commercial transactions. Whatever action is taken in the course of this review should have the objective of maintaining the Community's standing as a venue for arbitration, and enhancing party autonomy (consistently with the approach to choice of court agreements – see Question 3 above).

The Committee supports the proposals set out in the Study by Professors Hess, Pfeiffer and Schlosser as a starting point for bringing arbitration within the framework of the Regulation. The key element in the package should be a requirement on Member State courts other than those in which the arbitration has its "seat" to decline jurisdiction in matters falling within the scope of an arbitration agreement, as well as any ancillary matters relating to the arbitration (e.g. the appointment or removal of arbitrators, and procedural steps in support of the arbitration). Further work will, however, be required (with due consultation of practitioners and international arbitral bodies) to ensure that the regime is both consistent with the 1958 New York Convention, the leading international agreement in this field, and respects the different approaches currently taken by Member States to the allocation of competence between national courts and arbitral tribunals. On this view, any exclusive competence with respect to matters relating to arbitration should refer to "the courts of the Member State of the seat of the arbitration (without prejudice to the allocation of competence in that Member State between its courts and the arbitral tribunal)".

As to the concept of "place" or "seat" of the arbitration, it will be vital to develop a common set of rules that does not encourage speculative challenges to the validity of an arbitration agreement in the period before the tribunal has been constituted and the seat determined, in cases where the parties have not themselves designated the "seat".

Absent agreement on the exclusive competence of the courts of the Member State of the seat of the arbitration, the Committee would favour the continued exclusion of arbitration together with any ancillary proceedings relating to arbitration, including any question as to the validity or effect of an arbitration

agreement, from the scope of the Regulation. This would require amending Article 1(2)(d) to reverse the decision of the Court of Justice in *West Tankers*.

Question 8:

Do you believe that the operation of the Regulation could be improved in the ways suggested above?

The Committee has the following specific comments on the other adjustments to the Regulation set out in the Green Paper:

1. The autonomous definition of "domicile" for corporate bodies in Art. 60 of the Regulation has worked well, and a common definition should be developed for individuals. This could build on the concept of "habitual residence" as used in the Brussels II*bis*, Rome I and Rome II Regulations.

2. The Committee sees some merit in developing an additional rule of special jurisdiction for proceedings to recover possession or control of *tangible* moveable assets, favouring the courts of the place where the asset is physically located. The precise limits of that rule will, however, need to be carefully defined. In the case of *intangible* movable assets the Committee does not support the development of any additional rule of special jurisdiction given that the assignment of a *situs* to intangibles is fictional.

3. The Committee is opposed to the suggestion that the Regulation should permit the recovery of penalties collected by fiscal authorities, if it is intended to suggest that (contrary to the specific statement in Art. 1(1)) the Regulation should apply to "revenue matters". The cross-border enforcement of revenue claims falls outside the natural scope of the Regulation and should be addressed by other means, legislative or otherwise.

Yours sincerely

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Chair
Financial Law Committee

cc. European Commission, Directorate-General Justice, Freedom and Security

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