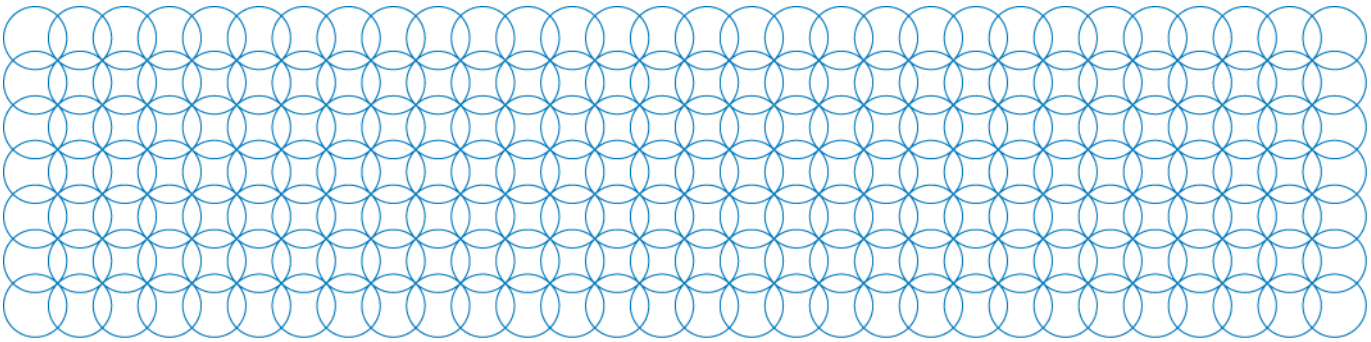
Ministry of JUSTICE

Revision of the Brussels I Regulation – How should the UK approach the negotiations

Consultation Paper CP18/10

This consultation begins on 22 December 2010

This consultation ends on 11 February 2011



Department of Justice

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The Scottish Government

Ministry of JUSTICE

Revision of the Brussels I Regulation – How should the UK approach the negotiations

A public consultation

A joint consultation produced by the Ministry of Justice, Scottish Government, Department of Justice (Northern Ireland). It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

To:	This consultation is aimed at individuals and organisations with an interest in private international law issues which arise in the context of the revision of the Brussels I Regulation (EC 44/2001)
Duration:	From 22/12/10 to 11/02/11
Enquiries (including requests for the paper in an alternative format) to:	Jean McMahon Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3208 Email: Jean.McMahon@justice.gsi.gov.uk
How to respond:	Please send your response by 11 February 2011 to: Jean McMahon Human Rights & International Directorate Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3208 Email: Jean.McMahon@justice.gsi.gov.uk
Additional ways to feed in your views:	For further information please use the “Enquiries” contact details above,
Response paper:	A response to this consultation exercise is due to be published by 14 June 2011 at: www.justice.gov.uk

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Introduction

1. On 14 December 2010, the European Commission published its proposal to revise Regulation (EC) 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This consultation paper seeks views as to whether it would be in the UK's national interests to opt in to the forthcoming negotiations on the Commission's revised Regulation. The Commission's proposal can be found at http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf. This paper also seeks views on the specific proposals contained in that instrument; this is in order to inform the UK's position in relation to these issues in advance of those negotiations. These are likely to commence in February next year.

2. Although in the main this consultation follows the Code of Practice on Consultation issued by the Cabinet Office, the Lord Chancellor and Secretary of State for Justice has decided that departure from the Code is appropriate as the UK is required to make a decision as to whether to opt in to the proposal or not, and must make that decision within three months of publication of the European Commission's proposal.

3. A tentative impact assessment has been completed and indicates that the following groups are likely to be affected:

   - the judiciary (when determining jurisdiction and recognising judgments in international cases);
   - the legal profession (specialist lawyers or law firms working in international civil or commercial matters);
   - enterprises of all sizes (any organisation involved in international business transactions or those contemplating new business links with overseas traders);
   - arbitration community (any organisation specifically involved in cross-border dispute resolution);
   - financial sector (any organisation involved in international contracting for financial purposes. This extends to trading in stocks and derivatives, insurance, banking and related fields);
   - consumers (any consumer involved in purchasing goods or services from abroad, including those by the internet); and
   - employees (those employed on contracts which involve working abroad).

4. It is possible that the proposals could lead to additional costs for some sectors. The Ministry of Justice has prepared a tentative impact assessment, separate from this consultation. Comments on the tentative impact assessment would be particularly welcome.

5. We would welcome responses to the following questions:

Q1. 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.

Q2. What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?

Q3. Do you agree with the tentative impact assessment? If not, please explain why.

Q4. Are there any other specific comments you may wish to make?

The proposed amendments to the current Regulation

Background

6. The Brussels I Regulation came into force on 1 March 2002. Article 73 of that Regulation placed an obligation on the European Commission to present a report on its application within 5 years of the Regulation's adoption. The Commission fulfilled that obligation by publishing their report on 21 April 2009. This was accompanied by a Green Paper which launched a consultation on possible ways to improve the operation of the Regulation.

7. In the light of the views received in response to that consultation exercise, the Commission has now published a legislative proposal to repeal and replace the current Brussels I Regulation. This proposal will be subject to negotiation by the Council of Ministers (made up of the Member States) and the European Parliament.

8. The Brussels I Regulation is concerned with private international law matters that arise in the context of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Regulation contains uniform rules to settle conflicts of jurisdiction and to facilitate the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the European Union (EU).

9. In general terms, the policy aims of the Regulation are designed to further the development of an area of freedom, security and justice and the operation of the internal market. This aim includes in particular the establishment of a system of predictable and appropriate jurisdictional rules which are generally based on the location of a defendant's domicile. The machinery for the recognition and enforcement of judgments is founded upon the principle of mutual trust between the Member States.

The purpose of this paper

10. The legal basis for this repeal and replace measure is Article 67(4) in conjunction with Article 81(2)(a), (c) and (e) of the Treaty on the Functioning of the European Union. This concerns measures in the field of judicial cooperation in civil matters having cross-border implications.

11. As this is a civil judicial cooperation matter, the UK's Protocol to Title V of the Treaty on the Functioning of the European Union will apply. This means that the UK's participation in the revised Regulation will depend upon the UK notifying the Community of its wish to take part in the adoption and application of the Regulation (known as opt in) within 3

12. The primary purpose of this consultation exercise is to seek the views of interested individuals and organisations as to whether, in the light of this opt in decision, it would, in overall terms, be in the national interest for the UK to apply the revised Regulation in the terms in which it has been published by the Commission. In view of the deadline laid down in the Protocol, the Government is now seeking views on this issue by 11 February 2011. Views are sought in particular on the potential advantages and disadvantages of the proposed revisions to the current Regulation and whether the revisions suggested on balance provide an adequately satisfactory system of rules as compared with that available under the current Regulation.

13. Reference is made at various points in this paper to the 2005 Hague Convention on Choice of Court Agreements. The Government supports the ratification of this instrument which, if it is to happen, must take place on an EU-wide basis. This support reflects the Government's appreciation of this instrument as a valuable means of enhancing the legal effectiveness of these commercially important agreements. Successful ratification of this instrument will be closely linked to the outcome of the review of the Brussels I Regulation and the prospect of such an outcome will require the UK to maximise its influence in that review, and this in turn will reflect a positive decision by the UK on the opt in question just described.

Devolution and Gibraltar

14. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. Responsibility for the law in this area is devolved to each jurisdiction: in Scotland, to the Scottish Justice Department and in Northern Ireland to the Department of Justice.

15. Gibraltar, although a British Overseas Territory, is subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to opt in.

The amendments to the Regulation

16. Outlined below are the principal changes envisaged in the proposed Regulation. A preliminary assessment by the Government accompanies some of these. All these assessments are necessarily subject to views expressed in this consultation exercise and further consideration within Government. In relation to the rest of the proposed changes, the Government is not yet ready to make a preliminary assessment and reserves its position for the moment. Included in the brief discussion of each of the major changes proposed by the Commission is the text of the relevant provisions in the proposed Regulation.

Abolition of Exequatur

17. "Exequatur" is the term given to what is currently a key procedural component in the system established under Brussels I for the recognition and enforcement of judgments within the EU. Under the rules in Section 2 of Chapter III of that instrument, in order that a judgment given in one Member State should be enforceable in another, it is provided that, as a necessary precondition, that judgment should have been declared enforceable in the latter Member State. In the UK and Ireland that process is known as registration for enforcement. The rules in that Section lay down a detailed uniform procedure for obtaining such declarations/registrations, with in-built safeguards for defendants and provision for appeals within the national court systems in the Member States.

18. The Commission's view is that in an internal market without unnecessary barriers it should be possible to abolish exequatur, together with the inevitable litigation costs which it imposes. The Commission believes that the current procedure results in delays. They suggest it can cost an applicant as much as £3,500[1] in the UK in a straightforward case (this includes court and lawyers fees, costs for service of documents and translations).

19. The Commission argues that the abolition of exequatur would have the following benefits in that it would:

- create a system that would facilitate the free circulation of judgments within the European Union;

[1] The Commission quoted the cost in the UK as Euros 4,000. This has been converted as at today's exchange rate £1=Euros 1.16.

- eliminate the costs and delays associated with the current procedure in the vast majority of cases where enforceability of a judgment is not contested by a defendant. This should mean that, in a straightforward case, applicants would be able to save a significant proportion of the current costs of the procedure, in particular legal and court fees would no longer be incurred, translation costs would be minimised through the use of a standard form and the competent authority in the Member State of enforcement would only be entitled to request the translation of an extract of the judgment. In more complex cases, claimants would still incur legal and translation costs if enforcement was contested by the defendant but with the introduction of standard forms this should still reduce translation costs and lawyers' fees;

- persuade more businesses and consumers to engage in cross-border trade, in particular Small and Medium Enterprises (SMEs). The Commission advise that in a recent study by the Centre for Strategy and Evaluation Services (CSES), 39% of SMEs stated that they would be more inclined to be involved in cross-border transactions if the exequatur procedure was abolished; and

- benefit claimants in the position of weaker parties in that it would improve, for example, the situation for an employee seeking to enforce a judgment against his/her employer in another Member State.

20. The Commission have proposed, however, that the exequatur procedure should be retained for judgments in defamation cases and those concerning collective redress.

The Government's preliminary assessment

21. In principle, the Government supports the abolition of exequatur, a reform which has been endorsed on many occasions by Ministers within the European Union. This support reflects its potential to reduce unnecessary delay and costs for litigants.

22. However, the Government is keen to ensure that abolition does not lead to the removal of the important protections that defendants currently enjoy. In that context, the Government welcomes in principle the retention of safeguards for defendants proposed by the Commission in the following situations:

(a) where the defendant was not properly informed in a timely way about the original proceedings;

(b) where there were procedural defects in the original proceedings which may have infringed a defendant's right to a fair trial; and

(c) where the judgment is irreconcilable with another judgment given either in the Member State where enforcement is sought or, in certain circumstances, in another country.

23. The Government is continuing to reflect on whether the proposed safeguards to be included in the revised Regulation are fully adequate to protect the legitimate interests of defendants (see Articles 38-46 below). In the light of this, views would be welcome on the following issues in particular which arise out of the Commission's proposals:

(a) whether it is appropriate to require defendants to litigate in the Member State of origin only on those issues which concern the failure to provide them with sufficient and timely information about the proceedings there, rather than enabling those issues, along with all the other alleged breaches of the safeguards, to be determined by courts in the Member State of enforcement;

(b) whether it is appropriate to remove the current safeguard of public policy in so far as that safeguard relates to substantive as opposed to procedural issues. It may be questionable whether such a removal is appropriate in cases where the issue relates to substantive public policy as expressed in national or EU legislation, for example in a case involving the interests of consumers; and

(c) whether it is right to treat certain judgments (specifically where the subject matter of the judgment concerns defamation or where the proceedings have been brought on the basis of collective redress) differently from other judgments, in particular where the proceedings are not subject to harmonised choice of law rules. It is for consideration whether judgments covering other matters, which are also not subject to harmonised choice of law rules, should likewise be treated in the same differentiated way, for example, judgments given in disputes involving real property?

24. The Government will reflect further on these issues in the light of responses to consultation.

ABOLITION OF EXEQUATUR

Article 38

1. Subject to the provisions of this Chapter, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required and without any possibility of opposing its recognition.

2. A judgment given in one Member State which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.

Article 39

1. A party who wishes to invoke in another Member State a judgment recognised pursuant to Article 38 (1) shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. The court before which the recognised judgment is invoked may, where necessary, ask the party invoking it to produce a certificate issued by the court of origin using the form set out in Annex I and to provide a transliteration or a translation of the contents of the form in accordance with Article 69.

   The court of origin shall also issue such a certificate at the request of any interested party.

3. The court before which the recognised judgment is invoked may suspend its proceedings, in whole or in part, if the judgment is challenged in the Member State of origin or in the event of an application for a review pursuant to Articles 45 or 46.

ENFORCEMENT

Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State of enforcement.

Article 41

1. Subject to the provisions of this Chapter, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State of enforcement. A judgment given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a judgment given in that Member State.

2. Notwithstanding paragraph 1, the grounds of refusal or suspension of enforcement under the law of the Member State of enforcement shall not apply in so far as they concern situations referred to in Articles 43 to 46.

Article 42

1. For the purposes of enforcement in another Member State of a judgment other than those referred to in paragraph 2 , the applicant shall provide the competent enforcement authorities with:

   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

   (b) the certificate in the form set out in Annex I issued by the court of origin, certifying that the judgment is enforceable and, containing, where appropriate, an extract of the judgment as well as relevant information on the recoverable costs of the proceedings and the calculation of interest.

2. For the purposes of enforcement in another Member State of a judgment ordering a provisional, including protective measure, the applicant shall provide the competent enforcement authorities with

   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

   (b) the certificate in the form set out in Annex I issued by the court of origin, containing a description of the measure and certifying

      (i) that the court has jurisdiction as to the substance of the matter; and
      (ii) where the measure is ordered without the defendant being summoned to appear and is intended to be enforced without prior service of the defendant, that the defendant has the right to challenge the measure under the law of the Member State of origin.

3. The competent authority may, where necessary, request a transliteration or a translation of the content of the form referred to in point (b) of paragraphs 1 and 2 above in accordance with Article 69.

4. The competent authorities may not require the applicant to provide a translation of the judgment. However, a translation may be required if the enforcement of the judgment is challenged and a translation appears necessary.

Article 43

The competent authority in the Member State of enforcement shall, on application by the defendant, refuse, either wholly or in part, the enforcement of the judgment if

(a) it is irreconcilable with a judgment given in a dispute between the same parties in the Member State of enforcement;

(b) it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement.

Article 44

1. In the event of an application for a review pursuant to Article 45 or Article 46, the competent authority in the Member State of enforcement may, on application by the defendant:

   (a) limit the enforcement proceedings to protective measures;

   (b) make enforcement conditional on the provision of such security as it shall determine; or

   (c) suspend, either wholly or in part, the enforcement of the judgment.

2. The competent authority shall, on application by the defendant, suspend the enforcement of the judgment where the enforceability of that judgment is suspended in the Member State of origin.

3. Where a protective measure was ordered without the defendant having been summoned to appear and enforced without prior service of the defendant, the competent authority may, on application by the defendant, suspend the enforcement if the defendant has challenged the measure in the Member State of origin.

COMMON PROVISIONS

Article 45

1. A defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the judgment before the competent court of that Member State where:

   (a) he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; or

   (b) he was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part; unless he failed to challenge the judgment when it was possible for him to do so.

2. The application shall be submitted using the form set out in Annex II.

3. The application may be submitted directly to the court in the Member State of origin which is competent for the review pursuant to this Article. The application may also be submitted to the competent court of the Member State of enforcement which will without undue delay transfer the application to the competent court in the Member State of origin using the means of communication as notified pursuant to Article 87 point b.

4. The application for a review shall be made promptly, in any event within 45 days from the day the defendant was effectively acquainted with the contents of the judgment and was able to react. Where the defendant applies for a review in the context of enforcement proceedings, the time period shall run at the latest from the date of the first enforcement measure having the effect of making his property non-disposable in whole or in part. The application shall be deemed to be made when it is received by either of the courts referred to in paragraph 3.

5. If the application for a review is manifestly unfounded, the court shall dismiss the application immediately and in any event within 30 days from the receipt of the application. In such case, the judgment shall remain in force.

   If the court decides that a review is justified on one of the grounds laid down in paragraph 1, the judgment shall be null and void. However, the party who obtained the judgment before the court of origin shall not see the benefits of the interruption of prescription or limitation periods acquired in the initial proceedings.

6. This provision shall apply instead of Article 19, paragraph 4 of Regulation (EC) No 1393/2007, if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

Article 46

1. In cases other than those covered by Article 45, a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial.

2. The application shall be brought before the court of the Member State of enforcement, listed in Annex III. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom recognition or enforcement is sought or to the place of enforcement.

3. The procedure for making the application shall be governed by the law of the Member State of enforcement.

4. If the application is manifestly unfounded, the court shall dismiss the application immediately and in any event within 30 days from the receipt of the application.

5. If the court decides that the application is justified, recognition or enforcement of the judgment shall be refused.

6. The judgment given in accordance with this Article may be contested only by the appeal referred to in Annex IV.

7. The court seised of an application in accordance with this Article may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. Where the time for such an appeal has not yet expired, the court may specify the time within which such an appeal is to be lodged.

8. The unsuccessful party shall bear the costs of the proceedings under this Article, including the legal costs of the other party.

The operation of the Regulation in the international legal order

25. One of the key purposes of Brussels I is to determine in any given situation, with a high degree of predictability, an appropriate national court within the EU which is competent to hear the dispute. In order to achieve this aim, the current instrument contains uniform rules to identify such a court. The scope of these rules is currently defined principally in terms of whether or not the defendant is domiciled within the EU. They do not apply in relation to defendants domiciled outside the EU.

26. The main rule of jurisdiction is that a defendant domiciled within the EU may be sued in the court of the Member State in which that party is domiciled. In addition, there are rules of special jurisdiction which allow a defendant to be sued in certain other Member States to which the dispute has a particularly close link by reason of the subject matter of

the dispute. For example, a claimant may sue a defendant in contract in the courts of the Member State where the goods in question were delivered under the contract or in tort in the courts of the Member State where the harmful event occurred. Other special protective rules of jurisdiction are laid down in support of the position of weaker parties to certain contracts, such as insured persons, consumers and employees. There are also certain exclusive grounds of jurisdiction where the dispute concerns a subject matter which it is particularly suitable to resolve in the Member State where that subject matter is located, for example disputes about real property or disputes concerning the validity or dissolution of companies.

27. The Commission points out that the current national rules of jurisdiction concerning defendants domiciled outside the EU vary widely between the Member States. In the light of this, the Commission argues that for claimants, particularly those domiciled within the EU, this complex state of affairs is unsatisfactory and has the potential:

(a) to result in unequal access to justice,

(b) for companies wishing to do business in the internal market, to create difficulties which can amount to a barrier to free competition; and

(c) to fail adequately to protect weaker parties, particularly as regards the enforcement of EU legislation.

28. In the light of these concerns, the Commission proposes an extension of the current rules of jurisdiction to cover disputes involving defendants domiciled outside the EU.

Government's preliminary assessment

29. The Government's view at this stage is that the case for extending the current jurisdiction rules in the Brussels I Regulation to cover disputes involving defendants domiciled outside the EU in the way proposed by the Commission has not been convincingly made out. It believes that, as a preferred alternative to unilateral harmonisation in this area at the EU level, more satisfactory solutions would be more likely to emerge through multinational negotiations at the global level, most probably under the auspices of the Hague Conference on Private International Law.

30. A possible compromise solution, which in the Government's view should be considered further, would be to allow Member States to retain their

current national grounds of jurisdiction in this area, notwithstanding the partial harmonisation of jurisdiction at EU level in respect of defendants domiciled outside the EU. As far as England and Wales are concerned these grounds are set out in Practice Direction 6B to Part 6 of the Common Procedural Rules. In relation to Scotland, these grounds are contained in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982.

31. If, as a result of the forthcoming negotiations on the Regulation, it is agreed that the Commission's proposal to extend the current rules of jurisdiction in the way proposed is generally acceptable, the Government is inclined at this stage to support in principle the proposed new grounds of jurisdiction in relation to moveable property and, in the interests of justice, a *forum necessitatis* for claimants who would otherwise be deprived of an adequate forum outside the EU in which to litigate their disputes (see Articles 25 and 26 below)

32. One consequence of the proposed harmonised extension of jurisdiction to cover cases involving "third country domiciliaries" is that the national grounds of jurisdiction established under the laws of the United Kingdom would no longer be available. The Government considers that careful consideration should be given to which, if any, of these national grounds should in some form be retained under the revised Regulation. This is essential in order to ensure that the interests of claimants are properly protected and that no jurisdictional lacuna is created as a result of the proposed extension of jurisdiction.

33. A further consequence of the Commission's approach is that the ambit of the protective rules of jurisdiction relating to insurance would be extended to situations where a defendant is domiciled outside the EU. In line with the current Brussels I Regulation, these provisions would apply in certain cases to defendants acting in a commercial capacity. This would mean that the possibilities for commercial parties to insurance contracts to make valid choice of court agreements between themselves, already restricted for cases falling under the Brussels I Regulation, would now be further restricted in cases where defendants are domiciled outside the EU.

34. The Government is concerned about this proposed extension of an already over-restrictive set of rules. The Government considers that in principle the only parties to insurance contracts who are in need of protection are those acting as consumers and not parties which are acting in a commercial capacity. In the light of this underlying concern the Commission's proposal appears to be unjustified and arguably neither in the best interests of the UK's insurance industry and its world-wide interests nor in the interests of the UK as a forum of choice for litigating international commercial disputes. It should also be pointed out that the Commission's approach would be inconsistent with the 2005

Hague Convention on Choice of Court Agreements and the principle of party autonomy which underpins that instrument.

35. A final consequence of the Commission's approach to jurisdiction is that, in the absence of any ameliorating provision, it would preclude entirely the operation of the procedural discretion available under the laws of the UK and known as *forum non conveniens.* This is a valuable mechanism deployed by courts in the UK to ensure the transfer of cases which would be more appropriately dealt with by the courts in another jurisdiction. The European Court of Justice's (ECJ's) decision in Case C-281/02 *Owusu v. Jackson* has already excluded the operation of the mechanism in cases falling within the current Brussels I Regulation and the proposed comprehensive scheme of EU jurisdiction would, complete that process of exclusion.

36. In this context the Government welcomes in principle the proposed rule which would establish a discretionary *lis pendens* rule where there are concurrent proceedings in the court of a Member State and the court of a non-Member State (see below Article 34). However, in view of the fact that the courts of a non-Member State will not be likely to be operating a jurisdictional regime equivalent to that which operates within the EU, the Government's initial assessment is that this provision should be reformulated in more flexible terms by analogy with Article 30 as regards related actions and without the requirement that a court in a non-Member State must necessarily have been seised first.

37. Finally, the Government welcomes the Commission's decision not to propose uniform rules to regulate, at the EU level, the recognition and enforcement within the EU of judgments coming from non-Member States. Such regulation would not have been justified, particularly in view of the probable difficulties to getting agreement within the Council on the necessary provisions. Issues in this area will continue to be regulated by national law.

SUBSIDIARY JURISDICTION AND *FORUM NECESSITATIS*

Article 25

Where no court of a Member State has jurisdiction in accordance with Articles 2 to24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that

(a) the value of the property is not disproportionate to the value of the claim; and

(b) the dispute has a sufficient connection with the Member State of the court seised.

Article 26

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 34

1. Notwithstanding the rules in Articles 3 to 7, if proceedings in relation to the same cause of action and between the same parties are pending before the courts of a third State at a time when a court in a Member State is seised, that court may stay its proceedings if:

   (a) the court of the third State was seised first in time;

   (b) it may be expected that the court in the third State will, within a reasonable time, render a judgment that will be capable of recognition and, where applicable, enforcement in that Member State; and

   (c) the court is satisfied that it is necessary for the proper administration of justice to do so.

2. During the period of the stay, the party who has seised the court in the Member State shall not lose the benefit of interruption of prescription or limitation periods provided for under the law of that Member State.

3. The court may discharge the stay at any time upon application by either party or of its own motion if one of the following conditions is met:

   (a) the proceedings in the court of the third State are themselves stayed or are discontinued;

   (b) it appears to the court that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time;

   (c) discharge of the stay is required for the proper administration of justice.

4. The court shall dismiss the proceedings upon application by either party or of its own motion if the proceedings in the court of the third State are concluded and have resulted in a judgment enforceable in that State, or capable of recognition and, where applicable, enforcement in the Member State.

Proposed changes in relation to choice of court agreements

38. The decision of the ECJ in Case C-116/02 *Gasser* which gave priority to the Regulation's *lis pendens* rule over an agreed exclusive jurisdiction deriving from a valid choice of court agreement between the parties, has produced significant problems in practice. It has undermined the ability of commercial parties effectively to select a jurisdiction to resolve their disputes and has thereby created opportunities for tactical litigation in jurisdictions which have not been chosen by the parties. This difficulty is exacerbated by the delay in some Member States in resolving issues of jurisdiction. The result is uncertainty and additional expense and the settlement of disputes on inappropriate terms. A good solution to this problem is a priority for the United Kingdom.

39. In the light of this the Commission proposes two amendments to enhance the effectiveness of choice of court agreements (see Article 23 below). Under the first, where the parties have designated a particular court or courts to resolve their dispute, it is proposed that priority should be given to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised of the dispute. Under this proposal any other court has to stay its proceedings until the chosen court has either confirmed its jurisdiction or, the cases where the choice of court agreement is invalid, declined jurisdiction. The Commission argues that this modification should increase the effectiveness of choice of court agreements and eliminate the incentives for abusive litigation in non-competent courts.

40. The Commission's second proposal is for a harmonised conflict of law rule on the substantive validity of choice of court agreements. The purpose of such a rule is to ensure a similar outcome on this issue wherever in the EU the court seised is situated.

Government's preliminary assessment

41. The Government welcomes the proposal that a court in a Member State chosen by the parties to resolve their dispute should always have priority to do so, regardless of whether that court is first or second seised. This should address the problems of cost, delay and legal uncertainty caused by the *Gasser* decision.

42. The Government also welcomes the Commission's proposal for a harmonised conflict of law rule on the substantive validity of choice of court agreements. Such a provision is welcomed as it reflects the rule in the 2005 Hague Convention on Choice of Court Agreements. This proposal will also have the benefit of removing an issue of legal uncertainty which exists under the current Brussels I Regulation.

PROROGATION OF JURISDICTION

Article 23

1. If the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substance under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

   (a) in writing or evidenced in writing; or

   (b) in a form which accords with practices which the parties have established between themselves; or

   (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Proposed changes to improve the interface between the Regulation and arbitration

43. As a result of the ECJ's decision in Case C-185/07 *West Tankers,* the scope of the exclusion of arbitration from the Regulation has been reduced. In particular, whenever a court characterises the subject matter of a claim brought before it as a matter within the scope of the Regulation, any issue as to the existence, scope or validity of an arbitration clause is a preliminary or incidental issue. The result of this is that the courts of an arbitral seat are powerless to protect the arbitration or take any action themselves. In particular they are unable to make their own determinations on the jurisdiction of the arbitrators and are forced simply to await the determination of whichever other court has been seised first. This in effect gives *carte blanche* to any party wishing to escape an arbitration clause to select its preferred court in order to

decide this issue. Such a party will commence a substantive claim, in the expectation that the other party will then make an application for a stay of proceedings. Further, once a court, other than the one where the seat of the arbitration is located has rendered a judgment on any issue concerning the arbitration, it would appear that courts in every other Member State will have to recognise and enforce this decision, thereby undermining the role of the courts of the arbitral seat and the operation of the New York Convention more generally.

44. In view of the importance of arbitration to international commerce the satisfactory resolution of these problems caused by the *West Tankers* decision is a priority for the UK.

45. The Commission's objective in proposing amendments in this area is to ensure the transparent and predictable coordination of court and arbitral proceedings thereby preserving or improving the attractiveness of the EU as a place of arbitration. The Commission has decided to enhance the effectiveness of arbitration agreements by providing that the court seised with a dispute involving an arbitration agreement would have to stay proceedings if an arbitral tribunal or court at the seat of arbitration was seised. The Commission argues these amendments would eliminate the risk of parallel proceedings and reduce the possibilities of abusive litigation tactics. As a result, arbitration should become more effective thereby improving the parties' access to alternative means of dispute resolution as well as giving maximum effect to the will of the parties who make arbitration agreements.

46. The Commission proposes (see below Article 29(4)) that a court seised of a dispute should be obliged to stay its proceedings on the basis that certain conditions are satisfied:

- that those proceedings contravene an arbitration agreement; and

- that either an arbitral tribunal has already been seised of the dispute or that court proceedings have been commenced in the Member State where the arbitration has its seat.

Government's preliminary assessment:

47. The Government shares the stated objectives of the Commission in relation to arbitration, ie the need, in particular, to enhance the effectiveness of arbitration agreements within the EU to prevent parallel court and arbitration proceedings and eliminate the incentive for abusive litigation tactics.

48. However, in seeking to achieve these objectives, the Government notes that the Commission has not adopted the approach advocated by the UK in response to the Commission's consultation, namely a reinforcement of the current exclusion of arbitration from the scope of the Brussels I Regulation in order to remove the entirety of the arbitral process from the scope of the Regulation.

49. The Government reserves its position on the viability of the Commission's proposals until it has consulted extensively with the arbitration community. One factor which the Government will weigh carefully is the extent to which the Commission's proposals could potentially create problems by because they are based on the extended scope of EU competence in this area which has resulted from the *West Tankers* decision.

Article 29(4)

4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

   This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

   This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II.

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

50. The Commission has proposed various amendments to the Regulation with the aim of improving the coordination of legal proceedings in the Member States. The amendments proposed include the following:

- improving the operation of the intra-EU *lis pendens* rule, by prescribing a time limit within which the court first seised of the dispute must decide on its jurisdiction. This proposed amendment would also provide for an exchange of information between the courts dealing with the same subject matter of the dispute (see below Article 29(1) and 29(2));

- a provision to facilitate the consolidation of related actions by abolishing the current technical requirement that consolidation must be permissible under national law;

- various proposals relating to provisional, including protective, measures. The most significant of these proposals is the suggested limitation on the circulation of such measures ordered by a court other than the court with jurisdiction over the substance of the dispute. The Commission argues that given the wide divergence of national laws in this area, the effect of such measures should be limited to the territory of the Member State where they were granted. The Commission's justification for this proposal is that it would prevent the risk of abusive forum-shopping.

The Government's preliminary assessment

51. The Government is generally supportive of the proposal to improve the internal *lis pendens* rule by prescribing a time limit within which the court first seised must decide on its jurisdiction. However, the Government is sceptical about the related proposal that there should be an exchange of information by the courts seised of the same matter. It is concerned that the creation of such a mechanism may not have any significant value in practice and could well lead to additional delay and expense for the parties involved.

52. The Government is also in principle supportive of the proposal to facilitate the consolidation of related actions. It favours such consolidation in general and considers that such an outcome is unduly restricted by the current technical limitation which, with its reference to the national laws of the Member States, may also be difficult to ascertain.

53. In relation to the Commission's various proposals on provisional measures the Government expresses no view at the moment, except to note in particular the proposed restriction on the circulation of such measures ordered by courts without jurisdiction over the substance of the dispute. This is not the current position under the Brussels I Regulation and views are sought both on its appropriateness in principle and its practical implications.

LIS PENDENS— RELATED ACTIONS

Article 29(1) & (2)

1. Without prejudice to Article 32(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction.

Proposals aimed at improving access to Justice

54. The Commission has proposed various technical amendments with the aim of improving the practical functioning of the jurisdiction rules. These include the following:

a. the creation of a jurisdiction for the resolution of claims to rights *in rem* in or possession of moveable property in the place where the moveable assets are located (see Article 5(3) below);

b. the possibility to bring actions against multiple defendants in the employment area under Article 6(1), in order to overcome the lacuna created by ECJ Case C-462/06 *Glaxosmithkline (*see Article 18(1) below*)*;

c. the possibility to conclude choice of court agreements in relation to disputes over commercial leases (see Article 22(1) below); and

d. the provision of mandatory information for a defendant in a weaker position, such as a consumer, an insured person or an employee, who enters an appearance about the legal consequences of not contesting the court's jurisdiction.

Government's preliminary response

55. The Government is in principle supportive of many of the proposals made by the Commission under this heading. In particular, it favours the creation of a jurisdiction to determine claims relating to rights *in rem* at the place where the moveable assets are located. This would appear to be an appropriate jurisdiction as the courts in that jurisdiction should in principle have control over that property. This might be particularly useful in relation to claims for the recovery of leased moveable assets, such as aircraft.

56. The Government is also supportive of the proposal to permit the possibility of consolidating actions against multiple defendants in the employment area. This proposal will remedy the situation which arose out of the ECJ Case C462/06 *Glaxosmithkline.* As the weaker parties in such litigation, employees should in principle be able to consolidate their claims in the same way as the generality of litigants. They should not in effect be discriminated against and required to have to go to the trouble and expense of bringing separate proceedings against different employers in several Member States.

57. Finally, the Government is supportive of the proposal to enable commercial parties to conclude choice of court agreements for disputes relating to commercial leases. This is currently prohibited under the current Regulation because of the scope of the exclusive jurisdiction in relation to disputes involving real property. However this situation is not clearly justifiable on the basis that agreements of this kind should be allowed in accordance with the general principle that party autonomy should be permitted between commercial parties.

SPECIAL JURISDICTION

Article 5(3)

3. As regards *rights in rem* or possession in moveable property, the courts for the place where the property is situated.

JURISDICTION OVER INDIVIDUAL CONTRACTS OF EMPLOYMENT

Article 18(1)

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to point 5 of Article 5 and Article 6(1).

EXCLUSIVE JURISDICTION

Article 22(1)

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. However:

   (a) in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State, either at the moment of conclusion of the agreement or at the moment of the institution of proceedings;

   (b) in agreements concerning tenancies of premises for professional use, parties may agree that a court or the courts of a Member State are to have jurisdiction in accordance with Article 23

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Q1. 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.

Q2. What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?

Q3. Do you agree with the tentative impact assessment? If not, please explain why.

Q4. Are there any other specific comments you may wish to make?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name / organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details / How to respond

Please send your response by 11 February 2011 to:

Jean McMahon
Ministry of Justice
Private International Law Team, Human Rights & International Directorate
6th Floor
102 Petty France
London SW1H 9AJ

Tel: 0203 334 3208
Email: Jean.McMahon@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from Jean McMahon (Jean.McMahon@justice.gsi.gov.uk or on 0203 334 3208).

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will

take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

A tentative impact assessment has been included as a separate document to this consultation exercise.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice Consultation Co-ordinator
Legal Policy Team, Legal Directorate
6.37, 6th Floor
102 Petty France
London SW1H 9AJ

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Alternative format versions of this report are available on request from
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