The Brussels I Regulation and non-Member States

I saw two problems. First, I wanted to define the scope of the Regulation and its various provisions. Secondly, I wanted to make it possible for Member-State courts to respect the rights and interests of non-Member States and persons domiciled in them.

Delimiting the scope of the Regulation

I started off with a complicated provision that tried to delimit the scope of all the Articles in the Brussels I Regulation. However, it soon became clear that most provisions themselves indicated their scope. The exception was the rule laid down in Owusu prohibiting forum non conveniens. So I eventually settled for a provision that just dealt with that. What I came up with was the following:

Article X

> 1.Where a court of a Member State has jurisdiction under this Regulation, it shall not decline jurisdiction on any ground for which provision is not made in this Regulation; in particular, it shall not decline jurisdiction on the ground that a court of another State is a more appropriate forum (*forum non conveniens*).
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> 2. Paragraph (1) shall not apply where, under Article 4(1), the court has jurisdiction under national law; nevertheless, in such a case a plaintiff domiciled in another Member State shall be treated no less favourably than a plaintiff domiciled in the Member State concerned.
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> 3. Paragraph (1) shall apply only with regard to a plaintiff domiciled in a Member State other than that in which the proceedings are brought. National law shall apply where paragraph (1) does not apply.

I think this speaks for itself. It is necessary to preserve forum non conveniens where English courts take jurisdiction under national law because the rules are so wide that they would by unacceptable internationally if they were not subject to this limitation. However, it is necessary to have a non-discrimination provision.

Paragraph (3) limits the prohibition to those cases in which the Community has an interest. This is based on domicile, the criterion adopted by the Regulation in general. The purpose of the new provision as a whole is to change the rule laid down in Owusu.

The proposal would clarify when a court of a Member State is permitted to apply the doctrine of forum non conveniens (assuming that it is part of its law). In Owusu the ECJ held that forum non conveniens does not apply when the defendant is domiciled in England, even if the only international links are with non-Member States. The proposed new provision would change this, but only as regards a plaintiff domiciled outside the Community. Thus if a French-domiciled plaintiff sues an English-domiciled defendant in England, forum non conveniens will not apply. It will, however, apply if an English-domiciled plaintiff sues an English-domiciled defendant in England for a tort committed in Jamaica and the defendant joins several Jamaican-domiciled parties as co-defendants.

The interests of non-Member States

It is agreed in general that the basic jurisdictional rules (domicile of defendant, etc.) are overridden in certain special situations. These are: exclusive jurisdiction, choice-of-court agreements and lis pendens. The Regulation makes provision for this, but it does so only where the other court is in a Member State. It does not permit or require a court of a Member State to stay the proceedings or to decline jurisdiction where –

- a court with exclusive jurisdiction is in a non-Member State;
- a choice-of-court agreement is in favour of a court of a non-Member State; or
- a court of a non-Member State was seised first (in the same proceedings or in related proceedings).

The proposal I put forward to deal with this is as follows:

Article Y

Notwithstanding the other provisions of this Regulation, a court of a Member State shall [stay its proceedings or decline jurisdiction, to the extent that the law of that State so provides,] [apply its national rules of jurisdiction] where:

(a) the courts of a non-Member State would have had exclusive jurisdiction under Article 22 if they had been in a Member State;

(b) the proceedings are subject to a choice-of-court agreement in favour of a court or the courts of a non-Member State and the Member-State court before which the proceedings are brought would have been obliged to decline jurisdiction under Article 23 if the chosen court had been in another Member State;

(c) a court of a non-Member State was seised first in proceedings involving the same cause of action and between the same parties, and the Member-State court in which the proceedings are brought would have been obliged to decline jurisdiction under Article 27 if those proceedings had been brought in a court of another Member State; or

(d) a court of a non-Member State was seised first in related proceedings as understood in Article 28 and the Member-State court before which the proceedings are brought would have been permitted to stay its proceedings or to decline jurisdiction under Article 28 if those proceedings had been brought in a court of another Member State;

provided that [in each case] [in the situations envisaged in sub-paragraphs (c) and (d)] any judgment given by the court of the non-Member State would be recognised and enforced in the Member State before which the proceedings are brought.

The proposal deals with the problem by using the provisions of the Regulation to specify the area in question, while permitting Member-State law to operate within that area. Thus, for example, Article 22 of the Regulation defines what is covered by “exclusive jurisdiction”, but Member-State law decides what will be done in such cases. In this, the proposal differs from the “reflex effect” favoured by some writers.

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