



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**JUSTCIV 117
CODEC 759**

NOTE

from : the delegation of the United Kingdom
to : Working Party on Civil Law Matters (Brussels I)

No. Cion prop. : 18101/10 JUSTCIV 239 CODEC 1587

Subject : Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)
- Comments from the delegation of the United Kingdom on Articles 34, 34 bis and 34 ter

As requested by the Presidency at the working party on 2nd March the UK submits its suggested amendments to article 34 and wording for the proposed recital. The proposed additions to article 34 are marked in **bold** and the deletions in ~~striktthrough~~ and are changes to the text in document number 18922/11. For ease of reading it assumes re-numbering.

The UK also re-submits its proposals for articles 34 bis and 34 ter which were previously submitted in June 2011 and were contained in document number 9474/11. Explanatory notes follow the text.

1. ~~[Notwithstanding]~~ **Where jurisdiction is based on Articles 3 to 7 and** where proceedings involving the same cause of action and between the same parties **or where proceedings involving related actions** are pending before the courts of a third State at the time when a court in a Member State is seised the latter court may upon application by one of the parties stay the proceedings if:
 - (a) it may be expected that the court in the third State will, within a reasonable time, give a judgment capable of recognition and, where applicable, enforcement in that Member State; and
 - (b) the court is satisfied that it is necessary for the proper administration of justice to do so.
2. The court may discharge the stay **and continue the proceedings** at any time upon application by either party or of its own motion if:
 - (a) the proceedings in the court of the third State are themselves stayed or are discontinued; or
 - (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; or
 - (c) the discharge of the stay is required for the proper administration of justice.
3. **Where the proceedings involve the same cause of action and the same parties** the court ~~[shall]~~ **may** 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 capable of recognition and, where applicable, enforcement in the Member State of the court seised.
4. **Where the proceedings involve related actions, the court may 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 capable of recognition and, where applicable, enforcement in the Member State of the court seised.**

Recital for Article 34

In deciding whether to stay its proceedings, where proceedings involve the same cause of action and are between the same parties or where related actions are pending before the courts of a third State a court in a Member State, the court may decide to do so on the basis that that is necessary for the proper administration of justice. In determining whether this condition is satisfied the court shall consider whether it would be clearly more appropriate for the proceedings to continue in the court of third State, having regard to all the facts of the particular case, including the connections between the facts of the case and the parties and that State, and the stage to which the proceedings in the third State had progressed by the time proceedings were started in the court of the Member State. Another relevant consideration is where the courts in the third State and the Member State agree on the law which should apply to the case and that is the law of the third State. Even where another court is clearly more appropriate in other respects a stay will not be granted if it will lead to a denial of justice because the claimant will not be able to bring the litigation in the other forum, for example for financial reasons.

Article 34 bis

- (1) Where jurisdiction is based on Articles 3 to 7 and proceedings either involving the same cause of action and the same parties or involving related actions are pending before the courts of a third State at the time when a court in a Member State is seised, the latter court may, upon application by one of the parties, stay its proceedings if the proceedings before the courts of the third State have as their object one of the following subject matters:*
- (a) rights in rem in immoveable property or tenancies of immoveable property where the property in question is situated in that third State; or*
 - (b) the validity of the constitution, nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, where the seat of the company, legal person or association is located in that third State. In order to determine that seat the court in the Member State shall apply the rules of private international law of the third State; or*

- (c) *the registration or validity of patents, trade marks, designs or similar rights to be deposited or registered where such deposit or registration has been applied for or has taken place in that third State;*

and if:

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

(b) the court in the Member State is satisfied that a stay is necessary for the proper administration of justice.

- (2) *The court may discharge the stay at any time upon application by either party if:*

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

(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; or

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

- (3) *Where the proceedings involve the same cause of action and the same parties, 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 capable of recognition and, where applicable, enforceable in the Member State of the court seised.*

- (4) *Where the proceedings involve related actions, the court may 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 capable of recognition and, where applicable, enforceable in the Member State of the court seised.*

Article 34 ter

- (1) Where jurisdiction is based on Articles 3 to 7 and where the proceedings are between the same parties and fall within the material scope of a choice of court agreement granting exclusive jurisdiction to a State which is neither a Member State nor a State bound by the 2007 Lugano Convention and those proceedings are pending before the courts of a third State at the time when a court in a Member State is seised, the latter court may, on the application by one of the parties, stay its proceedings if:*
 - (a) it may be expected that the court in that third State will, within a reasonable time, render a judgment that will be capable of recognition and, where applicable, enforcement in that Member state, except in a case where there are sufficient assets located in the third State to satisfy a judgment given in favour of the claimant; and*
 - (b) it is satisfied that a stay is necessary for the proper administration of justice; and*
 - (c) the subject matter of the choice of court agreement falls outside the scope of the 2005 Hague Choice of Court Agreements Convention.*
- (2) The court may discharge the stay at any time upon application by either party if:*
 - (a) the proceedings in the court of the third State are themselves stayed or are discontinued; or*
 - (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; or*
 - (c) discharge of the stay is necessary for the proper administration of justice.*
- (3) The court shall dismiss the proceedings upon application by either party 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.*

Explanatory notes to articles 34 bis and 34 ter

The UK considers that both provisions are required. The purpose of **Article 34 bis** is to provide for a discretion to decline a case in the court of a Member State in favour of a court in a third State where the latter court is dealing with proceedings which have as their object certain subject matters which reflect by analogy the exclusive grounds of jurisdiction laid down in Article 22. These subject matters are property law disputes concerned with rights *in rem* in respect of the property located in a third State, certain company law disputes where the seat of the company in question is located in a third State and certain intellectual property disputes where the right in question has been registered (or where registration has been applied for) in a third State. The availability of such reflexive effect under the current Regulation is unclear. This lack of clarity is unsatisfactory, a situation which will become all the more so in the event of the proposed extension of jurisdiction to defendants domiciled in third States.

The UK considers the policy case for a reflexive effect provision to be strong and to mirror the importance which has always been attached to the exclusive jurisdictions established under the Regulation, with the consequence that where one of those jurisdictions has been established in a Member State no courts in any other Member State are entitled to take the case. This policy consideration can apply equally where an analogous exclusive jurisdiction is located in a third State. The failure of the current Regulation to deal with this issue reflects a broader failure to take proper account of connections with third States. However, the reflexive effect cannot be automatic because the foreign court may not regard the case as falling within its jurisdiction far less its exclusive jurisdiction and therefore may regard the EU court as the appropriate court to hear the case. In addition the drafting of this exclusion does not mirror the complicated exception for internal cases in relation to short term tenancies and the proposed exception for choice of court agreements in relation to commercial leases. It would have to do so were the reflexive effect to be made mandatory.

The purpose of **Article 34 ter** is to confer a discretion on courts in Member States to stay proceedings in certain circumstances where the parties have agreed to confer exclusive jurisdiction on the courts of a third State to determine their disputes and, pursuant to that agreement, proceedings are taking place there. It seems doubtful whether any such discretion exists under the current Regulation, but in the view of the UK the case for it is strong by analogy with the reflexive effect provision proposed in *Article 34 bis* and the need to take proper account of connections with third States. Once again this case will be strengthened as a result of the proposed extension of jurisdiction regardless of the domicile of the defendant.

This discretionary power to stay proceedings has certain preconditions attached to its use. First, the exclusive jurisdiction must be conferred on a State outside the EU and those States bound by the Lugano Convention (Norway, Iceland and Switzerland). Secondly the subject matter of the proceedings must, self-evidently, fall within the material scope of the agreement. Thirdly, by analogy with Article 34(1)(a), a recognisable/ enforceable judgment must be expected from the chosen court within a reasonable time, in the absence of sufficient assets in the third State. Fourthly, a stay must be in the interest of justice. This may not be the case, for example if giving effect to the agreement would be unjust or contrary to the public policy of the Member State in question. Further the agreement itself may be legally void.

The final condition is important, namely that the subject matter of the agreement should fall outside the scope of the 2005 Hague Choice of Court Agreements Convention. This is necessary on the assumption that the coming into force of the revised Regulation will be accompanied by the ratification of this Convention by the EU. The Commission has indicated that this is its intention and this is strongly supported by the UK as a necessary preliminary to the Convention's global success as a valuable means of enhancing the legal efficacy of commercial choice of court agreements. On the assumption that these two events take place simultaneously, the UK's view is that, where the subject matter of the agreement falls within the scope of the Convention, jurisdictional issues in relation to it should be regulated by the Convention rather than by the Regulation. This appears to the UK as an essential means of ensuring that potential contracting States to the Convention retain a proper incentive to ratify it and thereby enjoy the reciprocal benefits which it will confer on their courts once validly chosen by commercial parties. However there are various subject matters which are excluded from the scope of the Convention, particularly in the field of maritime litigation. It seems clearly right that the Regulation should make provision for these matters.
