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MODULE I

SUBJECT 1- ADDENDA

RECENT DEVELOPMENTS IN CIVIL JUDICIAL COOPERATION AMONG THE EUROPEAN UNION MEMBER STATES

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**DISTANCE LEARNING COURSE
A SYSTEMATIC STUDY OF THE EUROPEAN
JUDICIAL AREA IN CIVIL AND COMMERCIAL
MATTERS: COMPETENCE, RECOGNITION AND
ENFORCEMENT OF JUDICIAL DECISIONS
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1.- INTRODUCTION

The adoption of The Hague Programme brought significant political impetus for the Union's work in a number of spheres, not least judicial cooperation in civil matters. Efforts based on the Action Plan implementing The Hague Programme, which set out specific objectives and areas of improvement with a view to making the provisions of the text a reality, were particularly productive. Following its expiry, the Union has already adopted a new initiative aimed at achieving further progress in the coming years: the Stockholm Programme, which was approved in the Summit of Heads of State and Government of 10 and 11 December 2009. This text establishes a time framework for the proposals in the area of justice and internal affairs to be put into practice over the next five years. Approval of an action plan specifying the objectives to be pursued and the related time schedule is expected for the first half of 2010. This offers a guarantee that the Union will continue the valuable work it has been performing in the field of civil justice.

Significant though the developments described in the preceding paragraph have been, the most relevant event in recent years as far as the structure of the European Union is concerned has been the approval and entry into force of the Treaty of Lisbon on 1 December 2009. This new treaty, which takes on board some of the proposals of the failed Constitutional Treaty, has brought about a fundamental reform of the Union's institutional make-up and regulatory regime.

A further important point is the European Union's recent enlargement following the integration of ten states on 1 May 2004 and of Bulgaria and Romania on 1 January 2007. The Union now has twenty-seven Member States, and negotiations are open for the possible entry of Croatia, Macedonia and Turkey. Other countries in the Balkan region and former Soviet Union republics which are now independent states, may also eventually become members.

This paper will discuss all these matters, which constitute the milestones of the European Union's most recent developments.

2.- THE ACTION PLAN IMPLEMENTING THE HAGUE PROGRAMME

The Action Plan implementing The Hague Programme, adopted in the meeting of the Council of Justice and Interior Ministers of 3 June 2005 (COM 2005 184 final), laid out the specific areas to be addressed by the Union and included an associated time schedule, ending in 2009. This initiative made it clear that progress in the area of freedom, security and justice is a priority concern in the Union's agenda, not simply because it is one of its foremost objectives, but also and more specifically, because it is a fundamental interest of the citizens of the Union.

In the field of civil justice, The Hague Programme set out to build a European area of justice for all. This was conceived of not merely as the recognition and enforcement of judgments issued in a given Member State in all the other Member States, but as the guarantee of effective access to justice with a view to obtaining and enforcing judicial decisions. For this purpose, the Plan not only contemplates new legislation on jurisdiction, recognition and the conflict of laws, but also measures to generate mutual trust and respect between the Member States, with minimum procedural rules and a high degree of quality in the justice systems, particularly with regard to impartiality and respect for the rights of defence.

Many regulatory texts were adopted during the life of the Plan (2005-2009), the most significant of which are listed here in the order of their date of adoption: Regulation 1896/2006 (Order for payment); Regulation 861/2007 (Small claims); Regulation 864/2007 (Rome II), Regulation 1393/2007 (Modifying the previous regulation on the service of documents); Directive of 21 May 2008 (Mediation); Regulation 593/2008 (Rome I); Decision of 27 November 2008 (New Lugano Convention); Regulation 4/2009 (Maintenance obligations); Decision of 26 February 2009 (Signing of the Hague Convention on choice of court agreements of 30 June 2005), and the Decision of 18 June 2009 (Modification of the Civil Network).

3.- THE UNRATIFIED TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

One objective that did not materialise in the process described in the preceding section - as a result of a series of impediments in the ratification procedure which began with rejection in the referendums held in France and the Netherlands - was the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004 and published in the OJEU on 16 December 2004.

This treaty attached particular importance to the right to an effective remedy, as proven by its recognition of the different national constitutional traditions that uphold this right (Art. I-9-3), by the declaration of the Union's willingness to accede to the European Convention for the Protection of Fundamental Rights (art. I-9-2) and its relations with the Union's actions. But it is further evidenced by the explicit recognition of the right to an effective remedy in the Charter of Fundamental Rights, contained in Part II of the Constitutional Treaty, and the mandatory requirement to interpret these rights in harmony with the constitutional traditions common to the Member States.

Alongside a long series of rights, the Constitutional Treaty also set forth - in the section devoted to the policies of the Union - a special provision on civil cooperation, associating it with the establishment of the area of freedom, security and justice referred to in Article I-3-2 and in the Preamble of the Charter of Fundamental Rights.

Article III-269 made explicit reference to cooperation in civil matters, providing as follows:

"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, European laws or framework laws shall establish measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, a European law or framework law of the Council shall establish measures concerning family law with cross-border implications. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a European decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament."

Rejection at the national level prevented the Constitutional Treaty from becoming effective and led to its exclusion from the European agenda. Nevertheless, a large part of its provisions in the field of civil judicial cooperation have made their way into the latest major text in the process of European construction: the Reform Treaty of 2007.

4.- THE TREATY OF LISBON

As outlined above, the Constitutional Treaty met with a series of setbacks in the ratification process which gave rise to a standstill. The remedy to this situation was provided by the European Council, which in its Brussels meeting of 21 and 22 June 2007 under the German presidency of the EU, decided to call an Intergovernmental Conference to be held later in 2007 and commission it with an important assignment. The Conference - which was to be the briefest in the history of the Union - worked on a project drawn up by the Portuguese presidency on the basis of the Conclusions of the Brussels European Council, a minutely detailed working document that gave the meeting an essentially technical character. The Conference was required to conclude its task before the end of 2007 so that the new treaty could be ratified before the European Parliament elections scheduled for June of 2009. Ireland's rejection in the referendum of 12 June 2008 meant this deadline was not kept to, but the positive outcome of the second referendum and the resolution of the final objections put forward by the Czech Republic opened the way for the Treaty's entry into force on 1 December 2009.

The mission entrusted to the Intergovernmental Conference was no other than to draw up a treaty - officially named the "Reform Treaty", although it is commonly known as the "Treaty of Lisbon" in reference to the city where it was signed - which would modify the existing treaties and abandon the constitutional path. In practice however, the essential elements of the Intergovernmental Conference that spawned the Constitutional Treaty found their way into the treaties, albeit modulated in accordance with the Conclusions of the Brussels Council of Europe of 21 and 22 June of 2007.

Once the Intergovernmental Conference had finished its task, the Treaty was validated by the Summit of Heads of State held in Lisbon in October of 2007 and signed in the same city on 13 December 2007, before the summit that ended the Portuguese presidency of the EU (Portugal's presidency in the second half of 2007 is the origin of the name of the Treaty of Lisbon).

As regards the content of the amendments made to the current treaties, these consisted, as has been described above, in the incorporation of the new elements resulting from the Intergovernmental Conference of 2004 (which produced the Constitutional Treaty) into the Treaty on European Union and the Treaty on the Functioning of the European Union (as the Treaty of the European Community is now known), with the modulations prescribed by the Council of Europe in June of 2007.

The Reform Treaty discards the terms "law" and "framework law" which had been established in the Constitutional Treaty as sources of Community Law, and maintains the traditional terms "regulation", "directive" and "decision".

The Treaty also does away with the existing pillar-based structure of Community action, with a Community pillar embodied in the Treaty of the European Community (as it had been known until then), a foreign policy and security pillar and a criminal judicial cooperation pillar (the latter two being founded on the Treaty on European Union). The new mechanism contemplates no other element apart from the European Union and its action (the name 'European Community' used until now in the "first pillar" will disappear), and will be based on two fundamental texts: the core treaty - the Treaty on European Union -, which governs the most relevant aspects of the European Union, and the development treaty - the Treaty on the Functioning of the European Union -, which is centred on all the necessary aspects for the Union to carry on its activity, such as the institutions, procedures, jurisdiction of each body, etc.

Turning to judicial cooperation in civil matters, in this field as in others the provisions of the Constitutional Treaty are maintained (albeit with some elements of fine-tuning in family law, as we will see below).

Article 65 of the Treaty on the Functioning of the European Union (as the Treaty of the European Community is now known) establishes that the Union will develop judicial cooperation in civil matters having cross-border implications, based on the principle of the mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. The second paragraph in the article specifies the areas where action should be focused. These are the following: (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff.

The new element introduced by the Reform Treaty with respect to the frustrated Treaty establishing a European Constitution refers to family law. At the Commission's proposal, the Council took a decision on the procedure for adopting instruments in the field of family law, according to which, instead of unanimity - as initially required in family law by contrast to the rest of civil cooperation, which follows the ordinary procedure - the ordinary procedure will be applied - as is generally the case in civil cooperation with the exception of family law, as has already been stated. Thus - here lies the novelty - the national parliaments have been granted, by virtue of what has been called a "bridging clause", which also operates in other legislative fields, the possibility to block this change in the decision-making system.

The other fundamental innovation introduced by the Reform Treaty is the elimination of the limitation established by Article 68 of the currently effective Treaty on the European Community on the referral of questions for preliminary rulings in the area of civil judicial cooperation and other matters. As stated above, these were restricted to national courts against whose decisions there is no judicial remedy under national law. This provision had been the subject of much criticism to the extent that it imposed a

great handicap on the Court of Justice's case-law generating role. After the Reform Treaty the general procedure will be applied, according to which preliminary rulings will be governed by Article 234 of the Treaty on the Functioning of the Union (as the Treaty on the European Community is now known). This will enhance the Court's case-law creating potential in a field as essential as civil judicial cooperation.

5.- THE STOCKHOLM PROGRAMME: FUTURE PERSPECTIVES

In the wake of the expiry of The Hague Programme, the Summit of Heads of State and Government held on 10 and 11 December 2009 drafted and adopted the Stockholm Programme, aiming to give further impetus to the Union's action in judicial matters. The initiative, which has been dubbed "An open and secure Europe serving and protecting the citizens", lays down the time frame of the proposals to be set in motion in the field of justice and internal affairs over the next five years. The Programme - as with its predecessor, The Hague Programme - will be supplemented with an Action Plan, establishing the specific objectives to be achieved.

The Stockholm Programme rests on the principle that freedom, security and justice are part of the European vision of society, and sets out to attain "a Europe of justice" by consolidating, improving and developing the existing mechanisms, while also guaranteeing that they are suitably complied with. It also intends to improve citizens' access to the courts of justice throughout the Union, foster cooperation among judicial professionals and eliminate barriers to mutual recognition. The basic instruments that will be used for this purpose are: encouraging mutual trust and knowledge of the systems of the different Member States, developing new legislative initiatives, improving the quality of legislation, simplifying the language used in legislation, establishing mechanisms to consolidate legislation and fostering objective, impartial procedures to assess the impact of the Programme and the efficiency of its implementation.

The particular areas on which the Union's action will be focused are: access to justice; jurisdiction, recognition and enforcement; international private law; the use of instruments to unify procedures, and the encouragement of relations with third-party states and international institutions with competence in the field of judicial cooperation.

In the area of access to justice, the Programme envisages intensifying the Union's legal aid measures, promoting alternative methods of settling disputes, abolishing formalities for the legalisation of documents by creating authentic "European documents", and reducing the language barriers that obstruct cooperation and access to justice in other states through the use of machine translation systems and the creation of databases of interpreters and translators. Lastly, special attention is given to the promotion of E-justice, to the point that it constitutes a priority element of the Programme, which is set to become a basic instrument in proceedings conducted in a Member State other than the state of residence. The use of videoconference will be stepped up, some already unified civil procedures (e.g. the European order for payment or the European small-claims procedure) will be available to deal with online, and some national registers will be interconnected.

Turning to jurisdiction, recognition and enforcement, the key objective is to consolidate the principle of "mutual recognition", abolishing any intermediate measures (i.e. the exequatur and other safeguards). Particular stress is laid on the need to improve the enforcement of precautionary decisions and enforcement procedures, even envisaging the possibility to establish a common procedure to freeze a debtor's bank accounts and other properties. The Programme also intends to extend enforcement to areas not yet covered by the action of the Union, such as succession

and wills and matrimonial property rights. Given that the new measures may cause a great increase in the number of legislative instruments, the Programme proposes the adoption of a Code of Judicial Cooperation in civil matters. Lastly, facilitating the obtention and recognition of civil status documents is also mentioned as an area for further advancement.

In the field of international private law, the Programme points to the need to issue an instrument on the law applicable to companies and insurance contracts, improve procedures for the application of foreign law where this is required to govern the legal relation at issue, with special emphasis on the role to be played in this respect by the networks of international judicial cooperation and particularly the European Civil and Commercial Judicial Network.

Regarding the unification of procedures - a process that began with the Regulations on the European payment order and the European small claims procedure - the aim is to encourage the establishment of common minimum procedural standards in areas such as the serving of documents (where progress has already been made with the provisions of the Regulation on the European Enforcement Order), the taking of evidence, systems for appeal and even enforcement mechanisms.

The last sphere of action envisaged by the Stockholm Programme concerns the fostering of relations of cooperation with other states and international agencies. Special attention is paid to The Hague Conference on International Private Law, which the Union has already acceded to. Indeed, the Union's own legislation is increasingly complementary to the provisions of the Conference, as clearly shown by the Brussels II bis Regulation and Regulation 4/2009 on maintenance obligations. Having said this, relations with third-party states are not ruled out. The possibility is provided to establish bilateral agreements between the European Union and such states, or to allow them to join the Lugano Convention.

In any event, the Stockholm Programme, as has already been pointed out, simply lays down a set of guidelines, which need to be translated into specific plans and targets in the Action Plan for its implementation, the approval of which has been set for 2010.

The European Union will continue - possibly simultaneously to the process for the approval of this Action Plan - developing with the initiatives already underway, which include the following:

- Succession and wills. The aim is to produce a Regulation to govern the most relevant and controversial aspects of cross-border inheritance law, covering the applicable law, the jurisdiction of judicial and non-judicial authorities, recognition and enforcement, with the possibility to create a "European certificate of inheritance".
- Matrimonial property rights. It is sought to adopt a Regulation that will address the key aspects in this field, to the extent that couples with links to various states are affected: applicable law, jurisdiction, recognition and enforcement.
- Divorce, by means of the Regulation (expected to be completed in the first half of 2010) amending Regulation (ECC) No. 2201/2003 as regards jurisdiction and introducing rules on the law applicable in matrimonial matters.
- A further area work currently underway is the recognition and enforcement of decisions to improve the procedures already in existence. A number of green papers published on this matter serve as the basis of such work, e.g. the Green Paper on the efficiency of the enforcement of judgments in the European Union: transparency of debtors' assets, and the Green Paper on improving the

efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts.

VI.- TEXTS CURRENTLY IN FORCE

This overview of the legislative process in the field of civil judicial cooperation in the European Union would not be complete without a reminder of the regulatory instruments that have been adopted to date. These may be divided into the following groups:

- 1) International Jurisdiction
- 2) Access to justice.
- 3) Cooperation in civil and commercial matters
- 4) Unification of civil procedures
- 5) Mutual recognition and enforcement of judgments
- 6) International private law

1) International Jurisdiction

- Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEC L 12 of 16.01.01) ("Brussels I").
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988 ("The Lugano Convention").
- Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("Brussels II").
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis").
- Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007 ("the New Lugano Convention").
- Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
- Council Decision of 26 February 2009 on the authorisation for the signing of The Hague Convention on Choice of Court Agreements of 30 June 2005.

2) Access to justice

- Council Directive of 27 January 2003 to improve access to justice in cross-border matters by establishing minimum common rules relating to legal aid for such disputes.
- Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

3) International Judicial Cooperation

- Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.

- Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters.
- Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.
- Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000.
- Decision of the European Parliament and of the Council of 18 June 2009 amending Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.

4) Procedural unification

- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May on certain aspects of mediation in civil and commercial matters.

5) Mutual recognition and enforcement of judgments

- Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I").
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988 ("The Lugano Convention").
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European order for payment procedure.
- Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("Brussels II").
- Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis").
- Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See.
- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- Council Regulation (EC) No 681/2007 of 13 June 2007 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings.
- Council Decision of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("New Lugano Convention").
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007 ("the

New Lugano Convention").

6) International private law

- Rome Convention of 1980 on the Law Applicable to Contractual Obligations ("Rome I") First and Second Protocols on the interpretation by the EU Court of Justice of the Convention of 1980.
- Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").
- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I").
- Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.