

BRIEFING ON RECAST BRUSSELS I REGULATION

Introduction

The recast Brussels Regulation ((EC) No, 1215/2012) has application from 10 January 2015. The Brussels I Regulation established a set of EU rules that determine which court has jurisdiction in cross-border disputes and how court judgments issued in one EU Member State are recognised and enforced in another Member State. The purpose of reforming the Brussels I Regulation was to remedy a number of deficiencies in the current operation of the Regulation.

This briefing note outlines some of the key changes in the recast Regulation and the impact of these changes.

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Key Changes

Key changes include:

- (1) The abolition of the “*exequatur*” procedure (the need to obtain a court order to enforce a foreign judgment).
- (2) Enhancing the effectiveness of jurisdiction agreements, to address the problem known as the “Italian torpedo”.
- (3) Extension of the rules relating to jurisdiction agreements to non-EU parties.
- (4) Introduction of a limited international *lis pendens* rule.
- (5) Extension of the rules relating to consumers and employees to non-EU traders and employers.
- (6) Clarification of the exclusion of arbitration from the scope of the Regulation.

(1) Abolition of the “*exequatur*” procedure

Under the Brussels I Regulation, a judgment given in one Member State does not automatically take effect in another Member State. Instead it first has to be validated and declared enforceable in a special intermediate court procedure, known as the “*exequatur*” procedure, which is costly and time-consuming. The *exequatur* procedure is seen as adding to the complexities of cross-border litigation which deters companies from cross-border trade.

The recast Regulation abolishes the *exequatur* procedure, so that any judgment obtained in one Member State will be automatically recognised and enforceable in any other Member State as if it were delivered in the latter Member State itself (Articles 36 and 39). This change will benefit businesses as they will save time and money by not having to go through intermediary proceedings to have a judgment recognised and enforced abroad.

A party who wishes to invoke or enforce in a Member State a judgment given in another Member State must produce: (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (2) a certificate in the form set out in Annex 1 of the Recast Regulation (Article 37 and 42).

The abolition of the exequatur procedure is accompanied by a series of procedural safeguards. The recognition or enforcement of a judgment shall be refused if it is contrary to public policy in the Member State in which it is sought to be enforced; or where the defendant was not served with the proceedings in sufficient time as to enable him to arrange for his defence; or if the judgment is irreconcilable with a judgment given between the same parties in the Member State where enforcement is sought; or in another Member State or in a third State (Article 45 and 46).

(2) Enhancing the effectiveness of jurisdiction agreements, to address the problem known as the "Italian Torpedo"

Under the Brussels I Regulation, 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 must stay its proceedings until the court first seised has determined whether or not it has jurisdiction. This rule applies even where a party brings proceedings in breach of a jurisdiction agreement for tactical reasons (known as "Italian torpedo" actions).

The Court of Justice of the European Union (**CJEU**) has ruled in the cases of *Gasser GmbH v MISAT srl* (Case C-116/02) [2003] ECR I-14693 and in *Turner v Grovit* (Case C-159/02) [2004] ECR I-3563, that a party cannot injunct another party from pursuing proceedings in another Member State in breach of a jurisdiction agreement. Instead, it is for the party to assert its contractual choice before the court first seised of the dispute.

The recast Regulation enhances the effectiveness of exclusive jurisdiction agreements and seeks to avoid abusive litigation tactics, by providing for an exception to the general *lis pendens* (disputes pending elsewhere) rule. Article 31(2) provides that "*where a court of a Member State on which an agreement...confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement*".

This new rule will ensure that the court designated in the jurisdiction clause has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. However a party must start proceedings in the designated court in order to trigger a stay of the proceedings commenced in breach of the jurisdiction clause.

This exception to the usual *lis pendens* rule does not apply where:

- The parties have entered into conflicting exclusive jurisdiction agreements.
- To insurance, consumer, or employee matters.
- Where parties have chosen a non-Member State court as having jurisdiction.
- Where non-exclusive jurisdiction only has been conferred on a Member State court.

It is also noteworthy that under the recast Regulation, jurisdiction agreements are separable. Article 25(5) provides that jurisdiction agreements "*shall be treated as an agreement independent of the other terms of the contract*".

(3) Extension of the rules relating to jurisdiction agreements to non-EU parties

Currently, the Brussels I Regulation does not apply to defendants domiciled outside of the EU, and in such circumstances the courts of the Member States apply their own national rules to determine whether they have jurisdiction. The European Commission proposed extending the Regulation to all non-EU defendants, however this caused much controversy, and this proposal was therefore not fully adopted.

Instead, the recast Regulation extends the scope of the rules in relation to jurisdiction agreements by removing the current requirement that at least one party must be domiciled in a Member State (Article 24). Therefore where two non-EU parties agree that any dispute will be subject to the exclusive jurisdiction of the Irish courts, the Irish courts will be required to accept jurisdiction.

However, as noted above, the chosen court specified in the jurisdiction agreement must be a court of an EU Member State, in order for the agreement to fall within the ambit of the recast Regulation. This means, for example, that were a contract includes an exclusive U.S. jurisdiction clause, and in breach of contract, one of the parties commences proceedings in Ireland, on the basis that the defendant is Irish, there is no express provision in the recast Regulation requiring the Irish court to decline jurisdiction.

The recast Regulation also introduces a harmonised conflict of law rule on the substantive validity of jurisdiction agreements. The laws of the Member State court designated in the jurisdiction agreement shall govern questions of substantive validity of the jurisdiction agreement, even if that is different from the governing law of the contract (Article 25).

(4) Introduction of a limited international *lis pendens* rule

The recast Regulation introduces a new international *lis pendens* rule, which aims to avoid parallel proceedings taking place inside and outside the EU. It provides the courts of a Member State with discretion to stay proceedings where a court of a (non-EU) third state has already been seised with a related action at the time the EU Member State court is seised.

The court of a Member State may only grant a stay if: (a) it is expedient to determine the related actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings; (b) it is expected that the court of the third state will give a judgment capable of recognition and of enforcement in that Member State; and (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice (Article 34(1)).

The court of a Member State may also dismiss the proceedings before it, if the proceedings before the third party state are concluded and have resulted in a judgment capable of recognition and of enforcement in that Member State (Article 34(3)).

(5) Extension of the rules relating to consumers and employees to non-EU traders and employers

Under the Brussels I Regulation, a consumer or employee may be sued only in the courts of the Member State in which the consumer or employee is domiciled. However a trader or employer may be sued either in those courts or in the courts of the Member State where the trader or employer is established.

The recast Regulation extends these protective rules applicable to consumers and employees, by making them applicable even where the trader or employer is domiciled outside the EU (Article 18 and 21). The rules also restrict the ability of the parties to depart from these rules by agreement.

(6) Clarification of the exclusion of arbitration from the scope of the regulation

Arbitration matters are excluded from the scope of the Brussels I Regulation. However, the interface between arbitration and litigation needed to be improved.

In the case of *Allianz spA v West Tankers (Case C-185/07)*, the CJEU held that the mere fact that a claim is the subject of an arbitration agreement does not deprive a court, which would otherwise determine the substance of the claim, of its jurisdiction under the Brussels I Regulation. This was so even on issues concerning the validity and scope of the arbitration agreement. This decision has been widely criticised as it undermines arbitration agreements, and creates incentives for abusive litigation tactics, which leads to further costs and delays.

The recast Regulation seeks to address such concerns. It confirms that it does not apply to arbitration (Article 1(2) (d)); clarifies the ambit of the arbitration exception (Recital 12), and provides that it shall not affect the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Article 73(2)).

It enhances the effectiveness of arbitration agreements, by providing that nothing in the recast Regulation will prevent the courts of Member States from referring parties to arbitration, staying or dismissing proceedings, and ruling on the validity of an arbitration agreement, in accordance with their national law. A Member State is not obliged to wait for the decision of another Member State on the validity of an arbitration agreement, even if the question has been referred to that other court first.

The New York Convention takes precedence over the recast Regulation, and therefore Member State courts are permitted to recognise and enforce an arbitral award even if it is inconsistent with another Member State's judgment.

The scope of the arbitration exclusion has also been clarified. The recast Regulation does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Entry into force

The recast Regulation applies from 10 January 2015 (with the exception of Articles 75 and 76, which applied from 10 January 2014).

Although Denmark did not take part in the adoption of the recast Regulation, it has notified the European Commission of its decision to implement the provisions of the Regulation (as published in the Official Journal on 21 March 2013).

The recast Regulation will not affect the application of the 2007 Lugano Convention, which the non-EU states of Switzerland, Iceland, and Norway are party to (Article 73(1)).

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