

Recast Brussels I Regulation enhances jurisdiction agreements in the EU

The EU has published the recast form of the Brussels I Regulation on jurisdiction and the enforcement of judgments, which will come into force in January 2015. The recast Regulation addresses one of the major problems with the existing Regulation by strengthening the protection given to jurisdiction agreements. "Italian torpedoes", aimed at undermining contractual jurisdiction clauses, should become things of the past because the Regulation gives the court chosen by the parties precedence over all other courts regardless of when proceedings are started. The recast Regulation also places arbitration firmly outside its scope, and introduces a discretion to stay proceedings in favour of non-EU courts.

The Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters (Regulation 44/2001/EC) seeks to secure the free movement of judgments within the EU. The courts of one member state should have jurisdiction to determine a dispute, and the judgment given by those courts should then be enforced in all other EU member states. Where more than one court might have jurisdiction, the Regulation adopts a simple tie-break: the court first seised of a dispute has jurisdiction; all others are obliged to defer to the court first seised.

Italian torpedoes

But this creates a problem, as the European Court of Justice confirmed in *Erich Gasser GmbH v MISAT Srl* (Case C-116/02). The court first seised takes precedence over all other courts not only in deciding the substance of the dispute but also in

deciding the logically prior question of whether or not it has jurisdiction under the Regulation to determine the substance of the dispute. Even if it is clear beyond peradventure that the court first seised does not have jurisdiction (for example, because the parties have agreed that another court should have exclusive jurisdiction), any court seised subsequently is still obliged to halt its proceedings pending a decision by the court first seised as to its jurisdiction.

A decision on jurisdiction can take some time, not least because the practice of some courts is to decide jurisdictional issues at the same time as they decide the substance. The delay and inconvenience involved in challenging the jurisdiction of the court first seised will often secure the object of the party that launched the initial proceedings in the "wrong" court. That party is able to put off the time at which a court will decide the

Key issues

- Basic jurisdictional rules left unchanged by revisions to the Brussels I Regulation
- But the position of contractual jurisdiction clauses will be much improved in the new Regulation
- EU courts will also have a discretion to stay proceedings in favour of non-EU courts, but only in limited and unsatisfactory circumstances
- Arbitration is placed firmly outside the scope of the Regulations

substance of the dispute or to improve its negotiating position by making it more costly and slow to resolve proceedings. The threat of these "Italian torpedoes" also encourages parties to rush to their

favoured court in order to gain the advantage of first seisure.

An example of the use of an Italian torpedo - the *Primacom* litigation - is given in the box on the right of this page.

Torpedoes rehoused

The recast Brussels I Regulation (Regulation 1215/2012/EU) addresses this problem. There will be an exception to the previously absolute rule that any court other than the first seised must stay its proceedings pending a decision by the court first seised. Under article 31(2) of the recast Regulation, if the parties have conferred exclusive jurisdiction on a particular court, that court may proceed to hear the case even if it was not first seised. All other courts must halt their proceedings once the designated court has established that it has jurisdiction (article 31(3)) or possibly as soon as the chosen court is seised (recital (22)).

There will doubtless be some difficulties with the new regime (eg what if there are conflicting jurisdiction agreements or courts reach different conclusions as to whether there is a jurisdiction agreement?), but the recast Regulation is a significant improvement on the old Regulation. Where the parties have agreed to the exclusive jurisdiction of particular courts, the recast Regulation will remove the incentive to start proceedings elsewhere because doing so will no longer trump the jurisdiction of the chosen court. The chosen court will still be able to proceed. Similarly, there will be no need to rush to court prematurely to ensure that the chosen court is first seised.

Unilateral jurisdiction clauses

In September 2012, the French *Cour de cassation* decided that a jurisdiction provision that obliged one party to litigate in a named court but that allowed the other also to sue elsewhere was wholly ineffective under the Brussels I Regulation. The provision was not even effective to confer exclusive jurisdiction on the named court. Whether this decision will be followed by the Court of Justice of the European Union is an open question, creating uncertainty as to the enforceability of this kind of commonly-used jurisdiction clause (see our briefing entitled *French court questions one-sided jurisdiction clauses*).

The *Cour de cassation's* decision came too late to be addressed by the recast Regulation. The uncertainty over one-sided jurisdiction clauses will, therefore, remain until the Court of Justice of the European Union resolves the issue.

Indeed, the recast Regulation expands somewhat the area of uncertainty. Under the current Regulation, the uncertainty over one-sided jurisdiction agreements created by the *Cour de cassation's* decision applies if two conditions are met: first, the agreement confers jurisdiction on the courts of an EU member state; and, secondly, one of the parties to the agreement is domiciled in the EU. The recast Regulation removes the second of these conditions, with the result that a small number of additional jurisdiction agreements will be subject to the uncertainty caused by the *Cour de cassation's* decision.

Primacom

An example of the tactical use of an Italian (or, in this case, German) torpedo occurred in the *Primacom* litigation. An English judge observed that:

"... it is clear that both these proceedings [in Mainz and Frankfurt] were commenced in breach of the exclusive jurisdiction clause and the evidence suggests that this was done with the primary intention of frustrating any possible attempt by [the banks] to seek appropriate relief in the English Courts in accordance with the jurisdiction clause. The Mainz proceedings were, after some considerable delay, served on all the [banks] but the Frankfurt proceedings have not yet been served on a number of the [banks]. It is clear that delay is advantageous to *Primacom* and this appears to be one of its objectives." (Cooke J, *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm) at para [10])

The judge went on that it was "difficult to see how the German Courts could find that they are entitled to exercise jurisdiction in the face of the exclusive jurisdiction clause" in the facility agreement (para [34]), but concluded that he was still obliged to stay proceedings in England pending a decision by the German courts because the German courts had been seised of the dispute first. The German courts eventually agreed with the English judge's analysis that they had no jurisdiction to hear the dispute, but only after much expense and delay.

Courts outside the EU

The Brussels I Regulation provides in general that if a court has jurisdiction (usually based on the domicile of the defendant), it must exercise that jurisdiction. This is so even if a court outside the EU is already seised of the dispute or is a more appropriate court to determine the dispute. In mitigation, EU courts can in some circumstances give "reflexive effect" to the Regulation as far as courts outside the EU are concerned, ie EU courts can halt proceedings in favour of non-EU courts if they would have done so in favour of EU courts. The extent to which they can do this is, however, not clear.

English and other courts are prepared to give reflexive effect to the Regulation if there is a jurisdiction clause in favour of a non-EU court, but whether the principle applies more widely remains uncertain. The Commission's original proposal to recast the Regulation sought to remedy this by comprehensive provisions regulating jurisdiction between EU and non-EU courts. The proposal would, however, have severely limited the jurisdiction of some courts in the EU, potentially forcing EU-based parties to litigate in unsatisfactory jurisdictions outside the EU. The proposal was therefore watered down in negotiations. All that remains is a discretion for EU courts to stay proceedings in favour of a non-EU court if three conditions are met: first, the non-EU court was first seised; secondly, a judgment given by the non-EU court can be enforced in the EU member state concerned; and, thirdly, a stay is necessary for the proper administration of justice (articles 33 and 34).

Giving EU courts the ability to stay proceedings in favour of non-EU

courts is helpful. It is, however, unfortunate that the stay can only be exercised if the non-EU court is seised before the EU court. This unnecessary inflexibility risks encouraging parties to start proceedings, whether within or without the EU, prematurely in order to ensure that their favoured court is first seised. If an EU court is first seised, the discretion vanishes. Does this mean that an EU court will no longer be able to defer to a non-EU court where it would now do so (eg where there is a jurisdiction agreement in favour of the non-EU court even if the EU court is first seised)? Hopefully not, but there is a risk that a well-meaning reform will in fact make matters worse rather than better.

Arbitration

Arbitration is outside the scope of the existing Brussels I Regulation (article 1(2)(d)). That remains the case with the recast Regulation, but recital (12) to the recast Regulation fleshes out what this means in practice.

Recital (12) states that a ruling that an arbitration agreement is not binding will not be recognised under the Regulation. This reverses the position adopted by the English courts (*National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397). As a result, the fact that the courts of, say, Spain have decided that an agreement providing for arbitration in London is invalid does not prevent the English courts - still less the arbitrator - from deciding that the clause is valid and enforceable and that the arbitration should therefore proceed.

This could lead to two decisions on the same cause of action: one by a court, and another by the arbitrator (though it might in some

circumstances be argued that the decision given first in time creates an issue estoppel, preventing that decision being reopened by the second tribunal). If the court judgment and arbitral award are the same, there will be no problem. But if they are different, there could be competition for recognition and enforcement.

Recital (12) of the recast Regulation says that a court's decision that an arbitration clause is void does not preclude its award on the substance being enforced under the Regulation. The Recital goes on, however, that this is without prejudice to the competence of courts to decide on the enforceability of an arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which all EU member states are parties). According to Recital (12) and article 73(2), the New York Convention takes precedence over the Regulation.

Suppose, then, that one EU court decides that an arbitration agreement is invalid, and goes on to give judgment on the substance of the dispute, but the arbitrators (and, perhaps, the courts in the seat of the arbitration) disagree, and the arbitrators proceed to give a contradictory award on the substance of the dispute. A court in a third EU member state will be faced with two conflicting determinations, both potentially entitled to recognition and enforcement - the judgment under the Regulation and the arbitral award under the New York Convention.

Recital (12) to the recast Regulation suggests that this third court must reach its own conclusion as to whether the arbitration agreement is null and void, inoperative or incapable of being performed for the purposes

of the New York Convention. If it decides that the arbitration clause is invalid, all that remains is the court judgment; but if the court decides that the arbitration clause is valid, perhaps the arbitral award takes priority over the contrary court decision because of the precedence given to the New York Convention. Ultimately, however, the Court of Justice of the European Union will have to resolve which decision wins.

Enforcement

The Commission's original proposal for the revised Regulation was for the enforcement of a judgment given in one member state to be virtually automatic in all other member states. This failed to survive the negotiations. The grounds for challenging enforcement of a foreign judgment therefore remain the same, though the procedures for enforcement are somewhat streamlined.

Jurisdictional rules

The basic jurisdictional rules in the recast Regulation remain the same as in the existing Regulation. The starting point is the domicile of the defendant (article 4(1)), though there

are potentially additional jurisdictions (eg in matters relating to contract, the courts for the place of performance of the obligation in question (article 7(1)(a)) or jurisdictions that override domicile (eg proceedings that have as their object rights in rem in immoveable property (article 24(1)) or where the parties have agreed to the exclusive jurisdiction of particular courts (article 25)). Where two or more courts potentially have jurisdiction, the tie-break remains the date that proceedings were commenced, except in the importance case of jurisdiction agreements discussed above.

Date in force

The recast Regulation applies to legal proceedings instituted on or after 10 January 2015.

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