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Court jurisdiction under the Brussels I Regulation (recast): good in parts

The Brussels I Regulation (recast) will introduce significant improvements in the jurisdictional regime within the EU. In particular, it gives priority to a court nominated in an exclusive jurisdiction clause, allowing that court to continue with its proceedings even if another court in the EU was seised of the claim first. But the recast Regulation also contains ambiguities and unsatisfactory elements, including regarding the ability of EU courts to give effect to jurisdiction agreements in favour of non-EU courts. Overall, the recast Regulation is to be welcomed, but its application will not always be plain sailing.

On 10 January 2015, the Brussels I *Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* (Regulation (EU) No 1215/2012) will come into force, replacing the current version of the Brussels I Regulation (Regulation (EC) No 44/2001). It will apply in all EU member states to court proceedings commenced on or after that date (so, for example, judgments given in proceedings started before that date will remain subject to the old Brussels I Regulation).

The recast Regulation follows the structure of old Regulation. A person domiciled in an EU member state must still be sued in that state unless the case falls within one of the exceptions in the Regulation. Those exceptions remain largely the same, eg in tort claims, the courts of the place where the harmful event occurred, and, where there is more than one defendant, the courts where any of them is domiciled.

But the recast Regulation also introduces significant changes, particularly regarding the enforceability of jurisdiction clauses, relations with courts in third states and arbitration.

The form of a jurisdiction clause

Article 25 of the recast Regulation governs jurisdiction clauses in agreements, and introduces two principal changes.

First, the recast Regulation's provisions about jurisdiction clauses apply if jurisdiction is given to a court in the EU, regardless of the domicile of the parties (article 23 of the old Regulation only applied if one of the parties was domiciled within the EU). This reform is sensible. It avoids any need to consider where contracting parties are domiciled, and limits the possibility of different rules applying to different parties.

Secondly, in order to be effective, a jurisdiction clause in a contract must not only meet the requirements of the recast Regulation but it must also not be "null and void as to its substantive validity" under the law of the courts to which it gives jurisdiction. This change is in principle less welcome because it removes the current uniformity in approach within the EU. Previously, the validity of a jurisdiction clause was solely a matter of EU law, but it will become necessary to consider both EU law and local law to decide whether a jurisdiction clause is valid. A jurisdiction clause in a form effective to confer jurisdiction on the English courts might not be effective

Key issues

- The effectiveness of jurisdiction clauses in favour of EU courts will be reinforced
- EU courts can stay proceedings in favour of non-EU courts, as long as the non-EU court is first seised
- If there is jurisdiction clause in favour of an non-EU court but the EU court is first seised, the position is unclear
- Arbitration's exclusion from the Regulation is reinforced, but practical ambiguities remain

to confer jurisdiction on, say, the Bulgarian courts.

This change follows the Hague Convention on Choice of Court Agreements. The Convention obliges courts in participating states to recognise exclusive jurisdiction clauses and to enforce judgments given by the chosen courts. Only Mexico has so far ratified the Convention. The EU and the US have signed the Convention; if both were also to ratify the Convention, the mild irritation of the lack of uniformity within the EU would be a price worth paying for greater global respect for exclusive jurisdiction clauses.

The effect of a jurisdiction clause

If contracting parties give exclusive jurisdiction to particular courts within the EU, they will expect those courts to determine any claim. But the old Regulation undermined this expectation. If another EU court was seised of the case before the chosen court, the chosen court was obliged to stay its proceedings until the court first seised decided that it did not have jurisdiction (old article 27, new article 29, as interpreted by the ECJ in *Erich Gasser GmbH v MISAT SrL*, Case C-116/02).

This encouraged parties to launch "Italian torpedoes", ie to start proceedings in a court other than the one chosen, a court that would invariably, but not coincidentally, be slow or only determine jurisdictional issues at the same time as the substantive dispute. The disreputable or the disingenuous could therefore exploit the Regulation in order to delay or stymie claims against them.

The recast Regulation aims to "enhance the effectiveness of choice of court agreements and to avoid abusive litigation tactics" (recital (12)). It does this by providing an exception to the general rule that any court other than the first seised must defer to the court first seised. This exception, in article 31(2), states that:

> "... where a court of Member State on which an agreement as referred to in Article 25 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."

The welcome effect of article 31(2) is that if a court is seised of a dispute before the chosen court is seised, the court first seised should stay its proceedings in favour of the chosen

The law governing a jurisdiction clause

Article 25(1) of the recast Regulation provides that a jurisdiction clause must not be "null and void as to its substantive validity" under the law of the courts chosen. The law of these courts includes their conflict of laws rules (recital (20)).

In the light of this, the first step in any analysis of a jurisdiction clause will be to decide what law governs the clause. The Rome I Regulation on the law applicable to contractual obligations does not apply to jurisdiction and arbitration clauses (article 1(2)(e)), and so the governing law must be determined according to local conflict of laws rules. If there is a choice of law expressly applicable to the jurisdiction clause, is it effective? If there is only a general choice of law applicable to the agreement as a whole, does that choice apply to the jurisdiction clause even though a jurisdiction clause is treated as an agreement independent of the other terms of the contract and its validity cannot be contested solely on the ground that the underlying contract is not valid (article 25(5))?

Absent express or implied choice, English courts have recently favoured the law of the chosen courts as the law governing a jurisdiction clause rather than the law applicable to the rest of the agreement (eg *Sulamerica Cia Nacional de Seguros SA v Endesa Engenharia SA* [2012] EWCA Civ 638, a case about an arbitration clause), but the case law is not consistent. Parties may, indeed, be surprised to find that one clause in an agreement otherwise governed by, for example, Brazilian law (as in *Sulamerica*) is governed by English law.

If the chosen court decides that its law governs the jurisdiction clause, it can apply that law. A curiosity could arise if the chosen court decides that the law of another country applies. If the foreign law in question includes its conflict of laws rules, the court must then decide what law applies to the clause under that foreign law. If the foreign conflict of laws rules point to the law of the chosen court, there could be total renvoi, ie circularity in the choice of law because the conflict of laws rules in the chosen court point to a foreign law, but the conflict of laws rules of that foreign law point back to the law of the chosen court.

Total renvoi is much debated academically but seldom encountered in practice. For example, in *Blue Sky One Limited v Mahan Air* [2010] EWHC 631 (Comm), English conflict of laws rules required the validity of a transfer of title (an aircraft mortgage) to be determined according to Dutch law; Dutch conflict of laws rules pointed back to English law. The English court avoided renvoi by deciding that Dutch law applied in England for these purposes did not include Dutch conflict of laws rules. The CJEU may need to decide if it too can sidestep renvoi in this way.

court. The chosen court, not the court first seised, should decide on the validity of the jurisdiction clause and whether the dispute falls within its scope (recital (22)). The chosen court can go ahead even before the court first seised has stayed its proceedings.

This exception to the general rule only applies to exclusive jurisdiction clauses (jurisdiction clauses are exclusive unless the parties have agreed otherwise: article 25(1)). But what constitutes an exclusive jurisdiction clause for these purposes may be open to question.

For example, is a one-sided jurisdiction agreement, requiring one party to sue only in the named court but allowing the other party to sue in any court with jurisdiction, exclusive for these purposes? One-sided clauses are common in financial agreements. If a party has agreed that it will sue only in a named court, the clause is exclusive as far as that party is concerned, and suing elsewhere would certainly be an abusive litigation tactic. On a purposive approach, a one-sided jurisdiction clause should therefore fall within article 31(2), but the CJEU may need to resolve this question.

(This depends upon one-sided clauses being valid under the Regulation, a matter called into question by the French Cour de cassation in *Mme X v Rothschilds* (26 September 2012). The recast Regulation does not address this issue, which remains an open question that the CJEU may also need to resolve.)

Then there is a question as to what level of conviction the court first seised must have that there really is an applicable jurisdiction agreement in favour of another court. Is it enough for one party simply to assert the existence of a jurisdiction agreement and for the court named in that jurisdiction agreement to be seised of the claim? What if the defendant produces a jurisdiction agreement that looks like an obvious forgery? How satisfied does the court have to be that the parties really have reached agreement? More work for the CJEU.

Courts outside the EU

The old Regulation said nothing about courts outside the EU. It was, however, established that an EU court seised of a case on the basis of, for example, the defendant's domicile, could not stay its proceedings in favour of a court outside the EU merely because the court outside the EU represented a more appropriate venue for the trial of the claim *(Owusu v Jackson*, Case C-281/02). The discretionary approach to jurisdiction that this would have entailed was considered inconsistent with the certainty and predictability in jurisdictional matters required by the old Regulation.

The recast Regulation does an about turn. It now expressly addresses the position of courts outside the EU, giving EU courts a discretionary ability to defer to non-EU courts. However, the Regulation only allows this deference in limited circumstances.

Article 33(1) of the recast Regulation applies if two conditions are met:

- a court in a third country is seised of a case involving the same cause of action before the courts in an EU member state are seised; and
- a court in an EU member state is then seised on the basis of the defendant's domicile or the special jurisdiction provisions in the Regulation (eg place of performance of the contract).

If the EU court is first seised, article 33(1) has no application. This risks encouraging a rush to court, whether to the courts of a third country so that article 33(1) will apply or to the courts of an EU member state so that article 33(1) will not apply. Similarly, article 33(1) does not apply if the EU court is seised because there is a jurisdiction clause in its favour, whether exclusive or non-exclusive.

If article 33(1) applies, a court in an EU member state has a discretion to stay proceedings if two further conditions are met:

- the non-EU court is expected to give a judgment that is capable of recognition and enforcement in the member state in question; and
- the stay is necessary for the proper administration of justice.

This first condition will be a matter for local law since the enforcement of judgments from outside the EU is not governed by EU law. As a result, if a judgment from a particular third country is enforceable in France but not in England, the French courts could stay their proceedings in favour of those in the third country but the English courts could not.

For these purposes, enforcement will presumably include indirect enforcement under the common law. This requires a new action on the foreign judgment, leading to a separate domestic judgment. The foreign judgment is not enforced directly, but the substance of the underlying dispute is not re-litigated. Judgments from the US courts are enforced in this way in England.

The second condition requires the court to "assess all the circumstances... includ[ing] connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed... and whether or not

the court of the third State can be expected to give judgment within a reasonable time" (recital (24)).

The courts of an EU member state that stay proceedings in favour of the courts of a non-EU state can revisit their decision if the proceedings in the third state are themselves stayed or discontinued, if the courts in the third state are unlikely to be concluded within a reasonable time, or if the proper administration of justice requires the continuation of proceedings in the EU (article 33(2)).

Article 33 of the recast Regulation applies where EU courts are seised of claims involving the same cause of action as courts outside the EU. Article 34 sets out similar rules when courts within and without the EU are seised of related actions, ie actions that it is expedient to hear and determine together in order to avoid the risk of irreconcilable judgments.

Courts outside the EU and jurisdiction clauses

If parties have given exclusive jurisdiction to courts outside the EU, but one party sued the other in an EU court on the basis that the defendant was domiciled there, the old Regulation apparently required the EU court to hear the case. In *Owusu v Jackson*, Case C-281/02, the ECJ said that jurisdiction within the EU on the basis of domicile "is mandatory and... there can be no derogation from [this] principle... except in cases expressly provided for by the [Regulation]." There were no provisions about non-EU courts in the old Regulation.

Nevertheless, few seriously disagreed that giving effect to jurisdiction clauses in favour of non-EU courts was the right thing to do - the English courts were certainly willing to do so (eg *Konkola Copper Mines plc v Coromin* [2005] EWHC 898 (Comm)).

But the basis upon which the courts worked this alchemy in order to avoid defying the parties' intentions remained controversial. Were jurisdiction clauses in favour of non-EU courts outside the scope of the Regulation? Did the parties' agreement regarding jurisdiction override the Regulation? Could "reflexive effect" be given to the Regulation, applying by analogy to courts outside the EU the provisions in the Regulation regarding jurisdiction agreements in favour of courts inside the EU? Whatever the theoretical issues, jurisdiction clauses in favour of non-EU courts were in practice honoured.

The recast Regulation has addressed the old Regulation's weakness regarding Italian torpedoes aimed at EU courts, but it may have enabled a more powerful torpedo to be aimed at non-EU courts.

The most concerning aspect of articles 33 and 34 of the recast Regulation is whether courts within the EU will continue to be able to honour jurisdiction clauses in favour of courts outside the EU if the conditions set out in those articles are not met.

Suppose, for example, that the parties agree that the New York courts are to have exclusive jurisdiction. If the New York courts are first seised of any claim, courts within the EU can then stay their proceedings under article 33. But if one party sues the other in England, on the basis that the defendant is domiciled in England, before any proceedings are started in New York, what happens then? It would be profoundly unsatisfactory if the English court could not stay its proceedings. This would not respect the autonomy of the parties, which is one of the aims of the recast Regulation (recital (19)), nor would it "enhance the effectiveness of exclusive choice-of-court agreements" (recital (22)).

Despite the obvious desirability of the English court staying its proceedings in this scenario, the English court could not do so under article 33 because the English court was first seised. It is questionable whether a court could conclude, for example, that this issue was outside the scope of the recast Regulation or that reflexive effect should be given to the provisions regarding jurisdiction clauses in the recast Regulation when the issue is squarely addressed in the recast Regulation. The recast Regulation has relevant a provision (article 33) but the conditions for the applicability of that provision are not met. Reflexive effect in these circumstances might look like an attempt to re-write the recast Regulation to avoid the limitations in article 33. Or could reflexive effect now be given to article 31(2)?

The recast Regulation has addressed the old Regulation's weakness regarding Italian torpedoes aimed at other EU courts, but it may have enabled a more powerful torpedo to be aimed at courts outside the EU.

An English court might nevertheless be inclined to give a purposive approach to the recast Regulation in the light of its stated aims, but whether the CJEU would take the same view is a different matter. It may even be that full effect will only be given to exclusive jurisdiction clauses in favour of non-EU courts if and when the Hague Convention on Choice of Court Agreements comes into force, and then only between parties to the Convention.

Recognition and enforcement of judgments

As under the old Regulation, a judgment given by the courts of one EU member state must be recognised in all other member states without any special procedure (article 36; old article 33). Recognition can only be refused on the same limited grounds, such as public policy (article 45; old articles 33 and 34).

Enforcement of a judgment given by the courts of one EU member state in other member states is intended to be procedurally more straightforward under the recast Regulation. A judgment creditor will no longer be required to apply for an exequatur - a declaration of enforceability - before it can enforce its judgment (old article 38(1)). Instead, article 42 of the recast Regulation requires the judgment creditor merely to present to the enforcing court a copy of the judgment and a standard (if lengthy) certificate (article 53 and Annex 1). The judgment creditor can then go straight to whatever enforcement measures are available under local law. The onus is on the judgment debtor to apply to court to oppose enforcement on one the grounds set out in article 45.

Arbitration

Arbitration remains outside the scope of the recast Regulation (article 1(2)(d)). However, under the old Regulation, the English courts had concluded that a decision by another EU court as to the existence or applicability of an arbitration clause must be recognised under the Regulation (*National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397). As a result, if the Spanish courts decided that an arbitration clause was invalid, the English courts were obliged to follow that decision even if the seat of the arbitration was in England and the English courts would have reached the opposite conclusion.

The decision in *The Wadi Sudr* will be reversed by recital (12) to the recast Regulation. This states that a "ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation".

Recital (12) to the recast Regulation also provides, somewhat cryptically, that where another EU court has decided that an arbitration agreement is invalid and, as a result, goes on to give judgment on the substance of the dispute, the non-recognition under the recast Regulation of the decision on the agreement "should not preclude" enforcement of the substantive judgment. This is stated to be without prejudice to the competence of courts to decide on the enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which takes priority over the recast Regulation (recital (12) and article 73(1)) and to which all EU member states are parties.

This raises the possibility of an EU court deciding that, under its local law, an arbitration clause is invalid, and going on to give judgment on the substance of the dispute, but the arbitrators (sitting in a different country) deciding that the arbitration clause is valid, and also giving an award on the substance. If the judgment and the award are consistent, no problem; but if the judgment and the award conflict, the problem for courts in other EU member states will be how to reconcile the obligation to recognise and enforce the arbitral award in accordance with the New York Convention (assuming that they consider the arbitration clause valid) with the obligation to recognise and enforce the judgment in accordance with the recast Regulation.

Since the recast Regulation expressly cedes priority to the New York Convention, logic might indicate that a court asked to enforce an arbitration award under the New York Convention should do so and should refuse to enforce a contrary judgment, but the CJEU will need to resolve this conundrum.

Conclusion

The recast Regulation is generally to be welcomed as a well-intentioned attempt to improve the practical application of the Brussels I Regulation. As far as contractual terms giving jurisdiction to courts within the EU are concerned, the recast Regulation has achieved that. But where the parties give exclusive jurisdiction to courts outside the EU, there is a real risk that the recast Regulation will require courts to ignore the parties' wishes.

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