

The (recast) Brussels I Regulation applies!

Since 10 January 2015, the (recast) Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies (Regulation (EU) No 1215/2012). It replaces the current version of the Brussels I Regulation (Regulation (EC) No 44/2001).

Background

The new Brussels I Regulation ("recast Regulation") covers, like its predecessor, the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in cross-border disputes within the EU (excluding Denmark).

In April 2009 the EU commission issued a report on the concerns with the Brussels I Regulation No. 44/2001. At the same time, the commission published a Green Paper setting out its political objectives and their respective implementation.

The recast Regulation introduces rules to accommodate some of these concerns by enhancing access to justice and by improving the free circulation of judgments in the EU. It applies to civil and commercial court proceedings, authentic instruments, and court settlements initiated, produced or concluded from 10 January 2015 onwards.

Main features of the recast Regulation

Three elements form the core of the recast Regulation:

- Judgments given in one Member State can now be enforced in all other Member States with no need for any further intermediate measures (the requirement for exequatur proceedings has been abolished).
- Where there is an exclusive choice-of-court agreement, certain procedural delaying tactics ("torpedo actions") are no longer possible. However, it is not always advisable to agree on an exclusive choice-of-court clause with the sole purpose to avoid "torpedo actions".
- As to consumer transactions falling within the scope of the recast Regulation, a consumer can now always bring proceedings against a trader in the courts of his or her country of domicile. It is no longer a requirement that the trader maintains a business presence within the territorial scope of application of the recast Regulation.

Content Overview

- Exequatur proceedings abolished.
- Provisions to prevent abusive "torpedo actions".
- Rules for avoidance of parallel proceedings relating to non-EU states.
- Introduction of general place of jurisdiction for European consumers.
- Precision of scope of application.
- Arbitral matters remain outside the scope of application.
- Recast Regulation applies from 10 January 2015.

Exequatur proceedings abolished

The most significant change to the recast Regulation is the abolition of exequatur proceedings when enforcing judgments given in other Member States.

Previous legal position

Under the previous law, a judgment handed down in one Member State could be enforced in another only after a court in the second Member State had declared it enforceable (known as the "exequatur").

According to a report by the Commission, such mandatory exequatur proceedings merely resulted in extra costs for the judiciary and citizens and brought no additional value for the administration of justice. An expert opinion, on which this report was based, stated that the courts refused to grant exequatur in just five per cent of the cases. Moreover, the duration of exequatur proceedings ranged between two hours and seven months, depending on the Member State. Exequatur proceedings thus resulted in unnecessary costs, delays, and an uneven playing field regarding recourse to the courts.

New legal position

1. Final decisions, court settlements, and authentic instruments

Article 36(1) and Article 39 of the recast Regulation provide that no declaration of recognition or enforcement by a court in the Member State addressed is required for the recognition or enforcement of a final judgment. Under Articles 58 and 59, the same applies to the enforcement of authentic instruments and court settlements.

For the enforcement of a judgment, the creditor now simply needs to present the judgment to be enforced to the enforcement authority along with a "certificate of enforceability" issued pursuant to Article 53 or Article 60, as the case may be, by the court or public body that gave the judgment.

The European legislator is aware that this exposes debtors to an increased risk of unlawful enforcement. To protect those against whom enforcement is sought, the following mechanisms have been put in place:

- Service of the "certificate of enforceability" to be issued under Article 53. The certificate must be translated into the language of the person against whom enforcement is sought upon their request if the enforcement authority has not already arranged for such a translation (Article 42(3) and Article 43(2)).
- Option to "appeal" against recognition or enforcement in accordance with Article 46 in conjunction with Article 45. The grounds for refusal of enforcement provided for in Articles 34 and 35 of the old Regulation have been brought together unchanged in Article 45 of the recast Regulation.
- In accordance with recital 30 of the recast Regulation, rights against enforcement available under the national law of the petitioned Member State also apply in case of enforcement of a judgment given in another Member State (departure from the autonomy of the recast Regulation). This means that national anti-enforcement actions available at the place of enforcement may be used which are not avail-

able in the Member State where the judgment was rendered.

To conclude, the recast Regulation speeds up enforcement by avoiding exequatur proceedings, but the grounds for challenging enforcement remain the same and can still be asserted by the debtor.

2. Provisional measures

As regards provisional (or protective) measures, the recast Regulation makes the following distinction:

- As a rule, provisional measures ordered by a court which has jurisdiction as to the substance of the matter are directly enforceable with a qualified "certificate of enforceability" (Article 42(2); see above).
- On the other hand, measures ordered by a court that does *not* have jurisdiction as to the substance of the matter are confined to the territory of the Member State concerned (recital 33 and *argumentum e contrario* from Article 42(2)(b)(i)).

Provisional measures ordered without the "defendant" being heard are only enforceable in other Member States if the decision was served on the defendant prior to enforcement (Article 42(2)(c)).

Provisions to prevent abusive "torpedo actions"

The second main concern of the Commission and the Ministers of Justice when recasting the Brussels I Regulation was the "fight against abuse of rights".

Previous legal position

Previously, the Member State court first seized took priority over those seized subsequently. A Member State

court seized subsequently was required to stay proceedings while the first court determined whether or not it had jurisdiction. This mechanism, logical in itself, in practice sometimes resulted in abusive litigation tactics: a party fearing a successful action against it could bring an action for negative declaratory relief before a possibly competent Member State court which was overloaded or known for its "sluggishness" so as to delay proceedings. This tactic is widely known as "torpedo action" as it torpedoes timely access to justice.

New legal position

This abuse is no longer possible in cases where the parties have *agreed* that a particular court or the courts of a specific Member State shall have *exclusive* jurisdiction. In accordance with Article 31(2) of the recast Regulation, the court on which an agreement confers exclusive jurisdiction has priority. This applies regardless of when that court was seized and whether the choice-of-court agreement is valid in the view of the other court. This means that all other proceedings must be stayed until such time as the court which (potentially) has jurisdiction under an exclusive choice-of-court agreement determines jurisdiction.

And the question of whether or not such choice-of-court agreement is valid is no longer determined by means only of an autonomous interpretation of the recast Regulation; it is also to be determined in accordance with the laws of the Member State of the courts agreed (Article 25(1) and recital 20).

Of course, the provisions of Article 31(2) cover only one of many situations in which "torpedo actions" are possible. As such, this litigation tactic has not been entirely eliminated.

Abusive actions remain possible in all cases where there is no exclusive choice-of-court agreement.

This does not mean, however, that an exclusive choice-of-court agreement is always advisable. Avoidance of potential "torpedo actions" is only one of many aspects that need to be taken into account when negotiating choice-of-court clauses. In particular, and especially in the case of long-term contracts, it should be assessed on a case-by-case basis whether it is indeed in the best interest of the party concerned to be exclusively bound to a particular court or jurisdiction, or whether the flexibility to respond to changed circumstances is not at least as important as the avoidance of potential abusive actions.

Avoidance of parallel proceedings with third-state implications

Under the previous law, the court of a Member State which had jurisdiction under the Brussels I Regulation was required to accept and conduct proceedings in every case. This applied even if an action regarding the same facts was already pending before a court in a third state outside the EU.

Under the new Articles 33 and 34, a court seized of an action which has jurisdiction under the recast Regulation now has – to avoid parallel proceedings – the discretion ("may") to stay proceedings if the case is already pending before a third state court. Courts also have discretion to continue stayed proceedings at any time.

And while Articles 33 and 34 lay down certain conditions for such discretionary decisions, these are defined quite broadly. The only requirements are that the judgment of the court in the

third state will be enforceable in the Member State and that the proper administration of justice is guaranteed.

Introduction of general place of jurisdiction for European consumers

New provisions in Articles 18 and 6(1) have strengthened consumer rights.

Under the previous law (Article 15(2) and Article 16(1)), consumers were able to bring proceedings against a trader in the courts of their place of domicile *only* if the trader maintained at least one establishment within the EU. In contrast, Articles 18 and 6(1) of the recast Regulation provide that European consumers can *always* bring proceedings in the courts of their place of domicile – even if the trader against which proceedings are brought is not domiciled within the territorial scope of the Brussels I Regulation.

The restriction in Article 17(1)(c), however, still applies. For jurisdiction under Article 18, the party with which the consumer has entered into a contract must pursue commercial or professional activities within the territory of the EU. In the era of internet commerce, a physical presence in the EU is no longer required to be deemed to pursue commercial activities within the EU.

Precision of scope of application

The recast Regulation now in force also clarifies the question of whether it applies only to matters with cross-border implications.

Recital 3 of the recast Regulation clarifies that the aim of the recast Regulation is to eliminate divergences in civil matters "*having cross-border*

implications". This should take the formerly articulated view off the table that the old Brussels I Regulation also applies to purely national matters.

Arbitral matters remain outside the scope of the recast Regulation

The Commission originally planned to extend the scope of the recast Regulation to also cover court proceedings related to arbitration. In the Commission's report and the 2009 Green Paper the reason given was the problem of parallel arbitral and civil proceedings, a particular risk where rules are inconsistent.

To avoid parallel proceedings and conflicting decisions, the Commission proposed a common framework for court proceedings related to preliminary and incidental questions about arbitration proceedings. This, however, was not politically viable.

Therefore, in accordance with Article 1(2)(d), court proceedings related to arbitration remain outside the scope of the recast Regulation. Nevertheless, recital 12, which outlines the relationship between arbitration and the recast Regulation from the perspective of the recasting legislator, is still worth a look: It emphasises the right of each Member State to define

its relationship with arbitration autonomously. Hence, Member States can continue to determine under which conditions an arbitration clause will be recognised or civil proceedings brought in parallel be stayed or dismissed, regardless of the decisions of other Member States.

To give effect to this right, a judicial decision of this kind, particularly as regards the scope of an arbitration clause, may not be declared enforceable in another Member State under the recast Regulation. Due to Article 1(2)(d), this does not fall within the scope of application of the recast Regulation.

Judicial decisions regarding the annulment, recognition, or enforcement of an arbitral award, which in all Member States must be made in accordance with the minimum standards of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, will remain reserved to the individual Member States and thus also do not fall within the scope of the recast Regulation. As regards the substance of the matter, such judgments primarily concern the (arbitral) *proceedings* referred to in Article 1(2)(d), and not the decision on the (main) civil *matter* in

accordance with Article 1(1) of the recast Regulation. Moreover, the UN Convention takes precedence over the Brussels I Regulation (see also Article 73(2) of the recast Regulation). Actions or ancillary proceedings regarding the seat of the arbitral tribunal or the individual powers of arbitrators, too, remain outside the scope of the recast Regulation.

However, the decision of a national court on the substance of a matter given after an arbitration defence has been rejected can certainly be declared enforceable in other Member States under the Brussels I Regulation.

Date of application

Regulation (EU) No 1215/2012 entered into force on 1 January 2013, but the vast majority of its provisions has only been applicable since **10 January 2015**. Thus, it applies to legal proceedings instituted, authentic instruments drawn up, and court settlements concluded on or after that date (Article 66(1)). For proceedings instituted, settlements concluded, or instruments drawn up before this date, the old regulations continue to apply.

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