The Recast Brussels Regulation: key points to understand

The Recast Regulation, covering choice of court clauses and enforcement of judgments within the EU, came into effect on 10 January 2015. What is new?

What is it?

The Brussels Regulation (44/2001) was the key piece of EU legislation setting out the rules for allocation of jurisdiction and enforcement of judgments across member states, in civil and commercial matters.

After a lengthy consultation process, the Brussels Regulation is being replaced by the Recast Brussels Regulation (1215/2012), (the Recast Regulation).

The Recast Regulation will be applied by the Courts of all Member States. It will not apply to EFTA countries to whom the provisions of the Lugano Convention remain applicable.

When does it apply?

The Recast Regulation applies to proceedings that are issued on or after 10 January 2015. If your case has been issued before this time, the old Brussels Regulation will still apply.

How dramatic are the changes?

Many of the basic principles have not changed (although the paragraph numberings have). So, for example, the default rule remains that a defendant should be sued in the court of the Member State in which it is domiciled. The rules providing alternative bases for establishing jurisdiction (eg in matters relating to contract and tort) also survive. However, there are some important changes, most of which relate to jurisdiction clauses.

What is the impact for cases involving an exclusive jurisdiction clause?

Under the old rules, at least one party had to be domiciled in a Member State court before the rules relating to exclusive jurisdiction (old Article 23) applied. Now, no party has to be domiciled in a member state court. If the contract includes an exclusive jurisdiction clause, then the rules of the Recast Regulation dealing with such clauses (Article 25) will apply. So, for example, the Recast Regulation would apply (in proceedings in Member State courts) where a Russian party had a contractual dispute with an American counterparty and the contract contained an exclusive jurisdiction clause in favour
What about the problem of the Italian torpedo?

The old rules provided that where parallel proceedings were commenced (involving the same parties and the same cause of action) any court other than the court first seised had to stay its proceedings. The rationale for this was sound – to avoid two courts hearing the case and reaching inconsistent judgments (both of which could then be freely enforced across Europe). However, tactical defendants abused this provision. Defendants would frequently start proceedings, in clear breach of a jurisdiction clause, in a Member State court known to be slow (Italy being an example). The action was usually framed as one seeking negative declaratory relief (which has been held to be the same cause of action as the positive claim). Accordingly, applying the first seised rule, the “chosen” court designated in the agreement (being the court second seised) had to wait until the first seised court had decided whether it would take or (as should be the case) decline jurisdiction. That process could often take years. Case law from the ECJ prevented the chosen court continuing with the case in the meantime or issuing an anti-suit injunction.

The new regime seeks to neutralise the torpedo. Although the first seised rule still applies as the default, where there is an exclusive jurisdiction clause in favour of one Member State court, the rules provide that it is that chosen court which has the right to proceed with the case first, even if parallel proceedings have already been commenced in another Member State court (such that the chosen court is the court second seised). This is to be welcomed. However, there are still issues to be resolved such as how two Member State courts will cooperate in practice and what happens if the first seised (non-chosen) court considers that the jurisdiction clause is invalid.

Does a torpedo opportunity remain?

For the first time, the Recast Regulation gives priority in certain circumstances to actions commenced in non-Member State courts over those started in Member State courts, concerning the same or related causes of action. The provision is most likely to apply where there is an exclusive jurisdiction clause in favour of a non-Member State court.

There are conditions: the party will need to have commenced proceedings in the non-Member State court before the action was commenced in the Member State court and then establish that any judgment of the non-Member State court is likely to be enforceable in the EU. They will also need to show that a stay of the Member State proceedings is necessary in the interests of justice. This is quite a high bar. However, there is a real risk that a party wanting to circumvent a non-Member state jurisdiction clause will rush to commence proceedings in the non-chosen Member State court first and prevent the new rules applying. It is not clear whether, in that situation, a Member State court has any jurisdiction to stay the proceedings in its court in favour of the non-Member State chosen court. Although the parallel proceedings in the Member State court will not have the effect of staying the proceedings in the chosen court, there is still scope for disruptive tactics in this situation.

How do asymmetric jurisdiction clauses fit into the new regime?

An asymmetric clause is where one party has the ability to sue in a number of jurisdictions whereas the counterparty can only sue in one. This type of clause has been commonly used in the past by commercial parties with a strong negotiating position, particulars banks. Usually, the clause allows the bank to sue anywhere, whereas the borrower is restricted to suing in one jurisdiction chosen by the bank.

These clauses have proved controversial and have been overruled in a number of jurisdictions (for more, see our article here). What is more, it is by no means clear that they would qualify as exclusive jurisdiction clauses as defined in the new Recast Regulation. It is notable that the Hague Convention on Choice of Court Agreements, which the EU signed in
December 2014, defines an exclusive jurisdiction clause as designating the courts of a single state. If an asymmetrical clause is not an exclusive jurisdiction clause under the Recast Regulation, this would mean that such a clause would not bring with it the advantage of the chosen court having priority in taking jurisdiction.

Overall, it may be that asymmetrical clauses are now more trouble than they are worth. Parties should give real thought to whether it could be safer to use a plain vanilla exclusive jurisdiction clause.

**What are the other major changes in the Recast Regulation?**

Two are of note. First, the arbitration exception has been strengthened. Arbitration matters are now clearly outside the scope of the Recast Regulation. Secondly, the old rules of exequatur (the formal procedure to be gone through as a precursor to enforcing a judgment from one Member State in another) have been abolished. This is a welcome step that will make enforcement of judgments across Member States easier and quicker, though an opportunity for judgment debtors to object remains.