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Life set upon the Recast: the (recent) past and (near) future of questions of jurisdiction within the EU

KEY POINTS

- Arbitral tribunals (as opposed to member state courts) can make anti-suit awards, subject to national law on arbitration applicable in the state of enforcement.
- A defendant can be bound by an exclusive jurisdiction clause through assignment even if it is not a party to the original facility agreement and despite a ruling subsequent to the assignment by a "resolution authority" purporting to exclude it from the assignment.
- The need to give a location to the relevant tort in 'matters relating to tort, delict or quasi-delict' can cause difficulties in banking and finance cases.
- There are attractions in maintaining the status quo under an arrangement parallel to the Recast Regulation should the UK leave the EU.

Over a year has elapsed since the coming into force of Council Regulation 1215/2012 (Recast Regulation). The Recast Regulation replaced Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments (Brussels Regulation), which had, in turn, replaced the so-called "Brussels Convention". The Recast Regulation, which applies to proceedings instituted on or after 10 January 2015, continues to enshrine a system for determining which EU member state courts have jurisdiction over a dispute and how the judgments of a court in one member state should be recognised and enforced in the courts of other member states.[1] It seems appropriate on the eve of a referendum concerning the UK's membership of the European Union to consider what recent developments there have been and what the consequences might be for questions of jurisdiction of a decision on the part of the UK government to leave the EU.

Two fundamental principles have historically influenced which courts within the EU have jurisdiction over disputes. First, the "court first seised" principle, according to which there is no discretion, once jurisdiction is established as of right, to stay proceedings in favour of any court other than the one first seised of the issue in dispute.[2] Second, jurisdiction is broadly based on the domicile of the defendant.[3] That fundamental principle is subject to the provisions contained in Art 24 of the Recast Regulation conferring exclusive jurisdiction irrespective of the domicile of the defendant[4] as well as to specified exceptions preserved in ss 2 to 7 of chapter II (Arts 7–26) of the Recast Regulation.

OBJECTIVES OF RECASTING THE REGULATION

The changes made by the Recast Regulation were intended to enhance the efficacy of jurisdiction agreements and arbitration agreements, and to facilitate the enforcement of judgments. They have received a broadly warm welcome from those involved in cross-border litigation. In summary:

- The court first seised principle is now qualified by reference in the case of agreements which confer exclusive jurisdiction on courts of a member state. Article 31 of the Recast Regulation provides that the court which is, under the parties' agreement, to have exclusive jurisdiction will have priority over a court in which proceedings may have been first brought. There had previously been scope for a defendant to delay the progression of imminent proceedings against him by issuing his own proceedings first in the courts of a member state (typically, Italy) which was not the state referred to in the exclusive jurisdiction agreement between the parties (known by some as deploying the "Italian Torpedo"). The court first seised then had to rule on its own jurisdiction (which could, in Italy, take a long time), and proceedings subsequently issued in the courts which the parties had agreed were to have exclusive jurisdiction had to be stayed until the court first seised decided on its jurisdiction.
- The Recast Regulation has extended its geographical reach. The provision in Art 25 of the Recast Regulation prorogating jurisdiction now applies to non-EU contracting parties who have agreed on a member state having jurisdiction. Similarly, the jurisdiction rules applicable to cases brought by consumers and employees have been expressly extended, under Arts 18(1) and 21(2) respectively, to apply to traders and employers who are not domiciled in the EU.
- The Recast Regulation also provides for pending litigation outside the EU. Member state courts now have a discretion under Art 33 to stay proceedings brought before them where there are existing proceedings between the same parties involving the same cause of action in the courts of a non-EU state. Where such proceedings are concluded and the judgment is capable of recognition and enforcement in that member state, the courts are required to dismiss proceedings subsequently brought before them.
- A simplified enforcement procedure designed to save time and costs for judg-

ment creditors is now in place. All that is required under the Recast Regulation is a copy of the judgment, a standard certificate annexed to the Recast Regulation, and, where necessary, a translation of the certificate and/or judgment (Arts 36–37), subject to certain limited safeguards (in Arts 43–51 of the Recast Regulation). No longer is the declaration of enforceability required.

- The Recast Regulation still does not apply to arbitration. The recognition and enforcement of arbitral awards will continue to be governed by the 1958 New York Convention. The Recast Regulation does not prevent the courts of a member state from referring parties to arbitration if they have entered into an arbitration agreement. Recital (12) of the Recast Regulation does however resolve the question whether a court may refuse to recognise and enforce a judgment obtained in breach of an arbitration agreement. According to its paras 2 and 3, decisions as to the validity of an arbitration agreement are excluded from the provisions on recognition and enforcement, while decisions as to the substance of the dispute are subject to these provisions unless this would require a member state to violate its obligations (ie, to enforce a valid arbitral award) under the New York Convention. As von Hein puts it:

> 'This is not only a welcome step towards the legal certainty that the difficult relationship between the Regulation and the Convention indubitably requires but should also be understood as an attempt to counter-balance the absence of anti-suit injunctions within the Brussels I framework.'[5]

DEVELOPMENTS SINCE THE RECAST REGULATION: ARBITRATION ANTI-SUIT AWARD

The last year has witnessed a number of interesting decisions concerning jurisdiction within the EU.

Turning, first, to the approach taken towards arbitration provisions and awards, May 2015 saw publication of the long-awaited decision in *Gazprom OAO v Lithuania* (Case-536/13). In *Allianz SpA & anor v West Tankers* (Case C-185/07), the ECJ had disapproved of the grant by courts of anti-suit injunctions as 'they may … have consequences which undermine its effectiveness', if they 'prevent a court of another Member State from exercising the jurisdiction conferred on it by [the Regulation]',[6] which includes the decision on the jurisdictional defence based on an arbitration agreement. Accordingly, the ECJ found it:

> 'incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.'[7]

Gazprom required the CJEU to consider for the first time the case where an arbitral tribunal had made the "anti-suit" orders. The approach required under Art II(3) of the New York Convention, reflected in the first paragraph of the new recital (12) of the Recast Regulation, when faced with an application to stay or dismiss the court proceedings, is simply to send the case to arbitration, without having to adjudicate if the commencement of proceedings would violate a valid arbitration agreement. While recital (12) of the Recast Regulation tries to clarify the scope of the exclusion of arbitration in Art 1(2)(d) of the Regulation, nothing in the legislative history of the Recast Regulation, which left the actual text of the regulation otherwise unchanged, suggests that it was supposed to reverse the decision of the Grand Chamber in *West Tankers*.

In a judgment generally viewed as positive for EU-seated arbitral tribunals, the CJEU held that there was nothing in the Brussels Regulation that precluded an EU court from giving effect to an anti-suit award made by an arbitral tribunal, but that this should be left to be determined by the national arbitration law applicable in the state of enforcement (including incorporation of any international obligations under, say, the New York Convention).

It upheld the *West Tankers* authority, but correlated it with the principle that the EU courts are to be left to determine their jurisdiction for themselves, thereby distinguishing orders originating in EU courts from orders originating in an arbitral tribunal (see paras 32–33 and 35–36). It emphasised that a litigant remains free to contest the recognition and enforcement of the arbitration award before the relevant court (paras 37–39). Moreover, insofar as the consequence of non-compliance with the arbitral award would not be court-ordered penalties, that fact provided another basis upon which to distinguish its judgment in *West Tankers* (para 40).

Whether this lends further support to the proposition – which has yet to be subject to a decision of the CJEU – that damages should be available for breach of an arbitration clause is moot. Such claims have, however, been allowed by the High Court in *West Tankers* ([2012] EWHC 854 (Comm)), subsequent to the ECJ's decision and by the Court of Appeal in *The Alexandros T* [2014] EWCA Civ 1010.

BELATED EBRRD RESOLUTION AUTHORITY RULING DOES NOT APPLY RETROSPECTIVELY TO ASSIGNMENT OF LOAN FACILITY

In *Goldman Sachs International and Others v Novo Banco S.A.* [2015] EWHC 2371 (Comm), Hamblen J found that the Commercial Court had jurisdiction to determine a claim issued in England by the assignees of the creditor's interest in a loan facility agreement made in June 2014 for repayment under the agreement against a bridge bank to which assets and liabilities had passed from the original debtor bank by virtue of two "rulings" of the "resolution authority" under the Bank Recovery and Resolution Directive 2014/59/EU (EBRRD), the Bank of Portugal. The first of the Bank of Portugal's rulings in August 2014 created the bridge bank and transferred assets and liabilities subject to exclusions; the second such ruling, in December 2014, specifically provided that the relevant loan facility agreement was excluded from the liabilities passed onto the bridge bank. Hamblen J reasoned that the claim fell within the definition in Art 1(1) of the Brussels Regulation of a "civil and commercial matter" and the defendant was bound by an exclusive jurisdiction clause in accordance with Art 25 of the Brussels Regulation. Even though it was not a party to the original facility agreement containing the jurisdiction

clause, the rights and liabilities (including the jurisdiction agreement itself) were transferred to the defendant pursuant to a European Union directive recognised under English law. The later ruling of the resolution authority had no bearing on what transferred as a matter of law at the time of the original assignment.

"MATTERS RELATING TO TORT, DELICT OR QUASI-DELICT": ART 7(2)

It should be noted that consumer banking is primarily governed by Arts 17–19 of the Recast Regulation, but there have been two recent decisions ostensibly related to claims under the Civil Liability (Contribution) Act 1978, but of potentially wider significance to the financial services industry.

In *Iveco Ltd and anor v Magna SpA* [2015] EWHC 2887 (TCC), Edwards-Stuart J considered the application of the Recast Regulation to contribution claims against an Italian domiciled defendant. The first claimant, did not have a contractual relationship with the defendant component manufacturer. The second claimant, the manufacturer of the vehicles, had contractual relations with the defendant. The result was that the first claimant, a UK-registered supplier which had settled claims arising from fires in the UK affecting vehicles it supplied in the UK, could avail of the exception provided in Art 7(2) of the Recast Regulation (which was identical to Art 5(3) of the Brussels Regulation) entitling a claimant to sue 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred …'. All the relevant harmful events (the underlying fires causing damage, the settlement agreements and the payments pursuant to those agreements) occurred in England. The second claimant's claims in contract and tort were struck out insofar as the Italian courts had jurisdiction arising simply from the contract for supply of the component under Art 7(1) of the Recast Regulation (identical to Art 5(1) of the Brussels Regulation). The conclusion reached on contribution claims was identical to that reached by Jackson J (as he then was) in *Hewden Tower Cranes Ltd v Wolffkran GmbH* [2007] EWHC 857 (TCC), a decision which was predicated on the defendant's counsel's concession that the harmful event occurred within the jurisdiction.

In *XL Insurance Company SE (formerly XL Insurance Company Ltd) v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm), an English insurer claimed a contribution from the defendant insurer, based in France, towards the funding of a federal interpleader fund of US$200m to settle claims arising out of a serious collision in California resulting in the deaths of 24 people and injuries to many more. HHJ Waksman QC ruled that the claim related broadly to contract because it arose out of the fact that both parties were liable to Connex as their insured under the insurance policies. However, there was no contract of any kind between XL and AXA. AXA had no contractual obligation to make contribution to XL at all. It followed that Art 7(1) of the Recast Regulation was not engaged (see paras 16, 25–27 and 31 of the judgment).

XL's entitlement to a contribution arose by operation of law and arose once it had "overpaid" the insured. That was, therefore, the "event", if any. However, if so, it was very hard to characterise it as a "harmful event". It was true that AXA had previously refused to contribute to the fund and, had it done so, XL would not have needed to overpay, but the right to contribution simply depended on overpayment where there was another co-insurer. The fact that AXA could be said to be "liable" to contribute to XL (assuming its underlying defence failed) was not sufficient to engage Art 7(2). Prior harmful events could have included the original torts committed by Metrolink and Connex but, since they had not been committed by AXA, they were irrelevant. Therefore, the claim did not fall within Art 7(2) of the Recast Regulation. Accordingly, AXA's application succeeded. The High Court had no jurisdiction pursuant to either Art 7(1) or (2) and the proceedings had to be dismissed.

The significance of these decisions for non-consumer banking and finance lies in the reliance placed on the decision of *Brogsitter v Fabrication de Montres Normandes EURL* (Case C-548/12), in which the CJEU (drawing on the authority of *Kalfelis* (Case C189/97)) stated the principle that the concept of 'matters relating to tort, delict or quasi-delict' within what is now Art 7(2) 'covers all actions which seek to establish the liability of a defendant and which do not concern "matters relating to a contract"' (para 20) and concluded that, in the context of the case before it, matters which are not contractual, 'must be considered as falling under' what is now Art 7(2). That reasoning assumes that the claim is not one of the other types of claim identified within Art 7 of the Recast Regulation. Moreover, there are express exclusions of types of claim from the Recast Regulation.[8]

The reliance on *Brogsitter*, however, arguably revives the debate as to whether the conclusion reached by the majority of the House of Lords in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153 – that claims of unjust enrichment based on mistaken payments are likely to fall outside of what are now Arts 7(1) and (2) by virtue of the fact that there is generally no "harmful event" in unjust enrichment claims – is consistent with the jurisprudence of the European courts. Crucially, the autonomous concept of "matters relating to tort, delict or quasi-delict" arguably requires the national courts to give a location to the relevant tort, something that the House of Lords in *Kleinwort Benson*, had explicitly rejected.

In *Arcadia Petroleum Ltd and ors v Bosworth and ors* [2015] EWHC 1030 (Comm), Burton J expressly relied on *Brogsitter* in deciding that the pleaded conspiracy claim (as amended) by former employers against former employees was tortious and that it was standalone; accordingly, England had jurisdiction as to the location of the alleged tort within the meaning of Art 7(2) of the Recast Regulation (paras 39–48).

It was only in respect of the claim by the former employers for breach of fiduciary duty that Burton J found that Arts 18 and 20 of the Brussels Regulation (which appear materially unchanged at Arts 20 and 22 of the Recast Regulation) precluded the bringing of a claim against the former employee other than in the defendant's domicile (Switzerland); that was because the fiduciary duties could be said to relate to the defendants' contract of employment (para 60).

However, that did not stop Burton J from finding that the second claimant (the Swiss subsidiary within the group) was entitled to bring a claim (as amended) in the absence of a contract of employment for breach of fiduciary duty against the first and second defendants (notwithstanding the averral that the first defendant was a *de facto* director of the second claimant and the fact that the second claimant

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was Swiss) (see paras 50–64).

Burton J granted permission to appeal and the hearing before the Court of Appeal was scheduled for May 2016, but is not available at the time of writing. It is unlikely that the appeal will entail any challenge to the *Kleinwort Benson* exception to the slowly widening scope of Art 7 – based arguments on jurisdiction, but a close eye ought to be kept on the outcome of this appeal.

FUTURE DEVELOPMENTS

Turning now to possible developments in the event of a decision on the part of the UK government to leave the EU, given the multiplicity of political concerns within those advocating departure from the EU, it is impossible to predict how the jurisdictional rules will change. It is even conceivable that there will not be any substantive change. There are, however, two broad areas of discussion: first, how parties with vested rights in pending litigation and extant contracts are affected; second, what parts of the existing jurisdictional rules might the UK voluntarily adopt? Industry parties and individuals would be well advised to keep their contractual positions constantly under review in the light of evolving policy statements to ensure that their rights with respect to jurisdiction and enforcement are not prejudiced.

As regards existing contractual obligations, transitional provisions would likely be necessary. The risk is that parties to contracts whose obligations might arguably become more onerous upon the UK's departure from the European Union may try to avoid those obligations or renegotiate a contract in the event of a UK exit. A further complication impacting on extant contractual obligations is the uncertainty about the extent to which English law founded on European Union obligations (particularly those impacting on the field of employment[9]) may be repealed or amended. The more detailed the guidance in any transitional provisions is, the lower the chances are of a proliferation of contractual disputes.

There are attractions in maintaining the status quo under an arrangement parallel to the Recast Regulation. In doing so, UK parties would benefit from the protection it currently enjoys against EU parallel proceedings. Continuity of the Recast Regulation principles would be consistent with the practice across the remainder of the EU. Moreover, in the absence of an agreement, enforcement between the UK and remaining EU member states is likely to take longer, cost more and generally be more difficult.

Alternatively, the UK could restore its domestic rules on jurisdiction and enforcement of judgment, as contained in the Civil Judgments and Jurisdiction Act 1982, rehabilitating the primacy of the doctrine of *forum non conveniens*. Similarly, as regards applicable law, the UK might wish to restore the Private International Law (Miscellaneous Provisions) Act 1995 (non-contractual obligations). The UK courts may wish to reinvigorate the anti-suit injunction, reversing the *West Tankers* line of authority. The UK would remain a party to the New York Convention.

A UK exit would mean that the EU Service Regulation would not automatically apply and permission to serve proceedings out of the jurisdiction may be required. This would increase the time and cost of service out of the jurisdiction. ■

1 The Court of Appeal has recently confirmed that the Brussels regulations do not determine jurisdiction as between the legally separate parts of the UK: *Cook v Virgin Media Plc; McNeil v Tesco Plc* [2015] EWCA Civ 1287, for which the Civil Judgments and Jurisdiction Act 1982 remains the lodestar.

2 Ch. II, Section 9, Arts 29–34 of the Recast Regulation (Ch. II, s 9, Arts 27–30 of the Brussels Regulation).

3 Article 4 of the Recast Regulation; Art 2 of the Brussels Regulation.

4 Article 24, which mirrored Art 22 of the Brussels Regulation: '(1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated … (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat … (3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept … (4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place … (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.'

5 Conflict of Laws.net, The Protection of Arbitration Agreements within the EU after *West Tankers*, *Gazprom* and the Brussels I Recast, July 17 2015.

6 *West Tankers*, para 24, drawing on *Gasser* (Case C-116/02) and *Turner v Grovit* (Case C-259/02).

7 Ibid. para 34.

8 A recent example of which was *Winkler & anor v Shamoon & anor* [2016] EWHC 217 (Ch), in which Henry Carr J held that the claim fell within the "succession" exclusion to the Brussels I Regulation, and thus the claimant was not entitled to seek to join the defendants to the action under the provisions of Art 6(1) of the Lugano Convention (2007).

9 Considered in admirable detail by Michael Ford QC in his advice to the Trades Union Congress: https://www.tuc.org.uk/sites/default/files/Brexit%20Legal%20Opinion.pdf

Further Reading:

- Anti-suit injunctions after Gazprom: Business as usual [2015] 8 JIBFL 516.
- Conflict of laws in light of *Plaza BV* and the New Brussels Regulation [2015] 4 JIBFL 209.
- LexisPSL: Dispute Resolution Practice notes: Brussels 1 (recast): Tort and delict claims (Art 7(2)).