

IN PRACTICE

The London Disputes Newsletter

October 2012



Reform of the Brussels Regulation: Developments in Questions of Jurisdiction and the Recognition and Enforcement of Judgments Across the European Union

Introduction

The remarkable legislation that provides, across the European Union (EU), a harmonised approach to jurisdiction and the recognition and enforcement of judgments from the courts of EU Member States is often taken for granted. The legislation in question deals with two very broad concepts: which courts should have jurisdiction over disputes (and the related issue of jurisdiction clauses) and how judgments from the courts of one EU Member State should be recognised and enforced in other EU Member States.

This article examines some of the legislation that underpins the harmonised approach, and then looks at the proposed reforms currently under consideration. The reforms are still at an early stage in their implementation, and this article is the first in a series looking in detail at some of the changes.

Background

There are three separate regimes which govern jurisdiction and the recognition and enforcement of judgments from EU Member States:

- (a) The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by various Accession Conventions) (Brussels Convention)¹
- (b) The Lugano Convention of 30 October 2007 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention)²
- (c) Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation)³

In practice, the Brussels Regulation is likely to be the most commonly encountered regime in terms of questions of jurisdiction and the recognition and enforcement of European judgments. In broad terms, it applies to all judgments within its scope made in respect of legal proceedings instituted after its entry into force on 1 March

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IN PRACTICE

The London Disputes Newsletter

2002⁴. Article 66 of the Brussels Regulation details its scope and explains the transitional provisions (including how the Brussels Regulation applies to judgments in respect of proceedings instituted before its entry into force).

History and Implementation

Brussels Convention 1968

The Recitals detailed in the Preamble to the Brussels Convention set out two reasons behind the negotiation and implementation of the Convention by what were then the Member States of the European Economic Community:

- (a) A desire “to implement the provisions of Article 220 of [the Treaty of Rome (i.e. the Treaty establishing the European Economic Community) 1957⁵] by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals”
- (b) An anxiousness “to strengthen in the Community the legal protection of persons therein established”.

In order to achieve these aims, the Member States involved in negotiating the Brussels Convention considered, as set out in the Preamble to the Convention, that the Convention was necessary “to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements”.

Lugano Convention 1988

The basis for the Lugano Convention was essentially the same as the basis for the Brussels Convention — an anxiousness “to strengthen...the legal protection of persons...established” in the member states of the European Free Trade Area (EFTA). The Preamble to the Lugano Convention recites the same wording as in the Preamble to the Brussels Convention set out above.

Also contained in the Preamble to the Lugano Convention is an express acknowledgement of the Brussels Convention as well as of the economic and trade links between the member states of the European Economic Community (as it then was) and the EFTA states. On this theme, the penultimate Recital in the Preamble to the Lugano Convention sets out that the EFTA states are persuaded “that the extension of the principles of [the Brussels Convention]...will strengthen legal and economic cooperation in Europe”.

The Lugano Convention 1988, which has since been replaced by the 2007 version, extended the objectives and principles of the Brussels Convention to EFTA states and not just member states of the European Economic Community. These additional states were, initially, Iceland, Norway, Switzerland and, later, Poland.⁶

Brussels Regulation

The Brussels Regulation sets out in 29 Recitals some of the key motivating factors behind its implementation and purpose. Chief among these are the following Recitals:

“(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial

IN PRACTICE

The London Disputes Newsletter

cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

[...]

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty [of Rome], the objectives of this Regulation cannot be sufficiently achieved by Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

[...]

(6) In order to obtain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgements be governed by a Community legal instrument which is binding and directly applicable.”

It can be seen from these Recitals that the Brussels Regulation is a “Community legal instrument” implemented by regulation which is aimed at “maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured” by unifying the rules of conflict of jurisdiction and rationalising enforcement formalities. The Recitals set out that in order to achieve this objective fully, a regulation is required since a regulation has direct effect in domestic law and need not be implemented by local legislation thus making it more reliably and uniformly applicable throughout the Member States. A regulation also has primacy over domestic laws, thus legislation contrary to the spirit and purpose of the Brussels Regulation would be disregarded by local courts.

The Brussels Regulation is substantively the same as the Brussels Convention (as regards recognition and enforcement) and, indeed, the link between the two instruments is acknowledged in the Recitals to the Brussels Regulation — “Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end”.⁷

The Brussels Regulation originally applied to Belgium, France, Italy, Luxembourg, the Netherlands, Germany, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland and Sweden. Following the enlargement of the European Union (in 2004 and 2007), it now also applies to Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria and Romania. Denmark had originally opted out of the Brussels Regulation regime (meaning that the Brussels Convention continued to apply), but as of 1 July 2007, the provisions of the Brussels Regulation were extended to Denmark.

The continued relevance of the Brussels Convention is now very limited — it really is only of use with respect to those territories of EU Member States that fall within its territorial scope, but that are excluded from the Brussels Regulation pursuant to Article 299 of the Treaty establishing the European Community, e.g. France’s overseas territories such as New Caledonia.

IN PRACTICE

The London Disputes Newsletter

Key Provisions of the Brussels Regulation

In terms of jurisdiction, the general rule under the Brussels Regulation regime is that defendants domiciled in a Member State must be sued in the courts of their domicile (Article 2). Companies are entitled to be sued in the place of their statutory seat, central administration or principal place of business (Article 60). Article 5 provides some exceptions to the general rule. For example: (i) in matters relating to contracts, a defendant may be sued in the courts of the place of performance of the obligation in question (Article 5(1)); and (ii) in matters relating to tort, a defendant may be sued in the courts of the place where the harmful event occurred or may occur (Article 5(3)). Article 6 contains special rules for co-defendants, third parties to litigation and counterclaims.

In most cases, parties may contract out of the general rule by making an express choice of jurisdiction (Article 23). However, in certain specified situations, the Brussels Regulation places limits upon the ability of the parties to conclude a jurisdiction agreement. The exceptions and constraints of the Brussels Regulation relate to its material scope (the Brussels Regulation does not extend to, for example, insolvency matters) and exclusive jurisdiction arrangements for certain specific matters (Article 22 — certain questions of company law, registered intellectual property rights and others), and disputes relating to insurance (Article 13), consumer (Article 17) and employment contracts (Article 21).

In terms of recognition of judgments, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required (Article 33(1)) although recognition will not be granted:

- If that would be manifestly contrary to public policy in the Member State in which recognition is sought (Article 34(1));
- Where a judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so (Article 34(2));
- If it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought (Article 34(3)); and/or
- If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed (Article 34(4)).

Finally, in terms of enforcement, a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there (Article 38(1)).

Proposed Reform of the Brussels Regulation

On 14 December 2010, the European Commission published its proposed amendments to the Brussels Regulation.⁹ The key areas addressed in the Commission's legislative proposal are as follows:

- *Abolition of exequatur (the intermediate procedure for the recognition and enforcement of judgments)*

IN PRACTICE

The London Disputes Newsletter

The amendment aims to simplify the system for enforcing judgments across EU Member States and thus reducing costs and delays associated with the *exequatur* procedure. It provides for the introduction of standard forms to facilitate the recognition and enforcement of foreign judgments by the competent authorities. The proposal also envisages several procedural safeguards to prevent, in exceptional circumstances, enforcement of a judgement given in one Member State in another Member State. It is proposed, however, that the abolition of *exequatur* would not apply in defamation cases and collective redress.

- *Extension of the jurisdiction rules in the Regulation to disputes involving defendants who are not domiciled in an EU state*

The Brussels Regulation provides jurisdiction rules mainly with respect to defendants domiciled in the EU Member States. The Commission proposes to extend their application to non-EU defendants, allowing for third party defendants to be sued within the EU. This is particularly relevant in the context of matters relating to insurance (Article 9(1)), consumers (Article 15) and employment contracts (Article 19). In addition, claimants may bring proceedings against non-EU defendants at the Member State where property belonging to the defendant is located (Article 25) and if no other forum guarantees the right to a fair trial or the right to access to justice (Article 26). The proposed amendments also introduce a discretionary *lis pendens* (pending lawsuit) rule whereby a Member State court may stay its proceedings if the courts of a third state was seised first and will render a judgment within a reasonable time (Article 34).

- *Enhancement of the effectiveness of choice of court agreements*

Under the existing rules in the Brussels Regulation, the court second seised must stay its proceedings until the court first seised rules on whether it has jurisdiction. This applies even if there is a jurisdiction agreement between the parties, and the second seised court is the one designated by the parties. This *lis pendens* rule has been exploited by litigants acting in bad faith to delay proceedings by first seizing a non-competent court. To remedy the situation, the Commission's proposal gives priority to the court chosen by the parties to decide on its jurisdiction, regardless of whether it is first or second seised (Article 32(2)).

- *Improvement of the interface between the Regulation and arbitration*

Despite earlier indications that the "arbitration exception" in the Brussels Regulation (Article 1(2)(d)) would be excluded, the proposal preserves the arbitration exception and now provides, in addition, for a stay of arbitration related court proceedings, where the issue of a tribunal's jurisdiction has already been raised before either the courts of the seat of arbitration or the tribunal itself (Article 29(4)).

- *Better coordination of parallel proceedings*

The Commission's reform aims at strengthening the coordination of legal proceedings in the Member States. The proposed measures include specifying a time limit for the court first seised to determine its jurisdiction (Article 29(2)), sharing information between the courts seised of the same action (Article 29(2)) and removing the requirement that consolidation of related actions must be allowed under national law (Article 30(2)).

IN PRACTICE

The London Disputes Newsletter

- *Clarification on the circulation of provisional and protective measures in the EU*

The reform includes the provision for the free circulation of provisional, including protective, measures by the courts with jurisdiction as to the substance of the dispute, including measures granted *ex parte* (subject to conditions) (Recital 25). The proposal also requires the court seised with an application for provisional and protective measures to cooperate with other courts with jurisdiction over the substance of the matter (Article 31).

Concluding Remarks

The European Commission's draft legislative proposal has invited debate on the national and EU level.⁹ Some of the key points raised in the discussion include: preserving the right to challenge enforcement on public policy grounds; extending the abolition of the *exequatur* procedure to defamation and collective redress cases; conducting more extensive consultation with the Member States on the provisions regarding jurisdiction over non-EU defendants; and preserving the arbitration exception in the Regulation.

The European Parliament is scheduled to vote on the Commission's legislative proposal at its plenary session in December 2012.

The developments noted in this article above are, largely, positive developments for users of the courts in the EU (and, also, those wary of the interplay between arbitration proceedings and the court systems in the EU). Forthcoming articles will focus on some of the key developments in more depth.

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Endnotes

- ¹ The Brussels Convention can be found at OJ L 299, 31.12.1972, p. 32.
- ² The Lugano Convention can be found at OJ L 339, 21.12.2007, p. 3.
- ³ The Brussels Regulation can be found at OJ L 12, 16.1.2001, p. 1.
- ⁴ Article 76 of the Brussels Regulation.
- ⁵ Article 220 of the Treaty of Rome (*i.e.* the Treaty establishing the European Economic Community) 1957 was re-numbered Article 293 of the Treaty establishing the European Community by the Treaty of Amsterdam 1997. It states "*Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals...the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.*"
- ⁶ As a result of the enlargement of the European Union on 1 May 2004, judgements from Poland are now covered by the Brussels Regulation regime.
- ⁷ Recital 19 to the Brussels Regulation.
- ⁸ See http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf: Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- ⁹ Refer to "Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'" at OJ C 218, 23.07.2011, p. 78; European Parliament, "Draft report on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-467.046+01+DOC+PDF+V0//EN&language=EN>, 28.06.2011.

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