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Update

Avoiding jurisdictional disasters: How will the updated EU Jurisdiction Rules impact your dispute resolution strategy?

The UK continues to retain its position as a key forum for resolving international disputes. The Commercial Court in London is well versed in such disputes, and it has predictable processes and a reputation for impartiality which can prove attractive to foreign litigants. London is also a leading arbitration centre. For this reason, parties which have no connection with the UK often select English law and/or English jurisdiction to resolve disputes which may also have no connection whatsoever with the UK. This paper examines the degree to which the English courts will uphold such jurisdiction or arbitration agreements and the impact which EU law has on this position.

The Recast Brussels Regulation (1215/2012) (Recast Regulation), which came into force on 10th January 2015, has resulted in important changes. Revisions to the rules surrounding jurisdiction agreements are to be welcomed and some important issues have been clarified.

The Hague Convention on Choice of Court Agreements came into force on 1 October 2015. This relates to exclusive choice of court agreements. The English courts (and a number of other countries) already tend to respect these. However, some countries don't which is why the Convention came about. It was intended to be an equivalent to the New York Convention on arbitration, but so far fewer countries have signed up. It came into force between the EU (except Denmark) and Mexico on 1 October 2015. Although the US and Singapore have also signed the Convention, they have not yet ratified it. The Convention will not apply to determine questions of jurisdiction and the enforcement of judgments as between EU member states, as these will continue to be determined by the Brussels regime.

Jurisdiction agreements

English courts will generally enforce express jurisdiction clauses. If it is an English jurisdiction clause, they will hear the case and grant leave to serve the writ on a foreign defendant outside England, if necessary. If the clause chooses a foreign jurisdiction, the English courts retains a discretion over the clause (because of the principle that the jurisdiction of the English courts cannot be ousted by private agreement – see The Fehmarn[1]), but such clauses are usually effective.

Furthermore, in the recent decision of *Hin-Pro v Compania Sud Americana [2015]*[2], the Court of Appeal came close to suggesting that, absent any convincing reason to the contrary, a choice of English law implies that a reference to English jurisdiction makes the clause an exclusive jurisdiction clause in favour of England.

However, EU legislation has had an impact on this basic position, most recently with the implementation of the new Brussels Regulation 1215/2012 ('Recast Regulation').

Article 25 of the Recast Regulation provides that if the parties have agreed in writing (or in a form which accords with the parties' previous course of dealings or accords with trade practice) that the courts of a member state shall have jurisdiction (exclusive or permissive), then that court shall have jurisdiction (exclusive unless the parties have agreed otherwise, in which case the court selected has "additional" jurisdiction. However, if proceedings are first commenced before the nominated court, a permissive clause will be treated as if it was exclusive). This is the position regardless of the domicile of the parties (formerly, an express agreement would be honoured only if one of the parties was domiciled in a Member State). So, for example, if the English court is chosen to have jurisdiction, permission to serve out will not now be required even if neither party is domiciled in the EU (but if proceedings are pending in another EU country, permission will be required if the jurisdiction clause is not exclusive). Accordingly, foreign parties have been accorded greater freedom to select the English courts as the forum to hear their dispute.

Furthermore, the EU court named in an exclusive jurisdiction clause can now hear the case, even if it is not the court first seised in the EU. Under the "old" Regulation, if another court was first seised, then it was for that court to determine whether it could accept jurisdiction. Now, other EU courts must stay their proceedings if the court named in the clause determines that it does have jurisdiction. The court named in the exclusive jurisdiction clause can hear the case even if the court first seised has not yet decided on a stay (it is implicit, although not yet confirmed, that the court second seised need not wait for the court first seised to actually stay its proceedings before hearing the case).

The practicalities of this new situation are yet to be played out. For example, if an Italian court is first seised of a dispute governed by an exclusive English jurisdiction clause under the "old" Regulation, what will happen if the English court is then seised of proceedings after the "new" Regulation comes into force? Both courts would appear to have a legitimate claim to hear the case.

The detail of these and other important changes can be found within the new Regulation at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF

Staying proceedings on the basis of conveniens

As indicated above, English courts must now stay their proceedings if another EU court has been named in an exclusive jurisdiction clause and has agreed to hear the case (even if the English court was first seised).

The position with regard to non-EU courts was also altered by the Recast Regulation.

Under the Recast Regulation the EU courts now have a discretion to stay their proceedings in favour of a non-EU court if: (i) it is expedient to determine related actions together; (ii) the non-Member State court can give a judgment which will be enforceable in a Member State; and (iii) it is necessary for the proper administration of justice. However, this power only exists where the Member State court is second seised. The previous position was that the English courts had no discretion to stay English proceedings if a defendant was domiciled in England even if a non-EU jurisdiction was clearly the more appropriate forum (as confirmed in the ECJ decision of *Owusu v Jackson*[3]).

A recent case on this point, *MacDermid Offshore Solutions LLC v Niche Products Ltd*[4] was heard by the High Court. This considered an application to stay English proceedings in favour of a parallel action in the United States.

1 *Cargo Lately Laden on Board the Fehmarn(Owners) v Fehmarn (Owners)* The Fehmarn [1958] 1 W.L.R. 159

2 *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401

3 *Owusu v Jackson* (t/a Villa Holidays Bal Inn Villas) (C-281/02) [2005] Q.B. 801

4 *MacDermid Offshore Solutions LLC v Niche Products Ltd* [2013] EWHC 1493 (Ch)

The appellant (MacDermid) brought proceedings against the respondent (Niche) in Texas for misleading advertising. Four weeks later, Niche sued MacDermid in England for malicious falsehood.

MacDermid applied for the English action to be stayed on the basis of forum non conveniens, alternatively on case management grounds. The application was refused at first instance by the Patents County Court. The judge decided he should decline jurisdiction only if Texas was clearly a more appropriate forum for the trial.

MacDermid then appealed to the High Court. It contended that where proceedings had been initiated in another jurisdiction, the court should determine whether the foreign court was a natural and appropriate forum. If it was, the court should grant a stay unless there was some injustice in doing so.

The High Court rejected this approach, and upheld the original decision. The test remains whether the foreign jurisdiction is clearly more appropriate. The existence of prior foreign proceedings is not decisive. It may be a factor to be taken into account, and the weight to be attached to such proceedings is a matter of judgment.

Anti-suit injunctions

Under the Recast Regulation, it is now possible to bring proceedings before the courts of a Member State even though the courts of another Member State have been first seised, if those proceedings are brought "in support of arbitration" (e.g. they are started in order to obtain a declaration that there is a valid arbitration agreement between the parties). However, the Recast Regulation is silent on whether an anti-suit injunction can be obtained to restrain proceedings in the court first seised.

This was considered in the recent "*Gazprom*" *OAO*[5] decision: When a dispute arose between Gazprom OAO and the Lithuanian Ministry of Energy ("LME"), LME commenced court proceedings in Lithuania (which was therefore the court first seised). Gazprom alleged that those proceedings breached an arbitration agreement between the parties and commenced arbitration, before obtaining an anti-suit injunction from the arbitrators to restrain the pursuit of the Lithuanian proceedings. However, the Lithuanian courts refused to recognise and enforce the award and referred the matter to the Court of Justice of the European Union (CJEU).

The CJEU's decision unfortunately does not resolve the position under the Recast Regulation, since the decision is based on the old Regulation instead. It held that the Regulation does not preclude a Member State's courts from recognising and enforcing (or refusing to recognise and enforce) an arbitral award (obtained from a tribunal in another Member State) which prohibits a party from bringing certain claims before it.

In effect, therefore, this decision confirms that an anti-suit injunction can be obtained from the arbitrators to restrain proceedings brought in a Member State in breach of the arbitration agreement (assuming that the arbitrators have the power to grant the injunction).

However, it does not resolve the problem that that Member State's courts may still refuse to recognise and enforce the arbitral anti-suit injunction. Nor does it resolve the wider issue of whether the courts of a Member State might also grant an anti-suit injunction under the Recast Regulation.

Arbitration agreements

The "Italian torpedo" sent shockwaves through the international arbitration community a few years ago. To recap, the issue is that the courts in certain European countries such as Italy and Spain are sometimes inclined to disregard foreign arbitration clauses and determine the issues in dispute themselves. Traditionally, the English courts protected English arbitrations by issuing anti-suit injunctions. However the position became uncertain following the ECJ decision in *West Tankers*[6]. Shipowners there had brought proceedings in Italy (and hence Italy was "first seised") in breach of an arbitration agreement (in favour of London arbitration).

Under the old Regulation, the court of a Member State could not issue an anti-suit injunction to restrain proceedings which had already been brought in another Member State (that other Member State being "first seised"). The European Court of Justice ("ECJ") cases of *Turner v Grovit*[7] and *Gasser v MISAT*[8] confirmed that that was the position even where the proceedings in the other Member State had been brought in breach of an exclusive jurisdiction clause.

5 Case C-563/13

6 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc, Front Comor, The* (C-185/07) [2009] 1 A.C. 1138

7 *Turner v Grovit* (C-159/02) [2005] 1 A.C. 101

8 *Erich Gasser GmbH v MISAT Srl* (C-116/02) [2005] Q.B. 1

However, arbitration was excluded from the scope of the old Regulation. The ECJ ruled that the application for an anti-suit injunction from the English courts did not fall within the scope of the Regulation. However, it said that such an injunction would undermine the effectiveness of the Regulation, especially since the Italian court would be prevented from exercising the jurisdiction conferred on it by the Regulation. Accordingly, it was therefore for the Italian court alone to rule on its own jurisdiction and Member State courts must not grant anti-suit injunctions on the grounds that the proceedings have been brought in breach of an arbitration agreement.

That position has now been reversed by the Recast Regulation, which confirms that proceedings relating to arbitration fall outside of its scope. As a result it clarifies that any court proceedings brought in order to support an arbitration (including enforcing or challenging an award and deciding the validity of an arbitration agreement) fall outside the scope of the Regulation, and hence a court which is not first seised can decide these matters, despite the risk of parallel judgments.

That risk of conflicting and parallel judgments might be demonstrated as follows: Party A believes a dispute should be arbitrated but Party B starts litigation in an EU court first (say, Italy), following West Tankers, it was not possible to restrain the Italian proceedings with an anti-suit injunction – the court first seised has to hear the case.

Under the Recast Regulation if, say, English proceedings are brought "in support of arbitration" (ie they are started in order to obtain a declaration that there is a valid arbitration agreement and the parties have to arbitrate) then the English court can now decide that even though it is not the court first seised. So the English court might give a declaration that the dispute should be arbitrated and Party A might go on to obtain an award. However, at the same time, the Italian proceedings would continue – possibly giving a judgment that there is no valid arbitration agreement. The Regulation doesn't say whether the award or the English judgment would take precedence but because of Recital 12, it has been suggested by commentators that the award should trump the judgment.

Can an injunction be obtained from the English courts to stop the Italian proceedings continuing? Unfortunately, the new Regulation is silent on whether an anti-suit injunction can be obtained.

Advocate General Wathelet issued an Opinion in the ECJ case of "Gazprom" OAO9. In it, he opined that the Recast Regulation overturns West Tankers and that an anti-suit injunction would not be incompatible with the new Regulation but that is doubtful, since the Regulation arguably foresees English proceedings and Italian proceedings continuing in parallel.

Outside of the EU, it remains the case (as before) that the English courts can grant an anti-suit injunction to restrain the breach of a valid arbitration agreement.

Comity–enforcing foreign judgements and arbitration awards in England and Wales

The first step in enforcing a judgment or award is to ascertain which set of rules apply. Again, the Recast Regulation may be relevant. England is a party to several reciprocal regimes which allow for the enforcement of foreign judgments in England, without the need to commence fresh proceedings. Not all jurisdictions are covered by these reciprocal regimes. Accordingly, there are broadly four categories:

Judgments

The European regime

Under the Recast Regulation, a claimant who has obtained a judgment in one EU Member State may enforce it in another Member State without issuing separate proceedings. Applications for registration should be made within 6 years of the date of the original judgment.

There are still circumstances where the old European regime (ie the Brussels Convention and the new and old Lugano Conventions) may apply, for example to judgments given before the Brussels Regulation came into effect.

Under Regulation 805/2004 (which came into force in October 2005), judgments made on 21 January 2005 and after can also be certified as a European Enforcement Order (EEO) if they relate to uncontested claims in civil or commercial matters. Uncontested claims are claims which, in the course of the court proceedings, the debtor has admitted/settled or has never objected to, or claims in relation to which the debtor has never appeared or been represented at court after initially objecting to the claim. The effect of the EEO is that a judgment obtained in one EU Member State can be immediately enforced in the courts of another EU Member State (where the defendant has assets) without requiring the judgment to first be formally recognised or registered. This regime does not apply to Denmark.

9 Opinion of Advocate General Wathelet (4 December 2014)(1) Case C-536/13 '*Gazprom*' OAO

Other reciprocal regimes

Where the judgment originates in a non-EU country, there may be other statutory or bilateral conventions that could be relied upon to enforce the judgment in England and Wales.

The Administration of Justice Act 1920 provides for the enforcement by registration of certain judgments from the courts of many colonial and commonwealth countries (for example Barbados, the BVI, Singapore and New Zealand). This covers judgments made by the higher courts of those countries.

The UK has also entered into bilateral treaties with some countries (for example Australia, Guernsey, India and parts of Canada) pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1933 which allow the judgments of the higher courts of those countries to be enforced by registration. It applies only to money judgments (excluding taxes, fines or penalties).

The Civil Judgments and Jurisdiction Act 1982 applies to the registration and enforcement of a judgment in a jurisdiction within the UK. There are three separate jurisdictions within the UK: England and Wales; Scotland; and Northern Ireland. This Act does not however apply to judgments from e.g. the Channel Islands and the Isle of Man (for which you would have to use the 1933 or 1920 Act regimes).

Countries with no reciprocity

Where no reciprocal regime exists with a country (for example China, the USA and most of Canada (see above for other parts of Canada)), a party who has obtained judgment in that country must bring a fresh action, relying on common law, to enforce in England. The fresh action must be brought within six years from the date of the original judgment. For procedural purposes, the foreign judgment is sued upon as a debt between the parties, arising out of an implied promise by the debtor to pay the amount of the foreign judgment. A summary judgment will often be sought, on the basis that the defendant has no real prospect of defending the claim. Note that for non-money foreign judgments, you will need to bring a fresh action for your original claim.

Defences vary depending on which regime applies, but typical defences to an enforcement action include:

(a) Enforcement would be contrary to public policy
(b) The judgment is contrary to the rules of natural justice
(c) An appeal is pending in the original jurisdiction
(d) The judgment was obtained by fraud
(e) The judgment conflicts with a prior judgment

The Recast Regulation confirms that proceedings relating to arbitration fall outside of its scope.

Arbitration awards

New York Convention

There is an entirely separate regime for the enforcement of arbitration awards from that applicable to court judgments. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will apply and it is often the case that an arbitral award is easier to enforce than an English court judgment, in particular when enforcement is likely to take place outside Europe.

In England and Wales, the "reciprocity reservation" applies so that the English courts only apply the New York Convention to arbitral awards made in countries that are also party to the Convention.

Some 149 countries have signed up to the New York Convention, including the USA, China, India, Russia, most EU countries, Australia and Brazil. The effect of the Convention is that an award which on its face is valid will be recognised and enforced by the court in the same way as if it were a judgment given by the court from which enforcement is sought.

The New York Convention provides for limited grounds on which the enforcement of a Convention award can be refused. For example:

(a) A party to the agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration
(d) The composition of the arbitral authority was not in accordance with the agreement of the parties
(e) The award has not yet become binding on the parties, or has been set aside or suspended
(f) It would be contrary to public policy to recognise or enforce the award

Competing clauses: the one–stop presumption

Sometimes the contractual relationship between the parties will be complex, with competing clauses in separate agreements having been agreed. The English courts approach this issue based on a presumption set out in the House of Lords decision of *Fiona Trust & Holding Corp v Privalov*[10]. This is the "one-stop" presumption as elucidated by Lord Hoffmann: namely, there is an assumption that the parties, as rational business people, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. The presumption was recently cited by the Court of Appeal in *AmTrust Europe v Trust Risk Group*[11].

The claimant insurer began proceedings in England but its Italian broker argued that the dispute should be heard in an Italian arbitration rather than by the English courts and challenged the jurisdiction of the English courts. This in turn required an examination of the Terms of Business Agreement ("TOBA") entered into between the parties in 2010 and a Framework Agreement which they entered into in 2011. The TOBA provided that all disputes would be heard by the English courts and the Framework Agreement provided for Italian arbitration. At first instance, Blair J noted the "one-stop" presumption but held that it did not apply here because the TOBA and Framework Agreements were dealing with different subject matters and hence the claimants had a "good arguable case" that the English courts have jurisdiction. The broker appealed and the Court of Appeal has now dismissed that appeal.

It was held that the one-stop presumption does not apply where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements. Here, the claimants had a "good arguable case" (i.e. "a much better argument") that the Framework Agreement had not superseded the TOBA and that this dispute fell to be decided under the TOBA and was therefore subject to English law and jurisdiction.

The High Court recently held that a forum selection clause in a settlement agreement in favour of the English courts superseded an earlier contractual agreement in favour of arbitration (*Monde Petroleum SA v WesternZagros Ltd*).

Here, a complex set of proceedings led the High Court to consider whether a dispute resolution clause in a settlement agreement should take precedence over a conflicting dispute resolution clause in the original agreement.

Further information

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Further advice should be taken before relying on the contents of this summary.

10 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40

11 *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437

12 *Monde Petroleum SA v WesternZagros Ltd* [2015] EWHC 67 (Comm)).