

Insight: Dispute Resolution

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The Brussels Regulation Recast: What you need to know

The Brussels Regulation (Regulation (EC) 44/2001) has governed questions of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU for over a decade. From 10 January 2015, it will be repealed and replaced by Regulation (EU) 1215/2012 (the "**Recast Regulation**"). We set out the key changes.

Scope of the changes

The Recast Regulation will be applied by Member State courts from 10 January 2015 to all new legal proceedings.¹ While much of the wording of Council Regulation (EC) 44/2001 (the "**Former Regulation**") remains the same, there are key changes in four areas:²

1. Streamlining the process for enforcing Member State judgments in other Member States;
2. Addressing abusive litigation tactics and strengthening contractual choice of court agreements;
3. Extending the reach of the Brussels Regulation to jurisdiction clauses where neither party is domiciled in the EU; and
4. Enhancing the protection of arbitration agreements.

These changes will have a significant effect on the practicalities of cross-border litigation and international arbitration.

Streamlining the process for enforcing Member State judgments in other Member States

The Recast Regulation shifts the burden in relation to enforcement of judgments from the judgment creditor to the judgment debtor, who now has to apply to challenge the enforcement. In the absence of challenge, enforcement is automatic.

Under the Former Regulation, a successful judgment creditor seeking to enforce a judgment from a Member State's court in the territory of another Member State (for example, where the judgment debtor's assets were abroad) had to follow a formal procedure known as 'exequatur'. This required the judgment creditor to apply to the court in the Member State of enforcement for a declaration of enforceability, a potentially cumbersome and time-consuming process the detail of which varied between Member States.



Charlie Lightfoot

Partner, London

+ 44 20 7532 1815

clightfoot@whitecase.com

Rory Hishon

Associate, London

+ 44 20 7532 1806

rhishon@whitecase.com

White & Case LLP
5 Old Broad Street
London EC2N 1DW
Tel: + 44 20 7532 1000
Fax: + 44 20 7532 1001

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¹ Proceedings commenced before 10 January 2015 will continue to be dealt with under the former Brussels Regulation regime.

² Changes to the rules regarding consumers and employment contracts will be of less relevance to commercial parties, and are not considered here. There are also minor changes to the rules on insurance contracts, and in certain other areas.

The Recast Regulation abolishes 'exequatur'. A judgment creditor seeking to enforce now need only present the competent enforcement authority with a copy of the judgment and a standard form certificate from the court which granted the judgment. Should the judgment debtor wish to oppose enforcement, it must apply to the designated court in the Member State of enforcement. Grounds for refusal are limited, and include, for example, public policy.

Addressing abusive litigation tactics and strengthening contractual choice of court agreements

One of the most frequently voiced criticisms of the Former Regulation was its "first in time" *lis pendens* rule, which was often seen as enabling abusive litigation tactics.

Under the Former Regulation, where proceedings were brought in the courts of different Member States between the same parties and involving the same cause of action, all Member State courts other than the court first seised had to stay their proceedings until the court first seised had ruled on whether it had jurisdiction to hear the claim. This was so even where the proceedings before the court first seised breached a jurisdiction clause.

The intent of the rule was to avoid inconsistent judgments between Member States. But its practical effect was that a party wishing to delay could initiate proceedings in courts other than those named in an exclusive jurisdiction clause to which it had agreed. This *lis pendens* rule became used for tactical advantage, a strategy known as the "Italian torpedo".

The Recast Regulation reforms the *lis pendens* rule, so that priority now sits with the court designated in an exclusive jurisdiction clause, without the need to wait for any other Member State courts seised

earlier in time to consider their jurisdiction first. Any such other courts will be required to stay their proceedings in the meantime.

By reinforcing exclusive jurisdiction clauses, the changes aim to address the problem of parties concerned about the prospect of being on the wrong end of an opponent's torpedo tactics rushing to issue protective proceedings.

Extending the reach of the Brussels Regulation to jurisdiction clauses where neither party is domiciled in the EU

The test for the applicability of a contractual jurisdiction clause under the Former Regulation required both that a Member State's court be specified in the clause, and that at least one party be domiciled in a Member State.

Under the Recast Regulation, the domicile requirement is discarded, so that a jurisdiction clause specifying a particular Member State's court will be respected even if neither party is domiciled in a Member State.

The effect of this is to enhance contractual autonomy for non-EU domiciled parties, and to increase efficiency by removing the need for any enquiry into the domicile of the parties to a contract. Additionally, parties commencing proceedings in England would appear to benefit from an extended ability to serve those proceedings out of the jurisdiction without needing the English court's permission. The English Civil Procedure Rules allow service out without permission where there is a jurisdiction clause which is covered by the Brussels Regulation. That will now include proceedings based on jurisdiction clauses where neither claimant nor defendant is domiciled in a Member State.

Furthermore, under the Recast Regulation, the question of whether a jurisdiction clause is null and void will now be determined in accordance with the law of the Member State identified in that jurisdiction clause.

Protecting arbitration agreements against abusive litigation

Arbitration had been expressly excluded from the scope of the Former Regulation, but there was little guidance as to what was covered. To increase certainty as to the scope of the exclusion, the Recast Regulation contains a new recital clarifying that it should not apply to arbitration, and that any Member State's court may:

- refer parties to an arbitration agreement to arbitration;
- stay or dismiss proceedings in favour of arbitration; or
- investigate whether an arbitration agreement is null, void, inoperative or incapable of being performed in accordance with its national law,

even if this issue has already come before the courts of another Member State.

The new recital also provides that a ruling given by a Member State's court on that latter question should not be subject to the rules of recognition and enforcement in the Recast Regulation. The effect of this is that a declaration as to the validity of an arbitration agreement by one Member State is not required to be recognised in another Member State. However it is not clear what the position would be if a Member State Court is asked to enforce both an arbitral award and a conflicting substantive judgment by another Member State court. The Recast Regulation appears to allow the enforcing Member State court to give precedence to the enforcement of an arbitral award under the New York Convention, but it remains to be seen how this will work in practice.

Prior results do not guarantee a similar outcome.