

March 2015

LW.com

Thwarting Torpedoes and Other Clarifications: Recast Brussels Regulation in Force From 10 January 2015

By [Oliver Browne](#)

One of the relatively unsung success stories of the European Union (and its predecessors) is its experiment in judicial co-operation. The first major component of this experiment was the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Brussels Convention was updated, and partly superseded, by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regulation 44/2001 (now referred to as the “**Original Brussels Regulation**”) has been recast by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (referred to as the “**Recast Brussels Regulation**”).

For those dealing with transactions and disputes across borders in Europe, these fundamental pieces of legislation address two very important issues: which EU courts have jurisdiction, and how judgments from one Member State can be recognized and enforced in another Member State. They also touch on a number of other features of international disputes including, for example, the relationship between arbitration and litigation and the validity of court selection clauses.

The Recast Brussels Regulation entered into force on 10 January 2015. The changes it introduces are relatively limited. Set out below are details of the most important:

- **Abolition of *exequatur*:** The Recast Brussels Regulation has simplified the system for enforcing judgments across Member States, and has reduced costs and delays, by abolishing *exequatur*. This was an intermediate procedure required by the Original Brussels Regulation as part of the enforcement process whereby judgments were formally recognized before they could be enforced. The Regulation now also promotes the use of standard forms to facilitate the recognition and enforcement of foreign judgments by the competent authorities.
- **Extension of the jurisdiction rules in the Regulation to disputes involving defendants who are not domiciled in an EU State:** The Original Brussels Regulation contains jurisdiction rules which are mainly applicable if defendants are domiciled in Member States. The Recast Brussels Regulation applies those rules to non-EU defendants, allowing those defendants to be sued within the EU in certain circumstances — for example, in the case of certain insurance, consumer and employment contracts.

- **Changes to the *lis pendens* rules:** Under the Old Brussels Regulation, it was possible to commence so-called “torpedo” actions (see the European Court of Justice decision in *Gasser (Erich) GmbH v MISAT Srl* C-116/02 [2005] QB 1, [2005] 1 All ER (Comm) 538). In “torpedo” actions, claims are deliberately brought in slow moving Courts in breach of exclusive jurisdiction clauses. This strategy could potentially delay proceedings, as the court selected in the jurisdiction clause was obliged to stay proceedings before it until the court first seized determined whether it had jurisdiction. The Recast Brussels Regulation now says that proceedings in breach of exclusive jurisdiction clauses must be stayed until the court selected in the jurisdiction clause determines whether it has jurisdiction. This change hopefully will significantly reduce “torpedo” actions and forum shopping.
- **Arbitration exception:** Another significant change relates to the nature of the “arbitration exception” (*i.e.* the provision expressly excluding arbitration from the scope of the Recast Brussels Regulation), which had been heavily debated. The changes are generally supportive of arbitration, and the primacy of the New York Convention, and address some of the difficulties following the ECJ's decision in *Allianz SpA v West Tankers Inc* (Case C-185/07). In that case, an anti-suit injunction from the court of the seat of arbitration aimed at preventing litigation in another Member State was held to be contrary to the Brussels Regulation. Now, the Recast Brussels Regulation clarifies that the Courts of Member States should not be prevented from referring parties to arbitration, from staying or dismissing proceedings in favour of arbitration, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed. However, the wide-ranging reforms initially proposed have not fully materialized and some have criticized the Recast Brussels Regulation for not going far enough.
- **Court selection clauses:** The Recast Brussels Regulation expressly states that court selection clauses are separable agreements on jurisdiction and will be treated as independent of the other terms of the contract in which they are contained. The validity of court selection clauses cannot now be contested solely on the ground that the contract is not valid. Court selection clauses now fall within the Recast Brussels Regulation more easily: the requirement that the parties to agreements containing such clauses must include at least one party domiciled in a Member State has been removed. This means that the domicile of the parties becomes less relevant and that parties can more easily establish whether the Recast Brussels Regulation applies. However, the requirement that the court selection clause selects a Member State court remains in place (so if a non-Member State court is selected, the relevant court selection clause falls outside the Regulation).

On balance, the Recast Brussels Regulation fine tunes an already successful piece of legislation and the changes discussed above are not wide-ranging and should be welcomed. However, there is some sense that an opportunity was missed by the regulators, particularly in relation to the scope of the arbitration exception, to provide even more clarity and certainty.