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PERSPECTIVES

PAN-EUROPEAN LITIGATION AFTER BREXIT: A RETURN OF THE ITALIAN TORPEDO?

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Since January 2015, the so-called 'Brussels Recast Regulation' has allowed parties to litigation within the European Union to choose the courts that will resolve a dispute between them.

Brussels Recast is a relatively recent development to cross-border litigation within the EU. These new rules, together with existing rules requiring the mutual recognition and enforcement of judgments between courts of Member States, mean that litigants in Europe now have an effective and pragmatic system for resolving disputes.

This is a significant improvement on the rules in play before 2015. Council Regulation (EC) No 44/2001 provided that, where parties to proceedings were in

different Member States, jurisdiction disputes would be determined by the court first seized.

The rule stated that the second court to issue in any race to hear proceedings relating to a particular dispute must stay its proceedings until the court that had issued first had determined whether it had jurisdiction, regardless of any contractual jurisdiction clause. The rationale for the rule was to prevent parallel proceedings, and to avoid the risk of possibly conflicting decisions. In practice, it often meant that there would be a race to court with each party seeking to issue proceedings, first in its own national court, or in another jurisdiction perceived to offer some other advantage.



A party facing a claim would often pre-emptively issue proceedings in one jurisdiction (even if in breach of a contractual jurisdiction provision) for a negative declaration of liability, in effect precluding the claimant from pursuing its claim elsewhere. If the alleged wrong doer brought the first action in a country where the judicial system is known to suffer lengthy delays (and in some cases, where the judges were thought unlikely to release the case to the courts of another jurisdiction) it might prevent the claim from being actively pursued against it anywhere in Europe, at least for some time. This tactical first strike was known as the 'Italian torpedo'.

A jurisdiction race of this sort had been accepted as an appropriate tactic in Germany and the UK, with the English Court of Appeal saying that the Italian torpedo was not an abuse of process and that cross-border litigators are entitled to play such games.

Brussels Recast offered a pragmatic solution by giving effect to the parties' express contractual choice of courts. Where a dispute centres on a contract with a valid jurisdiction clause, the court of the jurisdiction named in that clause will have the first right to determine conclusively whether it has jurisdiction to hear the claim.

Jurisdiction post-Brexit

After leaving the EU, subject to the outcome of Brexit negotiations and the Great Repeal Bill, Brussels Recast will not apply to contracts in which the parties had chosen to give jurisdiction to the courts of England and Wales, Scotland or Northern Ireland.

One possible alternative is that the UK could sign up to the Hague Convention on Choice of Court Agreements. In relation to determining questions of jurisdiction, this would be better than nothing, but Article 6 of the Hague Convention does give rise to the potential for parties to get around contractual jurisdiction protection if there is any scope for argument that a party lacked capacity to conclude the jurisdiction clause; that giving effect to the clause would lead to manifest injustice or be contrary to public policy; or that, due to exceptional circumstances beyond the parties' control, the clause cannot reasonably be effected, for example. In short, the Hague Convention gives scope for uncertainty and satellite litigation.

Another possibility would be for the UK to accede to the 2007 Lugano Convention, which is currently in force between the EU, Switzerland, Norway and Iceland. While generally this would mean that courts of EU Member States would be obliged to recognise

a choice of jurisdiction in favour of English, Scottish or Northern Irish courts, it would broadly mirror the pre-2015 position and would not prevent the return of the Italian torpedo.

The post-Brexit dispute resolution arena might, therefore, also see a return of anti-suit injunctions.

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Currently outlawed across the EU by Brussels Recast, this is where a party obtains an injunction in one jurisdiction to prohibit proceedings being issued in another Member State, in breach of an express jurisdiction agreement.

So long as the EU does not enact a counter-anti-suit-injunction regulation (which could render any potential party to litigation in any EU court open to a finding of, and possibly damages for, ‘unlawful litigation’), this could present businesses engaged in jurisdiction disputes with a viable and effective play. Even without this, the effectiveness of such

injunctions will depend on a number of case specific factors, for example, whether the Respondent has a presence or assets in the UK, and on whether there continues to be a mutual recognition and enforcement agreement between the UK and EU.

Of course, another possibility is that the UK will negotiate a special deal with the EU under which Brussels Recast, or something very similar, would continue to apply. There is precedent for this – Denmark, which otherwise has a total opt-out from all EU international law measures, has concluded just such an agreement.

Managing uncertainty

Despite the uncertain political and legal landscape, there are some practical steps that businesses with UK and EU interests can take in order to minimise the scope for jurisdictional disputes and unwelcome satellite litigation.

Whatever the outcome of the UK's Brexit negotiations, it is still preferable to have a choice of law and jurisdiction clause in most contracts. Parties to cross-border deals often choose English law and courts, and for very good reasons. It is a trusted, neutral common law option and its rules on discovery and cost shifting are often seen as important advantages, even in cases involving

parties where there are no formal treaties for the recognition and enforcement of judgments (for example, there are no formal recognition agreements in place between the UK and a number of its most important trading partners, such as the US). Choosing jurisdiction is nevertheless important and should always take account of enforceability.

The risks of a tactical first strike or other jurisdictional challenge can often be avoided by negotiating an arbitration agreement in international contracts. An English law arbitration with a seat in London will be unaffected by Brexit and, since the UK is a longstanding signatory to the 1958 New York Convention (to which there are currently 156 signatories, including EU Members States, the US, China, Russia and most of the UK's other major trading partners worldwide), an award will be enforceable in the courts of other signatory countries. [CD](#)



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