Feature

KEY POINTS

- A jurisdiction agreement complies with the requirements of Art 25 of the Brussels Regulation (Recast) where it specifies a Member State court regardless of the domicile of the contracting parties.
- The English High Court has held that asymmetrical jurisdiction agreements fall within Art 25.
- A party does not require permission to serve out of the jurisdiction where it establishes jurisdiction under Art 25.
- Where a jurisdiction agreement is exclusive, the English court does not have to stay proceedings even where it is second seised.
- Where jurisdiction is established under Art 25, there is no basis to stay English proceedings in favour of a Third State court regardless of how advanced the foreign proceedings are.
- Unless certain measures are taken, such as entering into a UK–EU Agreement with the EU to ensure the continued application of Brussels Regulation (Recast), Brexit may have a serious impact upon the current position.

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The strengthening of jurisdiction agreements following Brussels Reg (Recast) and the impact of Brexit

This article considers the practicalities of commencing proceedings with a jurisdiction agreement under the EU Regulation 1215/2012 (the Brussels Regulation (Recast)) and the Civil Procedure Rules before considering the role of jurisdiction agreements in situations of parallel proceedings and how Brexit may impact on these developments.

INTRODUCTION

It is commonplace for financial contracts to contain a jurisdiction agreement in favour of England, even where neither party is domiciled in England or even in Europe. Often these jurisdiction agreements are "asymmetrical" such that the lender has the option to bring suit in any court of a competent jurisdiction, but if the borrower seeks to bring suit they must do so in England.

This article seeks to outline the practicalities of commencing such proceedings under a jurisdiction agreement before considering their role in parallel proceedings and the potential impact of Brexit on this area.

COMMENCING PROCEEDINGS UNDER AN ENGLISH JURISDICTION AGREEMENT

The Brussels Regulation (Recast) came into effect in January 2015 and introduced a significant change to the enforceability of jurisdiction agreements under the EU regime in providing that a jurisdiction agreement complied with Art 25 (formerly Art 23 of the EU Regulation 44/2001, the Brussels Regulation) where the parties selected a Member State court *"regardless of their domicile"*. Thus, it was no longer a requirement that one of the parties had to be domiciled in a Member State. This has had two important consequences.

First, any judgment entered pursuant to a jurisdiction agreement in favour of a Member State court could be enforced under the Brussels Regulation (Recast). This is particularly important because the Brussels Regulation (Recast) also removed the exequatur procedure whereby a judgment had to first be recognised in the state of enforcement before it could be enforced. Thus, instead of enforcement being a two-stage process, recognition followed by enforcement, it became a one-stage process, direct enforcement.

Secondly, this had a significant impact on English procedural law because it removed the requirement for permission to serve out of the jurisdiction when dealing with two non-EU parties. As a result, Civil Procedure Rules (CPR), r 6.33(2)(b)(v) provides:

> 'The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and
>
> ...
>
> (v) the defendant is a party to an agreement conferring jurisdiction within article 25 of the Judgments Regulation.'

While more often than not permission would have been granted where there was a jurisdiction agreement between two non-Member State parties in favour of England, this is nevertheless a significant change because: (i) permission was discretionary and the jurisdiction agreement was one factor in the *forum non conveniens* analysis, being a particular concern where the jurisdiction agreement was non-exclusive or could be argued to be so;[1] (ii) even if it was likely that permission would be granted, there was a risk that a hearing would be ordered to argue the issue, which would substantially increase the costs of commencing an action and cause delay. Importantly, under Art 25 jurisdiction is exclusive unless the parties have agreed otherwise and it expressly makes the validity

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of the jurisdiction agreement separate from the substantive contract. Thus, under the new provisions these risks are significantly reduced.

The ambit of the EU regime, in particular Art 25, has also been interpreted recently in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc and another* [2017] EWHC 161 (Comm) by the English High Court to extend to asymmetrical jurisdiction agreements. Financial institutions prefer such agreements as they give them a choice of jurisdiction whereas it restricts the other party, typically a borrower, to one jurisdiction. *Liquimar* is consistent with the traditional English approach of upholding jurisdiction clauses. However, some doubt remains as to whether other EU courts,[2] and ultimately the Court of Justice of the European Union, would accept such an interpretation.

Nevertheless, taking these developments together, it is now simple for a party to commence proceedings under a jurisdiction agreement (asymmetrical, exclusive and non-exclusive). The party attaches court form N510, which is entitled "Notice for Service Out of the jurisdiction where permission of the court is not required", to its claim form and confirms that:

> 'I state that each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and
>
> (a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State; and
>
> (b) the defendant is a party to an agreement conferring jurisdiction within article 25 of the said Regulation.'

In summary, therefore, the Brussels Regulation (Recast) has significantly simplified the process of establishing jurisdiction in the English court where there is a jurisdiction agreement in favour of England between two non-EU defendants.

JURISDICTION AGREEMENTS IN PARALLEL PROCEEDINGS

The Brussels Regulation (Recast) has also strengthened the role of jurisdiction agreements in situations of parallel proceedings in two respects.

First, Art 31(2) makes clear that where the jurisdiction agreement is exclusive the named court does not have to stay its proceedings where second seised under Art 29, as would normally be the case. This change was introduced to address the problem of parties commencing proceedings in another Member State with a view to tactically delaying litigation and increasing costs for the weaker party. Thus, where a party has an exclusive jurisdiction agreement in circumstances where proceedings are already underway in another Member State court they can confirm on form N510 that:

> 'I state that each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and the defendant is a party to an agreement conferring exclusive jurisdiction within article 25 of the said Regulation.'

Second, the Brussels Regulation (Recast) directly addresses the issue of parallel proceedings with Third States, at Arts 33 and 34, which had been causing problems since the decision of *Owusu v Jackson* [2005] Q.B. 801. In short, Arts 33 and 34 concern identical and related proceedings respectively and contain a number of pre-conditions before permitting a stay of proceedings where it is '*necessary for the proper administration of justice*' (as cross-referenced to recital 24). The key point for present purposes is that jurisdiction must be based on Arts 4, 7, 8 or 9 such that it appears that where jurisdiction is based on Art 25, the court has no ability to stay proceedings under the Brussels Regulation (Recast) and an English court *must* allow proceedings to continue despite there being parallel proceedings in Third States, except perhaps on case management grounds.[3]

THE POTENTIAL IMPACT OF BREXIT

It is clear from the above that jurisdiction agreements have been substantially strengthened under the Brussels Regulation (Recast): it is now simple to commence proceedings where one has a jurisdiction agreement; the court does not have to stay proceedings in favour of a Member State where second seised if the jurisdiction agreement is exclusive; and there is no ability to stay proceedings in favour of first seised Third State courts where jurisdiction is established under Art 25. This is to be welcomed by the financial sector and is part of a wider trend towards strengthening the enforceability of jurisdiction agreements.[4] Brexit could, however, undermine this position.

The Commercial Bar Association[5] and the Bar Council[6] have recently published their views on the best way for the United Kingdom to proceed following Brexit.[7] There are, essentially, five options:

(1) The United Kingdom could sign an agreement with the European Union which is analogous to that which Denmark signed in 2005 when they agreed to the application of the Brussels Regulation. There is precedent for a non-Member State to do so as Poland joined between 1999 and 2004 when they were not an EU or EFTA State.
(2) The UK could sign the Lugano Convention, which is currently signed by the EU, Iceland, Norway and Switzerland (the EFTA States). While the UK is currently a signatory to this by virtue of their membership of the EU, on Brexit this would cease and they would essentially be joining Iceland, Norway and Switzerland.
(3) The UK could sign the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention) , which is currently

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signed by EU members, Mexico and Singapore. Again, the UK is currently a signatory to this by virtue of their membership of the European Union. On Brexit they would essentially be joining Mexico and Singapore.

(4) The UK could seek to persuade the EU to sign an entirely new jurisdiction regime or to revise the terms of the Lugano Convention 2005 which included the same advantages as the current regime.

(5) The UK could do nothing.

ComBar has recommended that the UK should: (1) enter into a UK-EU Agreement with the EU to ensure the continued application of Brussels Regulation (Recast); (2) become a signatory to the Lugano Convention; (3) become a signatory to the Hague Convention; and (4) adopt transitional arrangements to ensure a smooth transition and adopt the recommendations proposed by the Bar Council.

This would be a welcome course in the present context for four reasons.

First, it is not realistic for the UK to simply do nothing and it appears that there is no political appetite or time to negotiate an entirely new treaty.

Secondly, it would be inadequate to only sign the Lugano Convention because it requires a party to the jurisdiction agreement to be domiciled in a Contracting State (Art 23). Further, there is no equivalent to Art 31(2) of the Brussels Regulation (Recast) with the result that there is no protection against a party commencing proceedings in another Contracting State to delay proceedings and increase expense. Finally, there are no provisions addressing parallel proceedings with Third States such that the problems created by *Owusu v Jackson* will return. While there may be scope to negotiate a "revised" Lugano Convention that incorporates these changes, at the time of writing it does not appear that there is real demand for such a move.

Thirdly, while the Hague Convention is directly aimed at the enforcement of jurisdiction agreements, it is limited to exclusive jurisdiction agreements (with no direct authority to suggest it applies to asymmetrical jurisdiction agreements); it does not cover a number of important areas of practice (including carriage of goods, insolvency and anti-trust); and it does not have the same advantages in relation to parallel proceedings. As a result, it would be too limited to rely solely on this instrument.

Fourthly, it is hoped that entering into a UK–EU Agreement with the EU to ensure the continued application of the Brussels Regulation (Recast) would minimise changes to the CPR provisions as to service outlined above which assist in the protection of English jurisdiction clauses.

CONCLUSION

The Brussels Regulation (Recast) and connected CPR amendments have substantially strengthened the role of jurisdiction agreements in resolving international disputes in England: the commencement of proceedings is simple, there are limited situations in which they must be stayed; and enforcement in EU Member States is now a one-stage process.

This undoubtedly strengthens Britain's financial sector both domestically and abroad but may be undermined by Brexit if the UK does not sign a EU–UK Agreement, analogous to that which Denmark signed in 2005, to ensure the continued application of the Brussels Regulation (Recast) and/or pursue further measures such as signing up to the Hague Convention. ■

1 The discussion of jurisdiction clauses as part of the *forum non conveniens* analysis features in *The Eleftheria* [1969] 1 Lloyd's Rep. 237; *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep. 368; *The Rothnie* [1996] 2 Lloyd's Rep. 206; *BP v Aon* [2006] 1 Lloyd's Rep. 549.

2 See, for example, the French decision in *Mme X v. Société Banque Privé Edmond de Rothschild 13*, First Civil Chamber, 26 September 2012, Case No. 11-26022.

3 There was discussion of the court's ability to stay proceedings on case management grounds prior to the Brussels Regulation (Recast) coming into force in *Plaza BV v Law Debenture Trust Corp Plc* [2015] EWHC 43 (Ch), §123–130 and *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), [2012] 1 C.L.C. 645, §199–200.

4 As also seen in the Hague Convention on Choice of Court Agreements 2005.

5 See www.combar.com/news/combar-brexit-papers/

6 See www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf

7 See further Aikens & Dinsmore, "Jurisdiction, enforcement and the conflict of laws in cross-border commercial disputes: what are the legal consequences of Brexit?" (2016) 27 (7) *EBLR* 903; Dickinson, "Back to the future: the UK's EU exit and the conflict of laws", Vol. 12, *Journal of Private International Law* 195 (2016); Masters & McRae, *Journal of International Arbitration*, Special Issue, Vol. 33, 483–500, "What does Brexit mean for the Brussels Regime?" (2016); Prof. Burkhard Hess, "Back to the past: Brexit and European International Private and Procedural Law", *Practice of International Private and Procedural Law (IPrax)*, Vol. 36, Issue 5, 409, September/October 2016.

Further Reading:

- The Hague Convention on Choice of Court Agreements – an unexpected game changer for English schemes of arrangement? [2016] 11 JIBFL 641.
- Foreign company schemes: is an asymmetric jurisdiction clause for choice of English law enough for jurisdiction? [2017] 7 JIBFL 410.