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Preparing for Brussels I recast--jurisdiction agreements

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Dispute Resolution analysis: With the recast Brussels I Regulation set to apply from January 2015, what do lawyers need to be aware of and prepare for when dealing with matters under the new regulation? Dr. Walter Häberling, partner with Meyerlustenberger Lachenal in Switzerland, and Heike Schulz, associate with the firm, consider the key changes relating to choice of court agreements and what they could mean for the relationship between Brussels I (recast) and the Hague Convention.

What are the key changes to section 7?

Heike Schulz (HS): The Regulation (EC) 1215/2012 (Brussels I (recast)) was adopted on 12 December 2012 and will apply from 10 January 2015 as part of the EU legal system. It replaces Regulation (EC) 44/2001 (Brussels I Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Brussels I (recast) expressly states that jurisdiction agreements are separable--ie that they 'shall be treated as an agreement independent of the other terms of the contract' (art 25(5)). It also provides that the validity of the choice of court agreement cannot be contested solely on the grounds that the contract is not valid.

Brussels I (recast) also harmonises the conflicts of law rule on the substantive validity of choice of court agreements. Article 25(1) confers jurisdiction to the chosen court 'unless the agreement is null and void as to its substantive validity under the law of that member state'. As a result, the laws of the member state court named in a choice of court agreement govern the question of substantive validity of the jurisdiction clause, even if this law is different from the law governing the contract.

Moreover, Brussels I (recast) widened the scope of choice of court agreements by abolishing the requirement that one or more of the parties must be domiciled in a member state. Its remit is extended to choice of court agreements entered into by parties not domiciled in the EU ('regardless of their domicile', art 25(1)), but which designate a court or the courts of a member state as the chosen forum.

Brussels I (recast) aims to end 'torpedo' actions by providing that any other member state court first seised must stay proceedings if the court designated in the choice of court agreement is also seised (art 31(2)). Therefore, it enhances the effectiveness of exclusive choice of court agreements and helps to avoid abusive litigation tactics by giving the chosen court precedence over all other courts. Currently, choice of court agreements have so far been impeded by the increasingly popular strategy of 'torpedo' actions, which involves bringing actions in courts other than the designated one--preferably courts in member states with a reputation of a slow and/or inefficient judicial system--to cause delay. Under Brussels I (recast), the court appears to have exclusive jurisdiction under a choice of court agreement but second seised, must stay its proceedings until the court first seised has determined whether it has jurisdiction (*Gasser (Erich) GmbH v MISAT Srl*: C-116/02 [2005] QB 1, [2005] 1 All ER (Comm) 538).

The amended provisions laid down in Brussels I (recast) have strengthened party autonomy by ensuring that choice of court agreements may not be circumvented by parties seising other courts than the chosen courts. Moreover, they ensure that the approach to jurisdiction clauses for intra-EU situations is in line with the one

that would apply to extra-EU situations under the Hague Convention on Choice of Court Agreements (Hague Convention).

How will this affect the relationship between Brussels I (recast) and the Hague Convention?

Dr Walter Häberling (WH): The Hague Convention is an international treaty and was adopted on 30 June 2005. It was concluded by the EU on behalf of the member states (except Denmark), but has not yet entered into force. Its objective is to ensure the effectiveness of valid choice of court agreements.

The Hague Convention sets forth three main principles for the enforcement of choice of court agreements:

- the chosen court must hear a case covered by the scope of the Hague Convention when proceedings are brought before it
- other courts must in principle suspend proceedings or decline to hear the case, and
- judgments rendered by a chosen court are recognised and enforceable in other contracting states, except when a ground for refusal applies

The Hague Convention's scope is limited to exclusive choice of court agreements in international civil or commercial matters though contracting states have the possibility to extend the scope of the Hague Convention to cover non-exclusive choice of court agreements. Consumer and employment contracts and certain specified subject matters are excluded from its scope.

When the Hague Convention enters into force and becomes binding upon the EU, the issue of its relation to the rules laid down in the Brussels I Regulation and Brussels I (recast) will arise. Article 26(6) of the Hague Convention deals with the situation where a 'regional economic integration organisation' such as the EU becomes a party to the Hague Convention. In practice, the Hague Convention affects the application of the Brussels I Regulation and Brussels I (recast) if at least one of the parties is resident in a contracting state to the Hague Convention. The Hague Convention takes precedence over the jurisdiction rules of Brussels I (recast) unless both parties are EU residents or come from third states, not contracting states to the Hague Convention. With regard to the recognition and enforcement of judgments, the Brussels I Regulation and Brussels I (recast) will prevail where the court that delivered the judgment and the court in which recognition and enforcement is sought are both located in the EU. This reduction of the scope of application of the Brussels I Regulation and Brussels I (recast) is considered acceptable by the Commission 'in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties'.

What are the practical implications for practitioners?

WH: Brussels I (recast) does not provide a rule allowing member state courts to decline jurisdiction where parties contractually conferred exclusive jurisdiction to a third, non-EU state court. This issue was intimated in *Owusu v Jackson (t/a Villa Holidays Bal-Inn Villas)*: C-281/02 [2005] QB 801, [2005] 2 All ER (Comm) 577 but not decided by the Court of Justice of the European Union. If the non-EU state court is seised first, the lis pendens provisions apply. However, these provisions do not apply if the non-member state court is second seised or if such proceedings have not started at all. Hence, uncertainty continues with regard to proceedings involving non-member states' courts. Particularly, the potential for abusive litigation tactics remains under the Brussels I (recast) in terms of chosen non-member state courts.

The Hague Convention once approved by the EU is beneficial in terms of promoting legal certainty and predictability for EU companies in respect of contracting states of the Hague Convention. It guarantees that choice of court agreements in favour of a contracting state outside the EU are respected in the EU and that agreements in favour of a member state court of the EU are respected in contracting states of the Hague Convention. Moreover, it ensures that a judgment rendered by a chosen member state court in the EU is eligible for recognition and enforcement in contracting states of the Hague Convention. However, not all choice of court agreements are within the scope of the Hague Convention and its ratification might only proceed slowly. As a result, coverage might conceivably be fragmentary for quite some time.

Should lawyers be taking any action in light of these changes?

HS: When negotiating an international contract, a choice of court agreement is an important element for the risk assessment for companies in international trade as it ensures legal predictability in case of a dispute. Lawyers therefore should take into account the different instruments such as the Brussels I Regulation, Brussels I (recast), the Lugano Convention and the Hague Convention, once it enters into force and becomes binding upon the EU, and their respective scope of application.

From a transitional point of view, lawyers when dealing with choice of court agreements in an international context should bear in mind that Brussels I (recast) applies only to legal proceedings instituted on or after 10 January 2015. If proceedings are instituted before that date, their recognition and enforcement will depend on the Brussels I Regulation. The date on which the choice of court agreement was concluded is irrelevant in this context. In contrast, the Hague Convention will apply to exclusive choice of court agreements concluded after the Hague Convention came into force for the contracting state of the chosen court. Where the proceedings are instituted in a court other than the chosen court, the Hague Convention will only apply if the choice of court agreement was concluded after the Hague Convention entered into force for the contracting state of the chosen court and cumulatively the proceedings were instituted after the Hague Convention entered into force for the contracting state in which the proceedings were brought (art 16 Hague Convention).

Having worked for several years as a legal clerk and finally as a judge with two different district courts, Dr Walter Häberling joined Meyerlustenberger Lachenal's litigation and arbitration department in 1997. He expanded his international focus in 1998/99 with post-doctorate studies at the University of Texas, Austin School of Law. In 2004 he was made a partner in the firm. His practice focuses on international contract law, and he has acted as counsel in numerous international litigation and arbitration proceedings.

Heike Schulz started her career as a legal clerk and has been an associate in Meyerlustenberger Lachenal's litigation and arbitration department since 2010 focusing on contract law in an international context, conflict of law rules and international civil procedure law. She holds a master's degree from the University of Potsdam (LLM) and a master's degree from the London School of Economics and Political Science (LLM) and has recently been involved in various litigation and arbitration proceedings for Swiss and international clients.

Meyerlustenberger Lachenal is based in Zurich and Geneva with offices in Zug, Lausanne and Brussels. It is one of the largest law firms in Switzerland and has been ranked in the Legal 500 and Chambers as one of the leading law firms in the country.

Interviewed by Kate Beaumont.

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