Jurisdiction, recognition and enforcement of judgments in civil and commercial matters

A new regulation applies

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On 12 December 2012, 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 ("Regulation 1215/2012" or "Brussels I*bis* Regulation") was adopted. It recasts and replaces Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation").

From 10 January 2015, Regulation 1215/2012 applies to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after this date.

The purpose of the recast is to ease the free circulation of judgments in civil and commercial matters within the European Union ("EU") and to facilitate access to justice.

Věra Jourová, the EU's Commissioner for Justice, Consumers and Gender Equality, stated that "*[t]his is very good news for Europe's citizens and SMEs. These new rules could bring savings of between €2,000 and €12,000 per individual case. It is a successful delivery on the promise to cut red tape and strengthen the EU's Single Market. Such action will make a significant difference in particular for small and medium enterprises and will open up many more opportunities for business across Europe*"[1].

The new regulation has left the core features of the previous regime on jurisdiction in civil and commercial matters largely unchanged. The main changes can be summarised as follows:

1. Abolition of *exequatur*

Regulation 1215/2012 substantially simplifies the system put in place by the Brussels I Regulation as it abolishes the need for an *exequatur*, i.e. the procedure for the declaration of enforceability of a judgment in another Member State.

The Brussels I Regulation required a declaration of enforceability for a judgment given in a Member State to be enforced in another Member State (Article 38(1)).

According to the European Commission ("EC"), the *exequatur* usually costs between €2,000 and €3,000 depending on the Member State, although it could cost up to €12,700 including lawyers' fees, translation and court costs. In almost 95% of cases, this procedure was a pure formality[2].

Regulation 1215/2012 provides that a judgment delivered in a Member State, which is enforceable in that Member State, shall be enforceable in any other Member State, without any declaration of enforceability being required (Article 39). An enforceable judgment shall entail the power

[1] http://europa.eu/rapid/press-release_IP-15-3080_en.htm.

[2] http://europa.eu/rapid/press-release_IP-15-3080_en.htm.

to proceed to any protective measures existing under the law of the Member State addressed (Article 40).

Pursuant to Article 42(1) of the Brussels I*bis* Regulation, a party who wishes to enforce a judgment delivered in another Member State shall provide the competent enforcement authority with:

a) A copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

b) A certificate issued by the court of origin in the form provided in Annex I of this regulation.

Notwithstanding the above, the new regulation still provides for grounds to refuse enforcement of a judgment (Articles 46 et seq. of the Brussels I*bis* Regulation; Articles 34 and 35 of the Brussels I Regulation). These grounds are the same as those for the refusal of recognition of a judgment (Article 45 of the Brussels I*bis* Regulation):

a) If the enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed;

b) Where the judgment was delivered in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence;

c) If the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

d) If the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;

e) If the judgment conflicts with the rules governing the jurisdiction when the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employees was the defendant (respectively Articles 10 to 16, Articles 17 to 19 and Articles 20 to 23), and the rules governing the exclusive jurisdiction (Article 24).

According to the EC, the new regulation abolishes the previous costly and lengthy procedure, which is used 10,000 times per year. As a consequence, cross-border legal disputes will be more easily solved and it should allow savings of up to €48 million each year in the EU.

2. Enhancement of effectiveness of choice of court agreements

An important amendment concerns the rule on international *lis pendens* which aims at addressing one of the main problems with the former regulation by strengthening the protection given to jurisdiction agreements.

Article 27(1) of the Brussels I Regulation reads as follows: "*where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized was established*". This mechanism led to an undermining of contractual jurisdiction clauses with the rushing to the favoured court in order to gain advantage of first seizure. This abuse of the *lis pendens* rule is also known as "Italian torpedo".

The Brussels I*bis* Regulation now gives the court chosen by the parties precedence over all other courts regardless of when proceedings are started.

The new regulation preserves the general rule that any court other than the court first seized must stay its proceedings pending its decision (Article 29(1)). However, an important exception has been inserted.

Pursuant to Article 31(2) of Regulation 1215/2012, where a court of a Member State on which parties have conferred exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until the court seized on the basis of the agreement declares that it has no jurisdiction under such agreement.

In other words, should the parties have conferred exclusive jurisdiction on a certain court, the latter may proceed to hear the case, even if it was not first seized and all other courts shall stay their proceedings. Once the court designated in the agreement has established jurisdiction, any court from another Member State shall decline jurisdiction in favour of the former one.

3. Extension of the jurisdiction rules to disputes involving defendants who are not domiciled in an EU Member State

Under the Brussels I Regulation, consumers were often not able to exercise their rights when, for instance, purchasing goods from an undertaking domiciled in a non-EU country but selling products in the EU.

The new jurisdiction rules in relation to employees, consumers and insured shall also apply independently of the domicile of respectively the employer, the undertaking or the insurer, when an exclusive competence rule protecting these three categories of person designates an EU jurisdiction (respectively Articles 20 and 21, Articles 17 and 18, and Articles 10 and next).

For instance, an employer which is not domiciled in the EU may be sued in a court of a Member State where (or from where) the employee habitually carries out his work, or in the court of the last place where the employee did so.

4. Arbitration exception

One of the strongest debates in relation to the Brussels I Regulation concerned the nature of its "arbitration exception". According to its Article 1(2)(d), arbitration was explicitly excluded from the scope of this regulation. Nevertheless, a series of court decisions watered this principle down.

According to most literature, Regulation 1215/2012 provides clarifications in this matter which have been welcomed.

First of all, the arbitration exception is maintained in Article 1(2)(d) of the new regulation.

Recital 12 of the Brussels I*bis* Regulation defines the scope of the arbitration exception as follows:

a) A court of a Member State should not be prevented from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is valid;

b) A ruling given by a court of a Member State on the validity of an arbitration agreement should not be subject to the rules of recognition and enforcement laid down in this new regulation, regardless of whether the court decided on this as a principal issue or an incidental question;

c) Where a court of a Member State has determined that an arbitration agreement is not valid, this should not preclude that court's judgment on the substance of the matter from being recognised or enforced in accordance with Regulation 1215/2012. This should be without prejudice to the competence of the courts to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

d) The Brussels I*bis* Regulation should not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of the arbitrators, the conduct of an arbitration procedure or any other aspects thereof.

Regulation 1215/2012 addresses some concerns arising from the case law of the Court of Justice of the European Union (in particular the West Tankers case [3]). A party may still open proceedings on the validity of an arbitration agreement and the court seized has the right to refer the parties to arbitration. Nevertheless, a court of a Member State is not required to recognise another judgment of a court of another Member State on the validity of an arbitration agreement. Even in the case of inconsistent decisions, where a court of a Member State is presented with (i) a valid arbitral award under the New York Convention and (ii) a conflicting judgment given by another court of a Member State that is enforceable under the Brussels I*bis* Regulation, the New York Convention takes precedence over Regulation 1215/2012, which means that

[3] CJEU Judgment of 10 February 2009, Case C-185/07 Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, and Generali Assicurazioni Generali SpA v. West Tankers Inc., Rep, 2009, I-663.

the enforcement of the arbitral award takes precedence over the enforcement of a judgment.

Despite the adoption of Regulation 1215/2012, the following issues were not clarified and therefore remain outstanding:

a) Regulation 1215/2012 does not address a situation where a party needs to enforce an arbitral award in a Member State, whose court held the arbitration agreement invalid;

b) Taking into account the precedence of the New York Convention over the Brussels I*bis* Regulation, there might be scope for parallel court and arbitral proceedings until the arbitral tribunal renders an enforceable award;

c) There might also be a risk of repeated court proceedings where a party dissatisfied with a judgment on the validity of an arbitration agreement rendered by the court first seized (which falls outside the scope of the Brussels I*bis* Regulation – pursuant to its Recital 12 – and which is therefore not binding on other Member States) initiates similar court proceedings in another Member State.

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