

Recast of the “Brussels I” (European) regulation

After 10 years of application, Council Regulation (EC) N°44/2001 of December 22, 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as “Brussels I Regulation”) is being recast.

“Matrix” of the European civil judicial cooperation, this text, of a considerable practical importance since it applies in a broad range of matters, is therefore subject to an eagerly expected review.

For the record, Council Regulation (EC) N°44/2001, the purpose of which is firstly to identify the most appropriate jurisdiction for solving a cross-border dispute and secondly to ensure the recognition and enforcement of judgments issued in another Member State, replaced the 1968 Brussels Convention^[1]. It entered into force on March 1, 2002.

It is after a 8-year period of functioning that the European Commission has decided to initiate a review process. On December 14, 2010, it adopted a Proposal for a regulation intended to recast the original regulation^[2]. Then, on December 6, 2012, the Council of the European Union has approved the recast in the form settled with the European Parliament in a first reading agreement.

It is provided that the recast regulation will start applying two years after its entry into force. Its purpose is officially *“to make the circulation of judgments in civil and commercial matters easier and faster within the Union, in line with the principle of mutual recognition and the Stockholm Programme guidelines”*^[3]. It will substantially change the current system, in particular with regards to the procedure for the recognition and enforcement of judgments, the universal application of the regulation and the application of choice of jurisdiction clauses.

1. Abolition of the intermediate procedure for the recognition and enforcement of judgments (exequatur)

According to the European Authorities, exequatur, i.e. the procedure for the declaration of enforceability of a judgment in another Member State, remains an obstacle to the free circulation of judgments within the

European Union.

Pursuant to Article 38 of the current Regulation, *“a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there”*.

In practice, this procedure requires verifying quite formally the existence of the judgment and its enforceability in the Member State where it has been issued in order to obtain a declaration of enforceability from a judge of the Member State where recognition and enforcement is sought. It is an ex parte procedure during which the judge hearing the request for the recognition and enforcement of a judgment does not examine the merits of the case (Article 41 of the current Regulation).

As such, under the recast Regulation, *“a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required”* (Article 39 of the recast Regulation).

The recast Regulation stipulates that the applicant must only provide the competent enforcement authority with all customarily required certificates and forms, in addition to a copy of the judgment (Article 42 of the recast Regulation).

This is a pure and simple application of the mutual recognition principle on which is based the very creation of an internal market in Europe in the field of justice. Judgments are supposed to freely circulate from one Member State to the other, without having the circulation be subject to any kind of judicial proceedings, even an ex parte procedure.

As opposed to what was applicable under the original Regulation, the application of enforcement measures will no longer be conditioned upon the intervention of a judge of another Member State in charge of acknowledging the enforceability of the foreign court judgment within the territory of his/her Member State.

Despite the forceful affirmation of the mutual recognition principle premised on mutual trust between Member States, the European Authorities have chosen to maintain the procedural “safeguards” initially granted under the Regulation to people against whom enforcement is sought abroad.

In the name of fundamental principles underlying the right to a fair trial, defendants may request the Member State to refuse the recognition (Art. 45 of the recast Regulation) or enforcement (Art. 46 of the recast Regulation) of a judgment on exceptional grounds listed in Article 45 of the recast Regulation (where such recognition is manifestly contrary to public policy, where the judgment was given in default of appearance or where the judgment is irreconcilable with an earlier judgment).

In this respect, it should be noted that the European Commission had proposed to replace the traditional concept of “public order” by the more modern one of “violation of the fundamental principles underlying the right to a fair trial” (Art. 46 of the Commission’s proposal) and wished to maintain the intermediate procedure for the recognition and enforcement of judgments issued in defamation cases and collective redress

proceedings (Art. 37§ 3 of the Commission's Proposal).

1. Extension of the jurisdiction rules to third country defendants

Right at the outset of the recast process, it was widely acknowledged that access to justice was not guaranteed within the European Union when the defendant was domiciled in a country outside the European Union (third-party country). In such case, the application of the initial Regulation could indeed be set aside (Article 3 of the current Regulation).

The European Authorities have endeavored to ensure that the recast Regulation would have a universal scope of implementation – just like the other European texts related to private international law – by introducing exceptions to the provisions set forth in Article 3 of the current Regulation (Article 6 of the recast Regulation).

Under the recast Regulation, some European jurisdiction rules designed to protect the “weaker party” in consumer and employment contracts, i.e. consumers and employees, will apply, irrespective of whether the defendant is based in a third party country or not (Articles 18,1 and 21, 2 of the recast Regulation).

In addition, the recast Regulation also provides for certain additional means to establish the residual jurisdiction of EU Member States against defendants based in third party countries (Article 24 of the recast Regulation).

Lastly, the recast Regulation addresses the issue of international *lis pendens* for disputes on the same subject matter and between the same parties pending before the courts in the EU and in a third-party country (Article 33 of the recast Regulation).

2. Enhancement of the effectiveness of choice of jurisdiction clauses

Under Regulation n°44/2001, it is the will of the parties to an international contract that is supposed to be the essential element to determine the competent jurisdiction.

Yet, in practice, there has been a surge in abusive litigation tactics aimed at applying *lis pendens* rules to preclude – at least provisionally – the enforcement of choice of jurisdiction clauses.

As indicated above, *lis pendens* describes a situation where the same dispute is brought before two distinct courts (i.e. proceedings involving the same cause of action and between the same parties). Theoretically, the second seized court (even if designated in a choice of jurisdiction clause) must suspend its proceedings until the first seized court rules on its jurisdiction (Article 27 of the current regulation).

As such, it does not really matter if the first seized court obviously lacks jurisdiction: because of the suspension of the proceedings before the second seized court, the parties seeking to delay the proceedings can temporarily preclude the application of the choice of jurisdiction clause.

To deter contractual parties from implementing such tactics, the recast Regulation will grant priority to the

court designated in the choice of jurisdiction clause to rule on its jurisdiction, regardless of whether it is first or second seized (Article 33 of the recast Regulation).

[1] Brussels convention of September 27, 1968, on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

[2] Proposal for a regulation of the European parliament and of the council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), European Commission, December 14, 2001, COM/2010/0748 final.

[3] Press release dated December 6, 2012, of the Council of the European Union, n°16599/12.

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