Linklaters

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The Brussels I Recast - A guide to the changes to the EU jurisdiction regime

Introduction

In January 2015, EU Regulation 44/2001 (the “**Brussels I Regulation**”) will be replaced by EU Regulation 1215/2012 (the “**Brussels I Recast**”) as the principal legislation governing, in civil and commercial matters before the EU courts, the taking of jurisdiction and the recognition and enforcement of judgments from other EU Member States. In this note we review the changes introduced by the Brussels I Recast together with some of the practical consequences. Click here for a copy of the Brussels I Recast.

When will the Brussels I Recast apply?

The rules on jurisdiction in the Brussels I Recast (hereinafter the “**Recast**”) will apply to any proceedings instituted before an EU court *on or after* 10 January 2015. For judgments, however, the applicability of the Recast is tied to when the substantive proceedings they are handed down in were instituted (not when the enforcement proceedings are instituted). That is to say, the recognition and enforcement of a judgment given in proceedings instituted before 10 January 2015 will remain under the Brussels I Regulation.[1]

A note on the Lugano Convention

The Lugano Convention 2007 governs jurisdiction and the recognition and enforcement of judgments as between the EU and Switzerland, Norway and Iceland (the latter three hereinafter referred to as the “**Lugano States**”) in civil and commercial matters. It essentially applies the provisions of the Brussels I Regulation as between the EU and the Lugano States.

The Recast does not affect the Lugano Convention.[2] As before the EU courts, the Lugano Convention will therefore continue to govern matters when it applies.[3] References to “non-EU” matters in this briefing must therefore be

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[1] Articles 66(1),(2) Recast.
[2] Article 73(1) Recast.
[3] From the perspective of an EU court the Lugano Convention applies to determine matters of jurisdiction whenever a defendant is domiciled in a Lugano State, the case involves exclusive jurisdiction of a Lugano State, the case involves a jurisdiction agreement in favour of a Lugano State, or there is a *lis pendens* before a Lugano State court. Likewise it governs the recognition and enforcement of a judgment from the Lugano States (Article 64 Lugano Convention).

read accordingly (i.e. from the perspective of an EU court, where a Lugano State comprises the relevant non-EU territory, the application of the Lugano Convention will still need to be considered).

The changes in overview

Generally speaking, the substance of the Recast follows that of the Brussels I Regulation. It is an evolution of the text rather than a fundamental rewrite. Those who are already familiar with the workings of the Brussels I Regulation will, therefore, find that the Recast preserves much of what has gone before.

Likewise, Recital 34 of the Recast stresses the need for continuity in the interpretation of the Recast and its predecessors (the Brussels I Regulation and the Brussels Convention). This means that CJEU case law interpreting a provision of its predecessors remains applicable where the relevant provision of the Recast may be treated as being equivalent.

There are, however, a number of changes of particular importance which we examine below. These comprise:

- Strengthening of the arbitration exclusion;
- important changes to the operation of jurisdiction clauses in favour of EU courts;
- new rules concerning non-EU *lis pendens* (i.e. disputes pending outside the EU); and
- simplification of the procedure for the enforcement of EU judgments.[4]

Strengthening of the arbitration exclusion

As with the Brussels I Regulation, certain "civil and commercial matters" are excluded from the scope of the Recast. One of these is, under both instruments, arbitration.[5] The exclusion is necessary to permit EU courts to give effect to arbitration clauses and arbitration awards free of the Regulation's scheme.

As with any exclusion, however, questions concerning its scope have arisen and, in recent years, difficulties have been created by the CJEU's ruling in *Allianz SpA v West Tankers*[6] ("***West Tankers***"). In that case, the CJEU prohibited the use of an anti-suit injunction by an EU court (being the court of the seat of arbitration – in this case England) to restrain court proceedings brought before another EU court in "breach" of an arbitration clause (in this case – Italy).

[4] In addition to these changes the Recast also contains new provisions in its rules on consumer and employment contracts which permit consumers/employees to sue a non-EU counterparty/employer in certain places within the EU (Articles 18(1) and 21(2) Recast). These, however, are beyond the scope of this note.

[5] Article 1(2)(d) in both.

[6] C-185/07.

That specific outcome took the headlines but more issues were, in fact, created by the detail of the CJEU's reasoning. First, it decided that although the proceedings for the injunction were outside of the scope of the Brussels I Regulation, they, nonetheless, were impermissible because they risked undermining its operation in the (Italian) court proceedings. On that reasoning, what other actions in support of arbitration might be prohibited on the basis that they, too, serve to undermine the operation of the Regulation?

In addition, the CJEU also held that any decision by the "wrongly seized" (Italian) court on the validity of the arbitration clause was a judgment within the Regulation for the purposes of recognition elsewhere in the EU. This raised the possibility that such a court's ruling would also bind the courts of the seat - with obvious consequences for the arbitration itself.

In the light of this case, reform of the arbitration exclusion became a priority. The eventual answer is that the Recast retains the arbitration exclusion but strengthens it by a new Recital 12. This reverses many of the negative effects of the *West Tankers* judgment by making the following clear:

i. That whilst nothing in the Recast prevents an EU court from examining the validity of an arbitration clause, any ruling as to that is not enforceable under the Recast's provisions.

ii. That if an EU court, despite the arbitration clause, goes on to rule on the substance of the underlying dispute that is to be without prejudice to the recognition and enforcement of arbitral awards by EU courts in accordance with the New York Convention, which takes precedence.

iii. Any ancillary court proceedings relating to the arbitration process are to be unaffected by the Recast.

In short, the Recast reinstates a clearer separation between the arbitration process and court proceedings and, in so doing, should reduce the potential for tactical litigation within the EU designed to frustrate EU arbitration clauses. In such cases, even *if* a court before which proceedings are (wrongly) brought refuses a stay under the New York Convention, the reforms should mean that the arbitration process can still be pursued without undue interference.

Important changes to the operation of jurisdiction clauses in favour of EU courts

- **EU exclusive jurisdiction clauses versus EU *lis pendens***

The Recast's changes in this area address one of the most controversial features of the Brussels I Regulation. In brief, one of the Brussels I Regulation's current articles[7] imposes a mandatory stay of proceedings on a second seised EU court in the event that proceedings concerning the same parties and the same cause of action are commenced elsewhere in the EU first. That second seised court must wait until the first seised court has determined whether it has jurisdiction and can only proceed if the first seised

[7] Article 27 Brussels I Regulation.

court declines. Controversially, in *Erich Gasser v MISAT* [8] the CJEU decided that this rule applies even where the second seised court's jurisdiction is based on an exclusive jurisdiction clause in its favour.

This ruling facilitated a particular kind of tactical litigation; known as the "torpedo" action – litigants could commence proceedings in one EU court - typically one which might take years to determine its jurisdiction - knowing that they could frustrate the progress of proceedings in the chosen court and, potentially, force a favourable settlement.[9]

There was a justifiably critical reaction to this state of affairs and rectifying it became one of the principal aims of the revision of the Brussels I Regulation.

As a result, new provisions[10] have been inserted into the Recast which require a first seised EU court to stay its proceedings as soon as the designated EU court under an exclusive jurisdiction clause has been seised. The non-chosen court will not then be able to proceed at all unless (and until) the chosen court declines jurisdiction.

Further, provisions in Recital 22 of the Recast strengthen this mechanism by making it clear that, as a consequence, the chosen court shall have priority to decide any issues concerning the validity or scope of the jurisdiction clause. This is designed to stop litigants from arguing that there is no effective clause upon which to send the case back to the chosen court. And, in addition, once seised, the chosen court is able to proceed irrespective of whether the non-chosen court has already decided on the stay of proceedings: so any delay on the part of the first seised court is neutralised.

In summary, this is a welcome reversal of one of the Brussels I Regulation's more uncommercial aspects. There do, however, remain defined limits to the rule. Specifically:

i. The Lugano Convention is unaffected by the Recast. This instrument will therefore continue to govern *lis pendens* issues involving proceedings before, on the one hand, an EU court, and, on the other, the courts of the Lugano States. As the Lugano Convention replicates the Brussels I Regulation it appears that "torpedo" actions will still be possible as between the EU courts and those of the Lugano States.

ii. The Recast itself contains a number of exceptions which may apply depending on the facts of any particular case; namely where the party seeking to rely on the clause entered an appearance in the first seised court, the provisions as to insurance, consumer or employment contracts which would deny effect to such an agreement apply, the parties have entered into

[8] C-116/02. By contrast, the CJEU has held that the position is different if the second seised court's jurisdiction is based on Article 22 of the Brussels I Regulation: *Weber v Weber* (C-438/12).

[9] In this context, an anti-suit injunction is no answer as the CJEU, in *Turner v Grovit* (C-159/02), prohibited the use of such measures by an EU court to protect proceedings brought before it against court proceedings elsewhere in the EU.

[10] Articles 31(2) and 31(3) Recast.

conflicting agreements, or, self-evidently, where the chosen court is seised first.[11]

iii. EU courts have a general discretion[12] to stay proceedings if related actions are pending elsewhere in the EU. Where an exclusive jurisdiction agreement exists in favour of the second seized court, the use of this discretion is likely to be confined to exceptional circumstances; but it nonetheless exists.

Finally, there are also a few practical issues which will need to be worked through by case-law before the new rule's workings become entirely clear. Two are as follows.

First it is not entirely clear what (if anything) needs to be "proven/shown" to the non-chosen court before it stays its proceedings. Clearly, it must be shown that that the chosen court has been seised; but this presents no problem. Rather, the issue is what exactly must be shown as regards the relevant jurisdiction clause. The new mechanism clearly does not require (or permit) the non-chosen court to be satisfied that there is a fully effective clause in the sense of requiring it to determine whether the Recast's requirements[13] as to the same are met. Recital 22 clearly envisages that a large part of the point of the stay is to reserve such a determination for the chosen court. But, if not that, then what? The most sensible approach would appear to be for the party seeking a stay in the non-chosen court to have to produce some *prima facie* evidence of such a clause; i.e. enough to engage the procedural stay but short of requiring it to fully argue and prove that the Recast's requirements of a jurisdiction clause are met.

Although this remains an issue, it should be remembered that in many cases the problem may be an academic one. An important feature of the new rule is that the chosen court is *released from its obligation to stay proceedings irrespective* of whether the non-chosen court has yet decided on the stay. Amongst other things, this creates an ability to obtain a pre-emptive ruling from the chosen court on its jurisdiction which will then be binding on any non-chosen court.[14]

The second issue is whether "one-sided/asymmetrical" exclusive jurisdiction clauses fall within the new rule. It might be said that the absence of an express reference to these in the text of the new rule creates some uncertainty in its application to them. In cases where such a clause is valid under the Recast (we consider this point below) it is hard to see why this should be so. First, on its own terms, the rule requires a court upon which "exclusive jurisdiction" has been conferred and, of course, in the case in which one party is tied to a particular jurisdiction but commences proceedings elsewhere that is *precisely* the nature of the jurisdiction that the chosen court has in respect of *the proceedings commenced elsewhere*. Second, the legislative policy of the new rule (encapsulated in Recital 22) is to enhance

[11] Articles 31(2), 31(4), Recital 22 Recast.
[12] Article 30 Recast (reproducing Article 28 Brussels I Regulation).
[13] I.e. Article 25.
[14] Article 31(3) Recast.

the effectiveness of choice-of-court agreements and to prevent abusive litigation tactics. Denying such clauses a place in the new rule's scheme would be directly contrary to that policy.

Nonetheless it is possible that courts in the EU may, at least before a CJEU ruling, take different views and, therefore, this provides another reason for parties to continue assessing the value of the flexibility to them of such clauses (see further below). It should not be overlooked, however, that where the chosen court is commercially robust and will act quickly then its (aforementioned) ability to pre-empt matters should help to minimise the potential for trouble in this area.

- **"Core" rules on jurisdiction clauses in favour of EU courts**

Article 25(1) of the Recast contains its "core" rules on EU jurisdiction clauses. Like its predecessor (Article 23(1) of the Brussels I Regulation) it requires that effect be given to such clauses provided certain requirements are met.

There are two significant changes. First, Article 23(1) Brussels I Regulation required at least one party to be EU-domiciled before its terms fully applied. That requirement is removed. So, in matters to which the Recast's provisions apply, such clauses will be governed by and derive their effect from Article 25(1), regardless of the parties' domicile.

One important consequence for English lawyers here is the likely impact this change will have upon the need to obtain permission to serve out of the jurisdiction in cases where there is a jurisdiction clause in favour of the English courts. Generally speaking this is not required where jurisdiction is based on the Brussels I Regulation, and the same will be true under the Recast. So the corollary of any expansion to the scope of its provisions should be a reduction in cases where permission is needed.

The second change is a new rule which states that the chosen court shall have jurisdiction unless the agreement is "null and void as to its substantive validity under the law of that [i.e. the chosen] Member State". Recital 20 adds that this includes the chosen state's conflict of laws rules.[15]

This is a potentially significant change. In case law on Article 25(1)'s predecessors the CJEU has consistently held that assessing the clause's validity is a matter for autonomous EU requirements (specifically the, minimal, formal requirements of the article), not a national governing law.[16]

This being the case, what are the consequences of this new change? It is easiest to consider first what is not altered. First, national laws on formal validity (for example that a clause be written in a particular language) will remain irrelevant. The (minimal) formal requirements remain prescribed by

[15] Jurisdiction clauses are excluded from the scope of the Rome I Regulation (Article 1(2)(e), Rome I) so the determination of the applicable law in this regard will be down to national conflict of laws rules as to the law which applies to govern a jurisdiction clause. When choosing to litigate, parties frequently "match" the governing law of their contract and their chosen jurisdiction (e.g. English law/English jurisdiction clause) which should help keep issues in this regard to a minimum. More complicated scenarios (where, for example, a foreign law is chosen or where two or more courts are chosen) may, however, require greater analysis.

[16] E.g. *Hugo Trumpy* (C-159/97). In addition, associated matters such as the separability of a clause have been measured by an autonomous standard (*Benincasa* C-269/95).

the Recast.[17] Second, separability of a jurisdiction clause is also expressly preserved by Article 25(5).[18]

Beyond that, however, there is a lack of consensus as to what the consequences are, and the new rule may bring potential pitfalls. To give one example – if the infamous French Cour de Cassation case of *Mme X v Rothschild* on "one-sided/asymmetrical" exclusive jurisdiction clauses were replayed under the Recast (and French law was the appropriate law to be applied), it becomes more difficult to criticise the outcome.

The practical implication would therefore appear to be that it may be prudent, when using a jurisdiction clause in favour of an EU court, to consider which national law will apply to determine the issue of substantive validity under the Recast in order to anticipate, and avoid, any specific problems that may arise. This will, of course, depend upon the applicable national law.[19]

Parties may wish to begin to consider this even before 10 January 2015 as it appears that, under the Recast, the rules to be applied to a clause will be those in effect when proceedings are commenced, not when the clause is entered into.[20]

- **What about "one-sided/asymmetrical" exclusive jurisdiction clauses in favour of EU courts?**

Such clauses have been the topic of a significant degree of discussion since the case of *Mme X v Rothschild*. Although a decision of the French Cour de Cassation the case has had practical ramifications even in transactional situations without a French nexus. In particular, the resulting uncertainty (specifically the increased risk of a reference to the CJEU to determine the validity of such clauses under the Brussels I Regulation) has led to a greater focus by parties on whether the flexibility offered by such clauses is necessary for their arrangements.

Under the Recast, it would seem that much of the controversy may be subsumed within the rule on substantive validity discussed above. Accordingly, parties who are considering use of such a clause in favour of an EU court may well wish to assess how the national law that will apply to the issue of substantive validity treats such clauses before using them. Where English law applies this should not be a problem in transactional or financing contracts between commercial entities as English law respects such clauses.[21]

That being said, whilst the precise scope of what is meant by "substantive validity" under the Recast awaits a CJEU determination, there remains the

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[17] See Articles 25(1), 25 (2) Recast.

[18] Which preserves the CJEU's decision in *Benincasa* against the legislative change discussed.

[19] Where this is English law (as, for example, in an English law governed contract with an English jurisdiction clause) problems are very unlikely to arise in transactional or financing contracts between commercial entities as English law generally upholds the parties' bargain in this area. Other laws which take a similar approach include, for example, German and Dutch law.

[20] See e.g. *Sanicentral* (C-25/79), a case dealing with this point under the transitional provisions of the Brussels Convention.

[21] See e.g. *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor* [2013] EWHC 1328 (Comm). Other laws under which the same would be true in such circumstances include, for example, German and Dutch law.

possibility of a court taking the view that the issue as to whether the Recast objects to such a clause *per se* (i.e. the controversy generated by *Rothschild*) still remains as a separate issue to be decided. Accordingly, the rationale for focusing on whether the flexibility offered by such a clause is necessary (as discussed above) would still seem to remain even once the Recast is applicable (and even assuming that there are no issues with such clauses under the law applicable to the issue of substantive validity). This also remains so in light of the observations made above concerning the new first seised rule.

New rules concerning non-EU *lis pendens*

The Recast contains new provisions, Articles 33 and 34, which regulate the response of EU courts to non-EU *lis pendens*. In doing so they are of fundamental importance to situations involving non-EU[22] jurisdictional factors (i.e. anything jurisdictionally relevant, for example an exclusive jurisdiction clause in favour of a non-EU state).

This is a complex issue but the problem has been whether an EU court, which would otherwise have jurisdiction under the Brussels I Regulation, can decline to exercise that jurisdiction on the basis of a non-EU jurisdictional factor.

Where the defendant is non-EU domiciled the issue has been less acute since national law can often be applied by the court to determine the matter. This will remain so under the Recast.[23]

Greater difficulties have arisen when any of the other grounds of jurisdiction in the Brussels I Regulation apply, for example Article 2 (EU defendant sued in the courts of its domicile). In such a case the text of the Brussels I Regulation is silent as to what the EU court can do. Further, in *Owusu v Jackson*[24] the CJEU held that in such a case an EU court could not decline jurisdiction on the basis of *forum non conveniens* considerations in favour of a non-EU court.

Is an EU court therefore bound to ignore non-EU jurisdictional factors in such cases? The one question left open by *Owusu* was whether this is true even where the factor is of a specific type which the Brussels I Regulation would give particular status to if in favour of an EU court. For example, a case where the non-EU court should have exclusive jurisdiction over, say, rights *in rem* in property in its jurisdiction, a case where an exclusive jurisdiction clause exists in favour of the non-EU state or where there is a *lis pendens* in the non-EU court.

One solution to such cases which many commentators have advocated[25] is to apply the equivalent provisions of the Brussels I Regulation by analogy

[22] The Lugano States form an exception to the following analysis as the Lugano Convention regulates the EU's jurisdictional relationship with those states so the issues discussed would fall to be determined by reference to that Convention in cases where they are involved.
[23] Article 4 Brussels I Regulation, Article 6 Recast.
[24] C-281/02
[25] And which has been considered by national courts, a recent example in England being *Ferrexpo v Gilson Investments* [2012] EWHC 721 (Comm).

(sometimes called “reflexive effect”) to give effect to the non-EU factor. However, no definitive ruling by the CJEU on this exists.

Against this background, the significance of the new provisions is that they now provide EU courts with a clear legislative rule conferring a discretion to stay proceedings in favour of non-EU proceedings if certain conditions are met.

Overall, those are that the non-EU proceedings must be first in time, the stay must be necessary for the proper administration of justice and, broadly speaking, the judgment of the non-EU court must also be capable of recognition and enforcement in the EU state seized. The discretion can also only operate where the EU court’s jurisdiction is based on the provisions of the Recast which themselves have as a precondition an EU domiciled defendant.[26] By contrast, where, the EU court has exclusive jurisdiction or jurisdiction pursuant to a clause in its favour (respectively, Articles 24 and 25 of the Recast) then the new provisions find no application.

What is the impact of Articles 33 and 34 of the Recast? On one view they are a positive development. Under the Recast there is now at least a firm legislative basis upon which situations involving a non-EU jurisdictional factor (including, say, a jurisdiction clause in favour of a non-EU state) can be given pre-eminence in (some) cases of Recast-based jurisdiction.

On the other hand, however, the existence of the new provisions makes it harder to accept that it is permissible for an EU court to give effect to such factors in circumstances other than set out in the relevant articles (as to do so would, effectively, be to bypass them).[27] If so, reflexive effect is impermissible and, for example, an EU court with jurisdiction over a defendant domiciled in its territory but faced with an exclusive jurisdiction clause in favour of a non-EU court, would only be able to give effect to that clause within the terms of Articles 33 and 34 of the Recast.

The implications should be clear. Under those provisions, it is critical that the non-EU proceedings are first in time. Thus non-EU lawyers managing domestic disputes where EU parties are involved will need to be aware of that. And, if their case raises any possibility of one of those parties being sued in the EU then commencing proceedings quickly in their local jurisdiction will be a vital step in insulating their local court’s proceedings and jurisdiction (be it on the basis of a jurisdiction clause or otherwise) against parallel proceedings in the EU.

One caveat to the above analysis will be cases involving exclusive jurisdiction clauses which fall to be given effect under the following potentially relevant instrument appearing…

[26] I.e. Articles 4, 7, 8 and 9 of the Recast.

[27] Recital 24 of the Recast gives support to such a view as it refers to matters of “exclusive” jurisdiction of a non-EU court as falling within the assessment of the interests of justice to be carried out under Articles 33 and 34 Recast.

On the horizon… the Hague Convention on Choice of Court Agreements (the "Hague Convention")

The Hague Convention is a multilateral instrument available for ratification by any state (at the time of writing only Mexico has yet done so). It will apply only to wholly exclusive jurisdiction agreements in favour of the courts of one Contracting State (or one or more courts *within one* Contracting State). So, non-exclusive or "asymmetric/one-sided" agreements are not its concern (such clauses in favour of an EU court would therefore, in so far as the EU courts are concerned, be governed by the Recast, not the Hague Convention).[28]

In brief, it will require chosen and non-chosen courts in states party to the Hague Convention ("**Convention States**") to respect such a clause when in favour of another Convention State. In addition, judgments given pursuant to such clauses will obtain the benefit of provisions as to recognition and enforcement under the Hague Convention.[29]

The EU has been extremely keen to ratify the Hague Convention and looks set to do so at some point in the coming months. The process for obtaining the European Parliament's consent is already well advanced.[30]

Once it is in force in the EU, the Hague Convention has the potential to affect some of the matters discussed above in a couple of notable ways.

First, as alluded to above, in cases involving a wholly exclusive jurisdiction clause in favour of a non-EU court, it will provide a potential basis by which such a clause may be given direct effect by an EU court, even in the face of Recast-based jurisdiction. A significant limitation is, however, that the chosen court must, of course, be in a Convention State. At present, that means Mexico and ratification by others may be piecemeal.[31] Another further limitation is, however, that even if that requirement is met, there are, so far as the EU courts are concerned, "give-way" provisions in the Hague Convention[32] which will preserve the Recast's effect unless at least one party is resident in a Convention State which is *also not* in the EU (i.e. at present, Mexico).

Second, once the Hague Convention comes into force in the EU, then when an EU court assesses a wholly exclusive clause solely in its favour (or indeed in favour of the courts of one other EU Member State) the Hague Convention

[28] Hartley/Dougachi Report paragraphs 102-109.
[29] There is also provision for judgments given pursuant to non-exclusive clauses to be entitled to recognition and enforcement, subject to reciprocal declarations having been made by the relevant Convention States (Article 22 Hague Convention). Note that, as a general matter, enforcement of an EU judgment in another EU Member State will remain governed by the Recast irrespective of the Hague Convention's provisions on recognition and enforcement (Article 26 (6)(b) Hague Convention).
[30] Once ratified it will then come into force in the EU on the first day following the expiration of three months after the deposit of the EU's instrument of ratification (Article 31(1) Hague Convention), although it will also only apply to exclusive choice of court agreements in favour of an EU court concluded after that date (Article 16(1) Hague Convention).
[31] Part of the reason for the EU ratifying the Hague Convention is to encourage the US to do so.
[32] Article 26(6)(a) Hague Convention.

will be capable of taking precedence over the Recast in terms of which instrument governs the clause.[33]

Such situations will, of course, be significantly limited (at least at first) by the width of the “give-way” rule discussed above. And, in practice, which instrument “governs” will not change matters from the perspective of a *chosen* EU court. All of the changes to the workings of EU jurisdiction clauses discussed above bring the provisions of the Recast in line with the Hague Convention so, from that perspective, the approach to be followed is the same.

Instead, the main potential difference in the texts lies in the absence, in the Hague Convention, of the new mechanism in the Recast which requires a *non-chosen* EU court to stay its proceedings when a *chosen* EU court is seised. If the Hague Convention applies, one question that may arise, therefore, is whether a first seized *non-chosen* EU court must act in accordance with the Recast’s provisions on this point and stay its proceedings. Two points should be made here. First, whatever the answer from the *non-chosen* court’s perspective, it is clear that, under the Hague Convention, the *chosen* EU court is, crucially, *not* obliged to stay its proceedings when another EU court is first seized.[34] Second, it *may* be that the CJEU,[35] should the question come before it, regards the non-chosen EU court as remaining obliged to apply the Recast’s provisions on this point.[36]

And finally… recognition and enforcement of EU judgments

In this area the main change is one of procedure, rather than substance. In summary, the change is as follows: Under the Brussels I Regulation, a party seeking enforcement of an EU judgment in another EU Member State had to first apply for a declaration of enforceability (known as the *exequatur* procedure). This required an *ex parte* application to court whereby the party seeking enforcement would have to exhibit certain documentation to the receiving court that would then make the declaration. The other party could then challenge the declaration by way of entirely separate appeal proceedings. Only after such processes were concluded and the declaration remained in force could a judgment then be enforced locally.

Under the Recast, the procedure is far more streamlined. The *exequatur* procedure is abolished; a judgment enforceable in one EU Member State is now directly enforceable in another. A party can therefore proceed straight to an application for enforcement. The procedure for that application is, generally, to be governed by the law of the EU Member State addressed; although the Recast still prescribes certain requirements as to documents to

[33] I.e. from an EU court’s perspective, the Hauge Convention is not limited to giving effect to exclusive jurisdiction clauses in favour of non-EU Convention Courts.

[34] Hartley/Dougachi Report paragraphs 133-134.

[35] Which, so far as the EU courts are concerned, will have competence to interpret the Hague Convention on the basis of Article 267 TFEU (the Hague Convention having been concluded by the EU on behalf of its Member States)

[36] The CJEU has been prepared to fill gaps in an applicable convention in such a way before (see *The Tatry* (C-406/92)).

be provided and stipulates the same (limited) grounds upon which enforcement may be resisted as the Brussels I Regulation before it.

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