Veröffentlichungen

EU: What is new in the recast Brussels I regulation on Jurisdiction and the Recognition and Enforcement in Civil and Commercial Matters (1st up-date)

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The EU has recast its regulation no. 44/2001 with the same title which had served as model for the new Lugano Convention of 2007 which practically extended all its rules to Switzerland, Norway and Iceland. Even before the new regulation becomes applicable it has been amended by regulation 542/2014 to include the European Unified Patent Court and the Benelux Court of Justice to be treated as if they were courts of Member of States. Annex III of the recast regulation contains a list of correlations. Annexes I and II were replaced by the annexes of the Commission delegated regulation (EU) 2015/281 of 26 November 2014.

A. Even for Denmark?

Yes, Denmark has opted in.

B. Jurisdiction

1. The **special jurisdictions** of the regulation as far as they are protecting

- consumers in matters relating to consumer contracts (arts. 17 to 19) or
- employees in individual contracts of employment (arts. 20 to 23)

will be extended to **defendants from third countries**, i.e. non-member states like China, India or the U.S. Whether these third countries might deny service of initial documents or recognition of a judgment if their law does not provide for such jurisdiction remains to be seen.

Art. 20 para. 1 extends the application art. 8 point 1, too, which means that a defendant (employer) from a third country can also be sued in the court of the habitual residence of a co-defendant.

2. **"Exorbitant jurisdictions"** now contained in annex I are excluded between member states but are still admissible against defendants from third countries (and even available for plaintiffs from other member states, so a French can sue a Russian resident in the courts of Frankfurt if the Russian has a bank account there under § 23 of the German Code of Civil Procedure but neither a French nor a German could sue a Transsylvanian under the same circumstances). The only real news are that there is no such list anymore in an annex to the regulation but there will be a list to be published and revised by the Commission according to notifications from the member states. But after the re-launch of eur-lex.europa.eu you will not find the list as easily as before.

3. Art. 7 point 4 contains **a new special jurisdiction** for ownership-based recovery claims of cultural objects in the terms of the Directive 93/7/EEC.

4. **Art. 24 point 4 was amended** to clarify that this jurisdiction is exclusive "irrespective of whether the issue is raised by way of an action or as a defense". It thereby codifies a judgment of the European Court of Justice, so there are only new words, but no new meaning.

C. Prorogation of Jurisdiction

There are three changes to notify:

1. The rules now contained in art. 25 will also apply to agreements if no party has residence in a member-state, so the regulation will apply to the validity of an agreement between a Chinese and an American company to litigate in London (together with English law, see below).

In the case of the last example now art. 23 para. 3 would prevent the courts of other Member States

than the U.K. to declare themselves competent before the U.K. courts have declined jurisdiction. Now this simply has become a question of the *lis alibi pendens* rules discussed later.

2. A new para. 5 of Art. 25 clarifies - for the sake of uniform application –

- in sub-para. 1 that “An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract” and
- in sub-para. 2 that “The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract [as a whole in which it is contained!] is not valid”.

Both these rules must be interpreted in connection with the last part of the first sentence of art. 25 para. 1 (“unless the agreement is null and void as to its substantive validity under the law of that Member State”) which shifts the burden of proof to the party that alleges voidness and states that the question must be determined by the laws of the prorogated court, which may be in another member state than the court seized.

3. A new para. 2 in art. 26 (as compared to art. 24 in regulation no. 44/2001) protects policy-holders (and possibly victims of accidents), consumers and employees as defendants where the special jurisdictions for their matters apply: In order to ensure that they do not prorogate the court seized unwittingly by entering an appearance in the terms of para. 1 the court seized “shall, before assuming jurisdiction under para. 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequence of entering or not entering an appearance”.

If the court is not in the Member State where enforcement needs to be sought this gives the defendant a possibility to contest enforceability later.

And art. 31 para. 4 reminds us that arts. 15, 19 and 23 of the new regulation limit the validity of prorogation agreements in insurance, consumer and employment matters.

D. *Lis (alibi) pendens* and torpedo actions

The actual rule that the later seized court has to stay proceedings until the court first seized has decided gave rise to so-called torpedo actions. Before the creditor seized the competent court the debtor sued him in a country with slow proceedings, eventually just seeking a declaration that there is no such claim, hoping that it might take a while until the court the debtor seized declares itself not competent. The actual regulation avoided this satisfactorily only in cases of exclusive jurisdiction under art. 22, which has become art. 24.

The new regulation has modified this system in order to avoid torpedoes being fired against prorogation agreements. Art. 31 para. 2 now rules – if both courts are in Member States - that if the prorogated court is later seized, the court first seized must stay until the prorogated court has stated on its competence – which makes sense also for another reason: the prorogated court's law governs the substantive validity of the prorogation agreement.

If one of the courts seized is in a third country (which is not a member) arts. 33 and 34 contain more flexible rules for the courts of the Member States. These questions will not be governed by the national procedural rules of the Member States anymore.

The race to the courts remains open for competing general and special jurisdictions.

E. Interim measures and definition of judgment

A new art. 2 contains definitions of terms; the one for decisions was moved from the former art. 32 to art. 2 lit. a but was amended there to include interim measures of the court seized for the principal matter. However, these will only be enforceable under the new regulation

- if made after the defendant had been summoned to appear OR
- if the defendant had not been summoned to appear in the court, if the measure is served on the defendant prior to enforcement.

Apart from these interim measures of the court of the principal matter the rule for provisional measures of other courts remained unchanged but was re-numbered from art. 31 to 35.

Art. 42 para. 2 provides for the documents to be presented for execution of such measures.

F. Abolition of the declaration of enforceability (exequatur)

1. The systematics of chapter III has been changed. The definition of judgment has been moved from the former art. 32 to the new art. 2 lit. a. After a shorter section I on recognition and a section II on enforcement the grounds to deny recognition or enforcement are now in a section III.

Recognition could formerly be denied if the judgment conflicted with sections 3, 4 or 6 of Chapter II (insurance matters, consumer contracts and exclusive jurisdiction). Now section 5 (employment matters) was added. But now sections 3, 4 and 5 can only hinder recognition if the defendant was the policy-holder, the insured or a beneficiary of the insurance contract, the injured party, the consumer or the employee.

2. Art. 46 briefly states that enforcement shall be denied for the same reasons – on application of the debtor. This leads us to **the counterweight of the abolition** of the requirement to apply for a declaration of enforceability in another country than the Member State of origin if enforcement is sought in this other country: The debtor does not have to wait anymore until the creditor takes the initiative and obtains a declaration of enforceability before the debtor can seek protection. The debtor who knows or thinks that a foreign judgment against him is not enforceable in another Member State can apply there for refusal of enforcement. The Member States shall communicate to the Commission which courts shall be competent for the application as well as for an appeal against this court's decision and the Commission will publish (and from time to time revise) lists of these (which will replace annexes II and III of the old regulation).

3. But there is more news: Art. 41 and recital 30 apparently concerning the actual enforcement in the requested state mix defenses against enforcement of the judgment as such with the level of its enforceability under the regulation. Recital 30 states that as far as possible the national laws should allow to integrate into the proceedings in which denial of enforceability is soughtall other defenses against the enforcement (like e.g. acquittal by payment or set-off after the judgment) which would now have to be brought before the courts of the country of origin or eventually in separate proceedings in the country of enforcement.

Germany has done so by the new § 1115 of the Code of Civil Procedure (ZPO). So, the combination is also possible if the defense has a value-of-the-matter of 5,000 € or less.

4. Art. 54 provides for the adaptation of foreign decision if they contain orders which are unknown in the executing state.

5. There is still no rule about remedies against a wrongly issued certificate of enforceability. This gap must therefore be filled by the national rules of the issuing state.

G. Translations of documents

Art. 42 para. 3 allows the executing authority to ask for a translation or transliteration of the

certificate of enforceability (which often will not be needed because the standard forms are designed in a way that will enable the executing authority to understand most information contained in the certificate by comparing it with the standard form in its own language). Art. 42 para. 4 provides that a translation of the decision itself can only be required if the executing authority cannot proceed without it.

H. Application in time

The new regulation is to be applied to

- proceedings commenced
- authentic instruments formally drawn up or registered
- court settlements approved or concluded

on or after 10 January 2015.

I. Application of other EU regulations

The regulation replaces only regulations 44/2001 and the Brussels Convention of 1968; however, the latter not in relation to areas where the Brussels regulations are not applicable.

For maintenance obligations in the terms of former art. 5 no. 2 see now the EU Maintenance Regulation no. 4/2009.

Particularly the regulation on the European Execution Title no. 805/2004 remains an option for creditors. If their debtor is no consumer the judgment can be confirmed as a European Execution Title which avoids the possibility for the debtor to apply for denial of enforceability.