

EXCLUSIVE JURISDICTION CLAUSES AND PARALLEL PROCEEDINGS
IN THE EUROPEAN COMMUNITY

STRUCTURE OF THE BRUSSELS REGULATION

Three Pillars:

- (1) A clearly defined and limited set of jurisdictional connecting factors;
- (2) Rules designed to prevent or minimise parallel proceedings; and
- (3) Free transportation of judgments.

Free transportation of judgments is the “*essential aim*” of the Regulation; and the rules designed to prevent or minimise parallel proceedings are “*indispensable*” to achieving that aim: **Overseas Union Insurance v New Hampshire Insurance Company** [1991] ECR I-03317.

Unifying feature: The rules of the Regulation must be clear, certain and predictable. Claimants need to know where they can bring proceedings and where they can enforce judgments; and defendants must know where they are liable to be sued.

Contrast with the Common Law:

- (1) Less flexibility; and
- (2) No scope for forum non conveniens (re-confirmed in **Owusu v Jackson** [2005] 1 QB 801).

RULES ON PARALLEL PROCEEDINGS

Article 27

Provides for a mandatory stay of proceedings which are between the same parties and which involve the same cause of action as proceedings begun earlier in time in another member state.

“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 seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”

Same “cause of action”

Proceedings must have the same ‘cause’ and the same ‘objet’ (**Glencore v Shell** [1999] 2 Lloyd’s Rep 692 at p694).

- The ‘cause’ of the action comprises “*the facts and the rule of law relied on as the basis of the action*” (**The Tatry** [1994] ECR I-05439 at para 39). The ‘rule of law’, in this context, means “*the juridical basis upon which arguments as to the facts will take place so that, in investigating “cause” the court looks to the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is co-incidence between them in the actions in different countries*” (**JP Morgan Europe v PrimaCom** [2005] EWHC 508 (Comm) at para 42; **Maersk Olie v Firma M De Haan** [2005] 1 Lloyd’s Rep 210 at para 38; **Glencore v Metro** [1999] 2 Lloyd’s Rep 632 at p637 per Moore-Bick J).
- The “*objet*” of the action means “*the end the action has in view*” (**The Tatry** at para 41). The object, in substance, is “*the essential issue raised between the parties*” to the action (**JP Morgan Europe v PrimaCom** at para 40; **Glencore v Shell** at p695-7).

Article 28

Discretionary power to stay proceedings which are not directly parallel, but are nevertheless “*related*”.

“Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.”

Related actions are defined, by Article 28 para 3, as being proceedings which:

“are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

EXCEPTIONS TO ARTICLES 27 AND 28

Where proceedings are covered by the exclusive jurisdiction provisions of Article 22.

“The following courts shall have exclusive jurisdiction, regardless of domicile:

1. *in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. ...;*
2. *in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies ..., or of the validity of the decisions of their organs, the courts of the Member State in which the company ... has its seat. ...;*
3. *in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;*
4. *in proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for ...;*
5. *in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.”*

Where such proceedings are brought in a state other than the state which has exclusive jurisdiction pursuant to Article 22, the courts in that other member state must stay those proceedings, even if they were first in time: **Overseas Union Insurance**.

The exclusive jurisdiction provisions of Article 22 of the Regulation override Articles 27 and 28. A litigant cannot evade the exclusive jurisdiction provisions of Article 22 by getting in first in another member state.

EXCLUSIVE JURISDICTION CLAUSES

An example:

- “(1) *This agreement shall be governed by, and shall be construed in accordance with, English law.*
- (2) *The courts of England shall have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any any dispute (a “Dispute”), which may arise out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or any clause contained therein).*
- (3) *The parties agree that the courts of England are the most convenient and appropriate courts to settle Disputes between them and accordingly they will not argue to the contrary.”*

Article 23

“If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Such an agreement conferring jurisdiction shall be either:

- (a) *in writing or evidenced in writing; or*
- (b) *in a form which accords with practices which the parties have established between themselves; or*
- (c) *in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”*

The English Approach (no longer good law)

Where a jurisdiction clause gave exclusive jurisdiction to the English courts, they would not stay proceedings in England in favour of proceedings brought in another member state, even if the proceedings in that member state were brought first in time (**Kloekner v Gatoil** [1990] 1 Lloyd’s Rep 177).

The English courts would grant anti-suit injunctions to restrain commencement or pursuit of proceedings brought in another member state in breach of an English jurisdiction clause (**Continental Bank v Aeakos** [1994] 1 WLR 588).

It would be “*ludicrous*” to stay English proceedings in favour of proceedings brought in another member state in breach of an exclusive jurisdiction clause; that would “*be calculated to cause unnecessary delay and expense for which I can see no justification whatsoever*”: **The Filiatra Legacy** [1994] 1 Lloyd’s Rep 513 per Saville J.

The ECJ Approach

Erich Gasser v MISAT [2005] 1 QB 1:

The court second seised must stay proceedings under Article 27, even where the proceedings in the courts first seised were brought in breach of an exclusive jurisdiction clause. Article 23 does not override Article 27.

Turner v Grovit [2005] 1 AC 101:

Anti-suit injunctions cannot be used to restrain proceedings in another member state falling within the scope of the Regulation, even where they are brought in bad faith or otherwise with a view to obstructing or frustrating proceedings in England.

CONSEQUENCES

- (1) Impaired efficacy of exclusive jurisdiction clauses;
- (2) Essential to get in first;
- (3) Use of CPR Protocols is fraught with risk;
- (4) The only way around – arbitration (cf. **Through Transport Mutual Insurance Association v New India Assurance Association [2004] EWCA Civ 1598**)?
- (5) Further litigation:
 - (a) Action for damages for loss caused by breach of an exclusive jurisdiction clause;
 - (b) Action for breach of Article 6(1) of the European Convention of Human Rights: everyone is entitled to a fair trial “*within a reasonable time*” (cf **Matthews v UK**).

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COUNCIL REGULATION (EL) NO. 44/2001

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

RELEVANT EXTRACTS

CHAPTER 1

SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. This Regulation shall not apply to:

...

(d) arbitration.

...

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex 1, in the same way as the nationals of that State.

...

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. ...
2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. ...
3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place. ...
5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
 - (b) in a form which accords with practices which the parties have established between themselves; or
 - (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.
 3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

...

Section 9

Lis pendens – related actions

Article 27

1. 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 is established.
2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the

court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

...

Chapter III

Recognition and Enforcement

Section I

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

...

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
3. if it 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.

...

Annex I

Rules of jurisdiction referred to in Article 3(2) and Article 4(2)

The rules of jurisdiction referred to in Article 3(2) and Article 4(2) are the following:

...

- in the United Kingdom: rules which enable jurisdiction to be founded on:

- (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
- (b) the presence within the United Kingdom of property belonging to the defendant; or
- (c) the seizure by the plaintiff of property situated in the United Kingdom.