

# CREMADES & CALVO-SOTELO

## ABOGADOS

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### **IMPACT OF THE NEW BRUSSELS 1 RECAST**

As Lord Goff said once: “On the continent of Europe, the essential need was seen to avoid any such clash between member States of the same community. A system was embodied in the Brussels Convention of 1968 and later in the Brussels 1 Regulation. This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice”.

In my view, although this Regulation has been a success in Europe, the inflexibility of its rules has led to unfair situations that led at the same time to its replacement by Brussels 1 recast.

The term **jurisdiction** or jurisdiction to adjudicate refers to the power of courts to decide on a claim brought before them. In what circumstances can I bring defendant X before the courts of country Y?

I will start talking about **consumers and employees** and how the law will evolve in respect of them. The consumer (being in an inferior position) is always exposed to bigger dangers, and for this reason, the law protects them. As we can see in art 16.1 of *Brussels I*, laws are very protective with consumers when it comes to defendants domiciled in the European Union, because they apply the Brussels 1 and can sue in multiple forums. But when it comes to defendants outside the European Union, the consumer is not protected, since national laws (which are very different among states) are applied.

On the other hand, the Brussels 1 is a system that although it is intended to protect defendants from exorbitant jurisdiction, it grants no protection to them. So from their point of view, they are exposed to injustices under this regime. *Brussels I recast* opens the possibility to sue in the European consumer’s domicile a person that is domiciled in a third state. This will impact positively on consumers, who do not have to be worried about the national law; and can sue a third country party in his domicile.

The situation for employment issues is exactly the same to that of consumers but with the difference that the defendant with the new regime will be required to appear in the place of work of the employee. As we can see, this benefits him.

But from the point of view of both defendants, the situation gets even worse than with Brussels 1, the old national rules of jurisdiction applied to them (which are unfair) turn into European general rules; which clearly give them absolutely no protection. They are now

# CREMADES & CALVO-SOTELO

## ABOGADOS

exposed to more problems, the same that Jamaica's defendants had in the Owusu case (more expensive proceedings, logistical difficulties, geographical distance)

Another change in the Recast regulation talks about *Choice of court agreements*, there is a significant difference in respect of Brussels 1. At first sight, the recast has not much impact on the rules on jurisdiction for non-European defendants, because both Brussels 1 and Brussels Recast compels the defendant to go before the European tribunal accorded in the agreement; the impact on them is not of the same calibre to that of consumer and employees.

The most important change in the *Brussels Recast* is that the domicile requirement disappears, so the requirement in art 25 is met even if none of the parties has domicile in Europe. With the incorporation of the phrase "regardless of their domicile", for the first time, two non-European parties have the possibility to go to European tribunals to solve their disputes. An immediate effect of this is the expansion of the scope of the choice of court agreement (welcoming more non-European Union people) to cover more than it covered with the previous regime. The term "to its substance validity under the law of the member state" chosen by the parties gives the choice of court agreement the enforceability that it lacked in the previous regime.

Under the Brussels 1, if a contract is declared invalid, the chosen court will still have jurisdiction, which gives certainty. But the phrase, "unless the agreement is null and void" incorporated in the Recast makes this rule a potential problem for both parties in case of invalidity or nullity; because in such a case, the European court that was designated by the parties will no longer have jurisdiction; creating uncertainty as to what court will hear the matter.

But the biggest change in the Recast is about *lis pendens* and I explain why. The *lis pendens* is a rule that has a different approach to that of *forum non conveniens*. While *forum non conveniens* tries to find the closest connection with the case and the end of justice, the first court seized will stay proceedings; this is not the case in *lis pendens* and in Brussels 1. This rule presents difficulties because it abolishes the *forum non conveniens* and the first court seized will not stay proceedings even other courts are more appropriate. So not necessarily the most appropriate court will solve the dispute. The *lis pendens* creates problems among European Union members because *forum non conveniens* disappears, but what we are trying to ascertain is whether this *forum non conveniens* also disappears for non-European members or on the other hand, they still can trust in this rule.

In the *Brussels I*, there is no reference to third states, so it is difficult to know if this negative effects will also impact on third states. In my view, by not being mentioned in the articles, third states should not be affected. But In view of the results in *Owusu v Jackson*, this problem also seems to affect non-European member states.

In this case, the proceeding have commenced in UK. But even in the case that the Jamaican courts had proceeding pending in their courts, UK will not refuse to hear the case because art

# CREMADES & CALVO-SOTELO

## ABOGADOS

2 and Brussels regulation cannot be avoided. This interpretation was considered as very narrow, the ECJ said that courts of member states do not have any discretion to decline to hear the case. In my opinion, this problems stems from the no flexibility of Brussels regulation, it is so rigid that makes it so difficult to derogate their principles.

They found in this case the forum non convinens as incompatible with the Brussels convention, saying that:

- Art 2 is mandatory
- No exception on the basis of forum non convinens was provided by the authors of the convention
- Undermines legal certainty
- Affects the uniform application of the rules of jurisdiction

On the other hand, in *Goshawk* case, the proceeding have commenced in the EEUU; and in this situation there was considered a broader discretion of member state's courts to stay proceeding in favour of a non-European member state as long as some requirements (pending proceeding in the non-European member and recognition and enforcement of that judgement in the European court) are met. In my opinion, the discretion that was mentioned in this case led to the implementation of art 33 in the Brussels recast.

With the creation of the *Brussels recast*, some unsolved problems for non-European defendants are solved and I will explain why. With the previous rules, defendants were exposed to injustices, because not necessarily the most appropriate court will solve the dispute, but with art 33, they have the possibility to hear the case or bring it to their country, so now with the recast, it will be the "appropriate court" who will hear the case. But not because the forum non convinens is granted (I have to clarify that the forum non convinens is not granted to the third country), but thanks to the lis pendens rule in art 33 that acts as a forum non convinens doctrine.

Although *Goshawk* is the case most closely related to the new art 33 (because in this case the proceedings were pending in the EEUU, so the situation would have been quite different with the new regulation), I consider convenient to compare it with another one. It is interesting to put this new art in the context of the *Owusu* case. In reality, as the facts were, the situation would have not changed simply because with art 33, it is needed that the non-European courts have pending proceedings. But imagine the Jamaican courts had pending proceedings, it is more than probably that UK courts would have stayed their proceedings and this "stay-lis pendens" acted in favour of the non-European courts as a forum non convinens. As a result, Mr Jackson would have been able in this case to be sued in Jamaica (not application of art 2), which will be more beneficial for him and also all the other defendants. The impact of this new art 33 is favourable for non-European defendants in terms of justice, but looking at all the indents it contains, I can see that the scope is very limited.

The problem is solved partially, because this "kind of forum non convinens" (and all the benefits it carries to third states) is only granted when the proceeding start in the non-European member, but when the proceeding start in an Europe court and there are no pending

# CREMADES & CALVO-SOTELO

## ABOGADOS

proceeding in the third state, the first court seised in Europe still has the right to hear the case.

Apart from this, art 33.2 asserts that the member state can get back the power to hear the case, to continue (at any time) the proceeding in certain cases. I understand the necessity to do so in some circumstances, but this will have a negative impact because this is a step back, like going back to Brussels 1. Besides, looking the new regulation, I could see the reticence in the Europe to grant the right to hear the case to third states. What they have obtained with this reticence is a “limited” advance, but at least it is an advance to obtain more justice and benefits like:

- Less expense of the proceedings
- No logistical difficulties from geographical distance
- No need to assess the merits of the case according to own country standards

Parallel proceedings were a possible situation with Brussels 1 but are no longer possible with Brussels Recast, because this new European regulation now includes non-European states, so it will be quite difficult or impossible to start or continue proceedings in Europe in cases where a non-European court was seised first and met all the requirement. This change makes rules on jurisdiction for non-European defendants more flexible and transparent, because art 33 turns the forum non conveniens available for two common law countries to a “kind of” forum non conveniens available for all Europe. These properties (that appeared in Re Harrods case), will be possible from now on with the Brussels recast. From my point of view, although the affirmation that Brussels convention is incompatible with forum non conveniens seems to be true, it is in partly deteriorated by the incorporation of art 33; also, the phrase “no exception on the basis of forum non conveniens provided by the authors of the convention” is also put in question.

Another result will be that the uniform application of the rules on jurisdiction will be damaged (art 2 is no longer mandatory in nature), though I am not saying this is bad, in some situations, less uniformity is a good solution. But unfortunately, more Flexibility and less uniformity usually means less legal certainty and predictability.

Brussels 1 also experienced big problems because some **abusive tactics** were used to frustrate both choice of court and arbitration agreements. The *current regulation* is a system so rigid and inflexible that has allowed abusive litigation tactics, enabling one party to control the procedure. I will explain this system and its flaws through the famous case *Gasser v Missat*. The question that comes to me is to what extent the lis pendens rule is so important under the current Brussels 1. It seems to me that too much importance was given to this instrument. I understand that avoiding parallel proceedings is one of the most important objectives of the regulation, but the decision of the ECJ to apply the lis pendens rule so strictly and completely forget any kind of agreement between the parties, is intolerable.

# CREMADES & CALVO-SOTELO

## ABOGADOS

As the UK Government asserted in Gasser case, *choice of court agreements* must be supported and encouraged and they prevail over other bases of jurisdiction. When two people agree to go to a specific court and they reach an agreement, this agreement must not be broken in under any circumstances. Even knowing that choice of court agreements prevail over other jurisdictions, the court held that even with an agreement between the parties, the *lis pendens* rule should be interpreted strictly and cannot be discarded.

In my view, the problem that led to the result in Gasser case stems from the:

- Uniform rules
- Little importance given to choice of court agreements (there is no mention in the recitals)
- Basis of mutual trust and respect between courts
- Responsibility to declare the validity of the agreement is placed in the first court seized

All this together in Gasser case had the effect of endangering the effectiveness of choice of court agreements in Europe.

Taking into account all the problems this case caused, there was an impetuous need to change the situation. The *Brussels Recast* regulation's priorities need to be the reverse of those prioritised by the ECJ in the Gasser case. That means that now choice of court agreements have more importance than *lis pendens*, in part thanks to the influence of the UK Government, who had much to do with this change. This increased importance can also be seen in the recitals, choice of court agreements are now mentioned in this important part of the regulation. The problem in this case and in all situations under the Brussels 1 is that the validity is determined by the first court seized. This does not seem to create much problems, but in countries where the law is very slow, it does.

Under the Brussels Recast, this problem is addressed placing this responsibility in the court chosen by the parties. This new change, together with the obligation to stay proceeding for the first court seized if the designated court seases; makes things easy and difficult at the same time. This new regulation impacts positively on the "innocent party" so to speak. But the impact on the "abusive party" is huge, making impossible to carry on with his abusive litigation tactics. In this way, the abusive party cannot control the procedure or deter the other party from enforcing his right by legal proceedings. The torpedo seems to be destroyed now, but there are some flaws in the new regulation, which will still allow certain abusive tactics. In cases such as *Gasser v Missat*, where the parallel proceedings are identical, are no longer possible to frustrate a choice of court agreement; but some related action can still be used in an inappropriate manner so as to use the torpedo again under the Recast. Parties trying to change the claim in order to make it slightly different, could cause serious problems, because they will fall under art 30 and not 31.

The problem of uniformity and inflexibility of the regulation appears again here; creating another problem, the impossibility to include related actions to article 31. Seeing how the regulation has been applied in other cases and its nature itself, it makes quite difficult to

# CREMADES & CALVO-SOTELO

## ABOGADOS

avoid this problem of related actions. As a result, with the Brussels Recast, if a “low pace jurisdiction” such as Italy is presented a case slightly different than the case that will be presented afterwards in the court chosen by the parties, Italy can continue with its proceeding and disregard article 31. This gap made in the regulation will for sure create unfair situations to the other party.

Although the Recast is a significant improvement in the way *lis pendens* is considered and an important progress respecting choice of court agreements, we cannot say that Brussels Recast puts the endpoint to abusive litigation tactics in Europe.

With the *Brussels I*, the problem of possible abusive litigation tactics to frustrate arbitration agreements was addressed by a tool called anti-suit injunctions. With this instrument, the party bringing a lawsuit in another jurisdiction should not commence or proceed with the claim. The problem came with the judgement in *Allianz v West Tankers*, where the court said that “issuing an anti-suit injunction to prevent those proceedings would be inconsistent with the regulation”. This affirmation could frustrate the arbitration process and allow the appearance of abusive tactics; tactics that were not possible before this judgement. For the first time in England, this possibility to continue granting anti-suit injunctions has been diminished considerably by the ECJ in *West Tankers* case.

The problem with the torpedo action tried to be solved at the beginning in the same way the problem was solved in *Gasser* case; creating a kind of a *lis pendens* rule that acts as an anti-suit injunction. In this way, this tool will not disappear and at the same time, in words of the commission, “will enhance the effectiveness the arbitration agreement in Europe and eliminate the incentive for abusive litigation”.

The final solution was the creation of recital 12 in the *Brussels Recast* (which abolishes anti-suit injunctions for arbitration). This inclusion of the recital is an improvement in the protection of arbitration agreements, since the decision of the “not designated” court about the validity, will not prevent parties from arbitration in another country and the new award will be binding. It is of course an improvement in relation to *Brussels I*, because with the old regulation, the decision of the first court is binding and prevents the other party from commencing arbitration. In this way, the prior interest of abusive parties in running to another country to commence proceeding as soon as possible to invalidate the agreement will be reduced; and also the torpedo actions.

To conclude, although it seems that the Brussels Recast will solve mayor problems (especially commercial parties’ conduct because of the *lis pendens* rules); there are some flaws and inconsistencies. This together with the absence of a clear wording in the regulation will create some problems in the future, but it is early to know, only time will tell.