



## Brussels Regulation Reform—Effects Felt Beyond Europe

From 10 January 2015, the reformed Brussels Regulation will be applied by the courts of all Member States of the European Union to regulate matters of jurisdiction and the recognition and enforcement of judgments in connection with civil and commercial claims. The impact of the “key” aspects of the reforms has been the subject of a good deal of commentary. The fundamental change in approach toward consumer<sup>1</sup> jurisdiction and the associated risks to business and institutions that contract with consumers seems, however, to have gone largely unnoticed, or at least unreported. That is surprising when it is the aspect of the reform which, in terms of extraterritorial effect, is one of the most far-reaching.

### Summary of “Key” Reforms

The headline reform is undoubtedly the change to the *lis pendens* provisions. The revision is designed to avoid the delays and costs associated with the much-bemoaned “Italian torpedo”. Under the current regime, putative defendants fearing an imminent claim against them are able to preempt the action by commencing proceedings themselves before arguably slow-moving courts of certain Member States, even where there is little or no connection between those courts and the claim or the parties. Once issued, that party can rest easy in the knowledge that separate proceedings cannot be advanced by the wronged party before any other EU Member State

court (even the court nominated in any applicable exclusive jurisdiction clause) until the court “first seized” declares whether or not it has jurisdiction. The new regime abolishes this rule and ensures the effective supremacy of any court nominated by an exclusive jurisdiction provision; every other Member State court is required to stay proceedings until the court nominated by the parties in their contract has determined whether or not it will hear the case. This change should address the most serious abuses of the *lis pendens* principle and one of the most criticised aspects of the current Regulation.

Other key changes include: the application of the parties’ choice of exclusive jurisdiction specified in their agreement, whether or not either party is EU domiciled; the express exclusion of arbitration from the scope of the Regulation; the express separation of jurisdiction agreements, meaning that they cannot be contested merely on the basis that the agreement of which they form part is said to be invalid; and the new discretion to have regard to proceedings pending before a non-EU court. These changes have been widely reported. The changes to the consumer position have received much less publicity.

### Consumer Contracts

As matters stand under the present Brussels Regulation, consumers may sue EU-domiciled

counterparties in the courts of the Member State in which either the counterparty is domiciled or, in recognition of their perceived position as the “weaker” party, their own home court. This rule is currently restricted to contracts entered into within the EU. This restriction was seen by the European Commission as having the potential to result in unequal access to justice for EU citizens, given that Member States’ own private international law rules concerning jurisdiction outside the EU vary widely.

The result has been to harmonise the rules in respect of all defendants to consumer contract claims, irrespective of their domicile and whether or not they are EU based. Article 18 of the reformed Regulation provides that a consumer may bring proceedings against the other party to an applicable contract<sup>2</sup> either in the courts of the Member State in which such after party is domiciled or, *regardless of the domicile of the other party*, in the consumer’s home court.

While this reform stands to achieve its primary aim, it will do so by taking the extraordinary step of conferring exorbitant jurisdiction upon Member State courts in respect of any party that happens to contract with EU-domiciled consumers, irrespective of where the transaction took place. For example, if a Spanish tourist visits Washington and purchases goods as a consumer, he or she might be able to bring claims in respect of those purchases in Spain, irrespective of any jurisdiction clause within the contract which the vendor may believe or assert is applicable. It could also cover the situation where a sophisticated British businessman working in New York purchases complex financial products (assuming that he does so outside the normal course of his profession).

Consumer-facing businesses and institutions located outside Europe whose customer or client base does or could include consumers domiciled in the EU will therefore face a far greater risk of becoming embroiled in litigation before the courts of EU Member States with which they may be unfamiliar and have no direct connection. The relevant forum will be determined solely by reference to the consumer’s own domicile and the European view as to what constitutes a relevant consumer contract, notwithstanding any protections which the counterparty has included within the contract; there is no ability to contract out of the relevant provisions by way of, for example, an exclusive jurisdiction clause. What is less clear, however, is how easily consumers

could successfully enforce resulting judgments in the event that their counterparties had no assets within the EU or how courts outside the EU will react to this development.

## Conclusion

Almost as striking as the expansion of EU Member State courts’ jurisdiction by the reform of the consumer contracts provisions of the Brussels Regulation is the lack of attention generated by it. The practical effect of these changes is yet to be seen, but it seems almost certain that non-EU businesses and institutions will become embroiled in litigation before the courts of EU Member States with which they have no direct connection and that may be entirely unfamiliar to them.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## Endnote

1 A “consumer contract” is defined within the Regulation as one concluded with a person for a purpose outside of their own trade or profession. This definition has been further explained by caselaw looking at related consumer regulations, for example see *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB).

2 Under Article 17(1), applicable contracts include contracts on credit terms or all other consumer contracts with a person who pursues commercial or professional activities in the Member State concerned or who directs by any means such activities to one or more Member States, including that of the consumer.