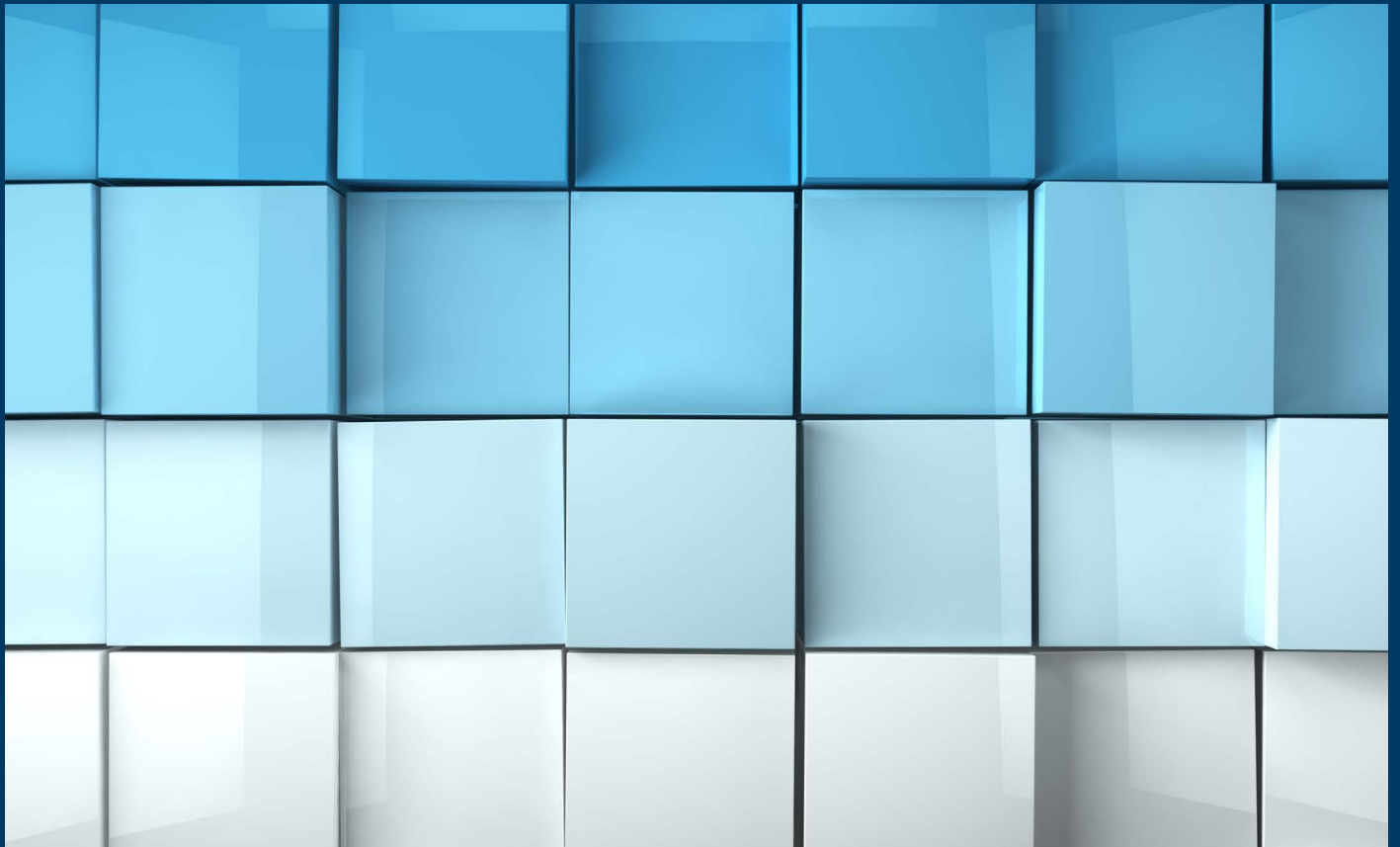




HERBERT
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HANDY CLIENT GUIDE TO JURISDICTION UNDER RECAST BRUSSELS REGULATION

ENGLAND AND
WALES

LEGAL GUIDE
SECOND EDITION

July 2015

This decision tree has been prepared as a quick reference guide to help determine whether the English court has jurisdiction over proceedings commenced on or after 10 January 2015 under the recast Brussels Regulation (Regulation (EU) No 1215/2012).

For proceedings commenced before that date, the original Brussels Regulation (Regulation (EU) No 44/2001) continues to apply and so the decision tree is not applicable.

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As jurisdiction questions are resolved by the English court at an interim stage of the proceedings, the claimant is not required to establish on the balance of probabilities that the test for jurisdiction is met. The general rule is that the claimant must show a "good arguable case" for any fact or matter on which the court's jurisdiction depends.

ASSUMPTIONS IN BRIEF:

- i. The matter in question is a civil or commercial matter for the purposes of article 1.
 - ii. There is no arbitration agreement under which an arbitral tribunal has jurisdiction to determine the issues in dispute.
 - iii. The matter in question does not fall within the grounds of exclusive jurisdiction under article 24.
 - iv. The defendant has not entered an appearance before the English court (other than to contest jurisdiction).
 - v. The matter in question is not a matter relating to insurance, consumer contracts or individual contracts of employment.
 - vi. The matter in question is not an application for provisional or protective measures falling within article 35.
 - vii. The matter in question is not a claim for damages or restitution based on an act giving rise to criminal proceedings, or the ownership of a cultural object, or for remuneration in respect of the salvage of cargo or freight.
 - viii. The matter in question is not a third party claim or counterclaim.
 - ix. Denmark will have put in place the necessary legislation to implement the Recast Brussels Regulation.
 - x. There is no exclusive jurisdiction clause in favour of Norway, Switzerland or Iceland, the defendant is not domiciled in any of those states and there are no parallel proceedings in any of those states.
 - xi. There is no relevant connection with Scotland or Northern Ireland that would give jurisdiction to those courts.
 - xii. The matter in question does not fall within the agreement between certain EU Member States dated 19 February 2013 establishing the Unified Patent Court.
 - xiii. There is no exclusive jurisdiction agreement in favour of Mexico.
- Click on **Box E** for more detail on each of these assumptions.

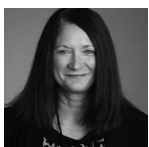
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STEPS 1 AND 2: EXCLUSIVE JURISDICTION CLAUSE

Article 25 gives jurisdiction to the courts of the Member State chosen by the parties. Unlike under the original Brussels Regulation, there is no requirement that either party is domiciled within the EU. So article 25 will apply even if the jurisdiction clause is in an agreement between, for example, an American company and a Japanese company. Conversely, article 25 will not apply if the chosen court is not the court of a Member State. Where there is an exclusive jurisdiction clause in favour of a non-Member State court, the English court may have a discretion to stay its proceedings (see Boxes B and D).

The rules relating to jurisdiction agreements take precedence over the other rules in the recast Brussels Regulation with the exception of: exclusive jurisdiction granted to a particular court under article 24 (eg certain land disputes); submission to the jurisdiction under article 26; and the special rules relating to employment, consumer contracts and insurance under articles 10 to 23 (for more on all these, see Assumptions iii to v).

Subject to those exceptions:

- Where the parties have agreed to the exclusive jurisdiction of the English court, the English court will have jurisdiction under the recast Brussels Regulation. The English court may however have a discretion to stay its proceedings in some circumstances, for example to await the outcome of a related action pending in another Member State court (see Box D).

- Where the parties have agreed to the exclusive jurisdiction of another Member State court, the English court may proceed (if it otherwise has jurisdiction under the recast Brussels Regulation or, if the defendant is not EU domiciled, the common law) unless and until proceedings are commenced in the chosen court. At that point, under article 31(2), the English court must stay its proceedings and may only proceed if the chosen court declares it has no jurisdiction under the agreement (see Box A).

The agreement conferring jurisdiction must be in writing or evidenced in writing, or in a form that accords with practices established between the parties or in the relevant international trade or commerce.

Problems sometimes arise in practice where transactions are documented in a number of related agreements, which contain conflicting jurisdiction clauses. If the claim in question arises under a particular agreement, the court will give effect to the jurisdiction clause in that agreement even if this results in a fragmentation of proceedings: see *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 considered here: [Conflicting jurisdiction clauses in complex financial transactions – further guidance from the Court of Appeal](#). Where however the claim involves a number of agreements, the court may look to the agreement "at the commercial centre of the transaction" to determine which jurisdiction clause should cover the dispute: see *UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585 considered here: [Synthetic CDOs in the English courts: Court of Appeal upholds New York jurisdiction](#).

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STEP 3: PRIOR PROCEEDINGS IN ANOTHER MEMBER STATE COURT

Article 29 determines priority where parallel proceedings (in the sense described below) are brought in the courts of different Member States. The rule is simple. The court "first seised", ie where proceedings are commenced first, has priority. Any other Member State's court must stay its proceedings until the jurisdiction of the first court is established and, at that point, must decline jurisdiction. The rule is designed to avoid the same matters being litigated before the courts of different Member States and the resulting risk of conflicting judgments.

There is however an exception under the recast Brussels Regulation where the proceedings come within an exclusive jurisdiction clause in favour of a Member State court and proceedings have been commenced in that court - whether before or after the parallel proceedings were commenced (see Boxes 1 and 2). Where that is the case, the chosen court has priority. Under article 31(2), any other Member State court must stay its proceedings unless and until the chosen court has declared that it has no jurisdiction under the agreement.

This is a major change from the original Brussels Regulation, which provided that any Member State court other than the first seised must stay its own proceedings until the jurisdiction of the first court was established, regardless of whether the first action was brought in breach of an exclusive jurisdiction clause in favour of the second court. That rule was open to abuse; a party that wanted to delay a judgment could race to issue proceedings in the courts of another Member State, perhaps one known for a more relaxed pace of justice, and the chosen court would then be forced to wait until the first court ultimately declared it had no jurisdiction. This tactic, known as the "Italian torpedo", is no longer available under the recast Brussels Regulation.

To fall under article 29, the two sets of proceedings must involve "the same cause of action" and be "between the same parties". Both of these phrases have an independent EU meaning:

- The same cause of action means that the actions must have the same "cause", ie the same facts and rules of law as the basis of each action, and the same "objet", ie the same end in view (see [Supreme Court interprets Articles 27 and 28 of Brussels Regulation, but many issues still require clarification from CJEU](#)). This includes where the claimant brings identical proceedings in two Member States, or where the claims are the mirror image of one another (for example a claim for damages for breach of contract and a claim for a declaration that there has been no breach). It is not sufficient that common issues might arise in both sets of proceedings.
- Whether the two actions have the same parties is a question of substance, not form, and may include where there are separate legal entities.

Where article 29 does not apply but there are related actions pending before the courts of two Member States, the second court seised has a discretion (but not an obligation) to stay its proceedings - see Box D.

When a particular Member State's court is seised depends on whether, under the procedural law of that state, the claim must be served before being lodged with the court. The English court is seised when the claim form is lodged at court for issue, unless the claimant then fails to serve within the applicable time limit (four months for service within the jurisdiction or six months for service outside the jurisdiction). In Member States where the claim must be served first, the court is seised when the claim is received by the authority responsible for service, provided that the claimant does not then fail to take the required steps to lodge the claim at court.

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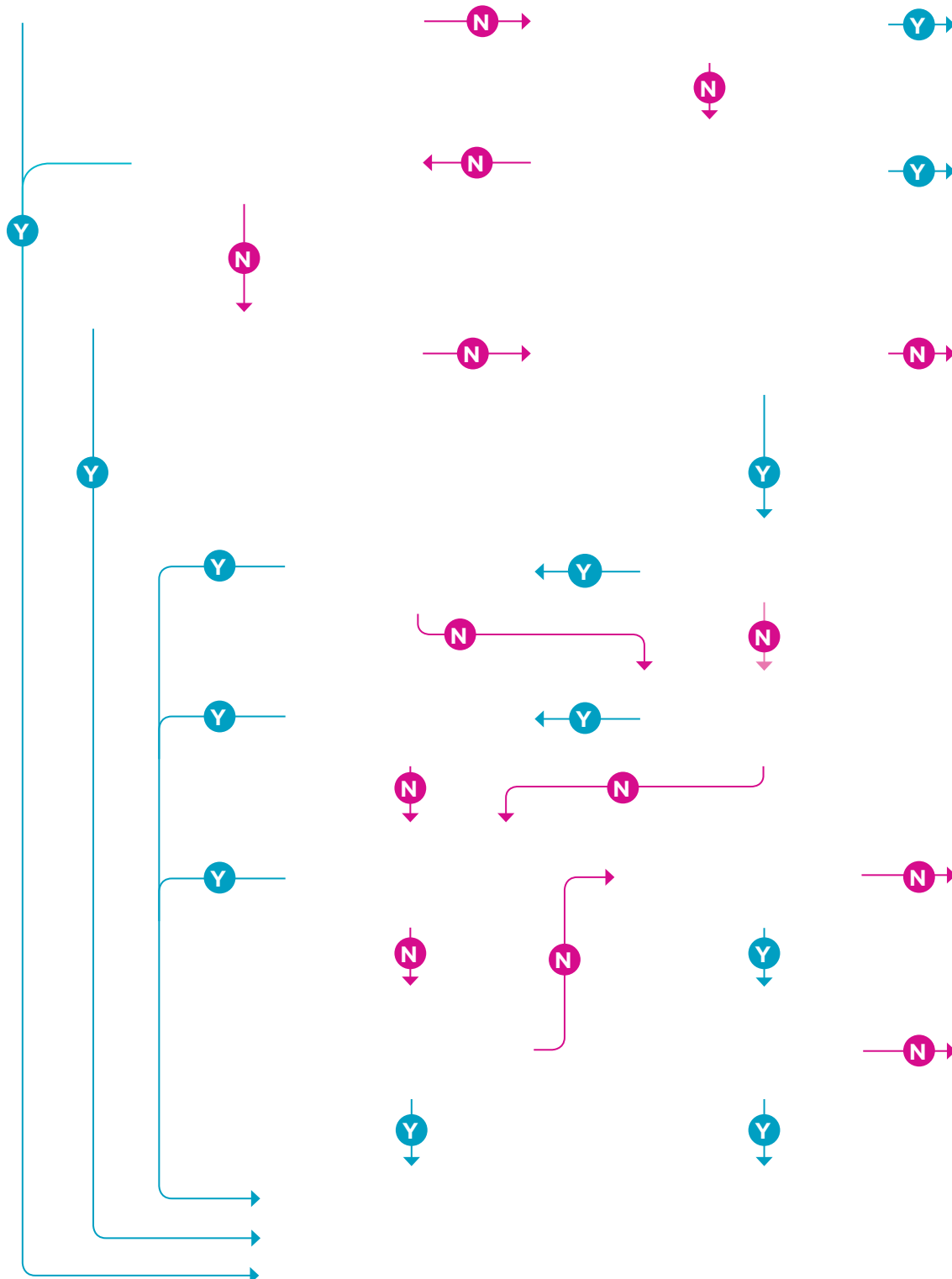
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DOES THE ENGLISH COURT HAVE JURISDICTION?

A DECISION TREE FOR PROCEEDINGS COMMENCED FROM 10 JANUARY 2015



STEP 4: NON-EXCLUSIVE JURISDICTION CLAUSE

Where the parties have agreed to the non-exclusive jurisdiction of the English court, that court will have jurisdiction under the recast Brussels Regulation. The English court may however have a discretion to stay its proceedings, for example to await the outcome of a related action pending in another Member State court (see Box D).

Where the parties have agreed to the non-exclusive jurisdiction of another Member State court, that will not ordinarily prevent the English court from taking jurisdiction over the dispute. However, if another Member State court has been first seised of proceedings involving the same cause of action and between the same parties, then the English court must stay its proceedings under article 29 (see Box 3).

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STEPS 5 AND 6: DOMICILE

The general rule under article 4 is that a person domiciled in a Member State must be sued in the courts of that Member State, unless another Member State has jurisdiction under the recast Brussels Regulation. That other Member State's jurisdiction may be in priority to the Member State of domicile, or it may be in addition to the Member State of domicile in which case the claimant has a choice as to where to bring proceedings.

So, where the defendant is domiciled in England and Wales (Box 5), the English court can proceed unless:

- proceedings have been brought in another Member State court pursuant to an exclusive jurisdiction clause in favour of that court (see Box 2); or
- there are parallel proceedings in another Member State court which were commenced before the English proceedings (see Box 3).

The English court may also have a discretion to stay its proceedings in certain circumstances (see Box D).

Where the defendant is not domiciled in England and Wales but is domiciled in another Member State (Box 6), the English court can proceed only if it has jurisdiction under some other provision of the recast Brussels Regulation. The English court cannot take jurisdiction under common law rules (eg based on the defendant's temporary presence within the jurisdiction) where the defendant is domiciled in a Member State.

Where the defendant is domiciled in any Member State, the rules of "special jurisdiction" in articles 7 and 8 allow the defendant to be sued in the courts of another Member State in certain circumstances, as an alternative to the Member State of domicile (see Boxes 7 to 14 and Assumption vii).

If the defendant is not domiciled in a Member State (and assuming none of the rules discussed in Boxes 1 to 4 or Assumptions iii to v apply) the English court will apply common law rules to determine whether or not to exercise jurisdiction (see Box B).

Under article 62, the question of whether a party is domiciled in a Member State is determined by reference to the internal law of that Member State. However, under article 63, a corporation is domiciled:

- where it has its statutory seat – for UK purposes, its registered office;
- where it has its central administration – this is where the company takes essential decisions, but it does not mean that a subsidiary company will ordinarily be domiciled where its parent is domiciled – see *Young v Anglo American South Africa Limited & Ors* [2014] EWCA Civ 1130 considered here: [Court of Appeal finds foreign subsidiary not domiciled in England under Brussels Regulation](#); and
- where it has its principal place of business.

It is sufficient if any one of the three limbs is satisfied.

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STEPS 7 AND 8: MATTERS RELATING TO A CONTRACT

Under article 7(1), in matters relating to a contract, a person domiciled in a Member State may alternatively be sued in the courts for the place of performance of the obligation in question.

Where the contract is for the sale of goods or the provision of services, the place of performance of the obligation in question is the place in a Member State where the goods/services were, or should have been, delivered/provided.

The phrase "matters relating to a contract" has an independent EU meaning. The classification of the claim under national law is irrelevant. The relevant question is whether the interpretation of the contract is indispensable in deciding the lawfulness of the conduct in question – see *Brogstetter v Fabrication de Montres Normandes EURL* (case C-548/12) [2014] ILPr 20 where, on a reference from the German court, the European court held that a claim for unfair competition fell within article 7(1) although it was classified as a tort under German law.

The requirement is that the claim must relate to a contract. It does not have to be a claim for breach of contract in order to fall within article 7(1). For example, a claim under the Contracts (Rights of Third Parties) Act 1999 is a matter relating to a contract within article 7(1) – see *WPP Holdings Italy SRL v Benatti* [2007] EWCA Civ 263. However, a claim for the tort of inducing a breach of contract is not – see *Marzillier, Dr Meier & Dr Gunter Rechtsanwaltsgesellschaft mbH v AMT Futures Limited* [2015] EWCA Civ 143.

Note that there are special rules governing individual contracts of employment, consumer contracts and insurance contracts, which apply in place of article 7(1) (see *Assumption v*).

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STEPS 9 AND 10: MATTERS RELATING TO TORT

Under article 7(2), in matters relating to tort, a person domiciled in a Member State may alternatively be sued in the courts for the place where the harmful event occurred or may occur – that is, either:

- where the wrongful act or omission took place; or
- where the damage occurred.

The claimant has an option to sue in either place – see *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA* (case 21/76) [1978] QB 708.

The phrase "matters relating to tort" has an independent EU meaning. It includes most torts that would be considered as such under English law, eg negligence, nuisance and defamation. Where a claim is a matter relating to a contract under article 7(1), it will not also be a matter relating to tort under article 7(2).

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STEP 11: BRANCHES / AGENCIES / OTHER ESTABLISHMENTS

Under article 7(5), where a dispute arises out of the operations of a branch, agency or other establishment, a person domiciled in a Member State may alternatively be sued in the courts for the place where the branch, agency or other establishment is situated.

It must be a branch, agency or other establishment of the defendant, not the claimant. The presence within the jurisdiction of a person who has acted as the defendant's agent is not sufficient - it must be some emanation of the defendant's business that gives it a corporate presence within the jurisdiction.

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STEP 12: TRUSTS

Under article 7(6), a person domiciled in a Member State may, where the claim is brought against that person as a settlor, trustee or beneficiary of a trust, be sued in the courts of the Member State in which the trust is domiciled.

This article applies only where the trust is created by the operation of a statute or by a written instrument or created orally and evidenced in writing. Claims based on an implied or constructive trust do not fall within this article.

The place of domicile of a trust is determined according to the rules of private international law of the court considering the matter. A trust is domiciled in England if English law is the system of law with which the trust has its closest and most real connection – see Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), sch 1, para 12(3).

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STEPS 13 AND 14: CO-DEFENDANTS

Under article 8(1), a person domiciled in a Member State may also be sued in the courts for the place where any co-defendant is domiciled, "provided the claims 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".

For the English court to have jurisdiction under this article, there must be a valid claim against the defendant domiciled in England and Wales, known as the "anchor defendant", assessed against the standard of a good arguable case.

Where there is such an anchor defendant, the question is whether the claims against the other defendants are sufficiently closely connected to the claim against the anchor defendant for the test to be met.

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CONCLUSION A: ENGLISH COURT MUST STAY PROCEEDINGS UNTIL OTHER COURT'S JURISDICTION ESTABLISHED

There are two main situations in which the English court **must** stay its proceedings in favour of another Member State court under the recast Brussels Regulation:

- Where the proceedings come within an exclusive jurisdiction clause in favour of another Member State court and proceedings have been commenced in that court, whether those proceedings were commenced before or after the English proceedings (see Box 2). In those circumstances, under article 31(2), the English court must stay its proceedings and may only proceed if the chosen court has declared that it has no jurisdiction under the agreement. Under article 31(3), once the chosen court has established its jurisdiction, the English court must decline jurisdiction.
- Where prior proceedings involving the same cause of action and between the same parties have been brought in another Member State court (see Box 3). In those circumstances, under article 29, unless there is an exclusive jurisdiction clause in its favour, the English court must stay its proceedings until the jurisdiction of the first court is established and, at that point, must decline jurisdiction.

In some other situations the English court has a discretion to stay its proceedings (see Box D).

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CONCLUSION B: COMMON LAW RULES APPLY

Where the recast Brussels Regulation does not apply (broadly, where the defendant is not domiciled in a Member State and the competing jurisdiction is outside the EU) the English court will apply common law rules to determine whether or not to exercise jurisdiction. The common law rules cannot however be invoked where the claim falls within the recast Brussels Regulation.

Jurisdiction under the common law starts with the question of whether the defendant can properly be served with proceedings.

Where a defendant is within the jurisdiction (eg if a company has a registered office or other address in England and Wales at which it may be served, or if an individual is resident or indeed temporarily present within the jurisdiction, or if either has appointed English solicitors to accept service on their behalf) then proceedings may be served as of right on that defendant, regardless of whether the claim has any other connection with the jurisdiction.

In those circumstances, however, the English court has a discretion to stay its proceedings if satisfied that there is a more convenient forum in which the dispute should be heard. This is the principle of "forum non conveniens". In broad summary, to obtain a stay, the defendant must show there is another available forum which, prima facie, is clearly more appropriate for the trial of the action. If it does so, the court will ordinarily grant a stay unless there are circumstances which mean that justice requires the trial to take place in England – see *Spiilada Maritime Corp v Cansulex* [1986] UKHL 10.

Where the defendant cannot be served within the jurisdiction of the English court, the claimant will need permission to serve proceedings on the defendant out of the jurisdiction. To obtain permission, the claimant must satisfy three tests:

- first, that there is a serious issue to be tried on the merits;
- secondly, that there is a good arguable case that the case comes within at least one of the gateways in CPR Practice Direction 6B paragraph 3.1 (eg a claim in respect of a contract made within the jurisdiction, or a contract governed by English law, or a breach of contract committed within the jurisdiction, or a claim in tort where damage was sustained within the jurisdiction or as a result of an act committed within the jurisdiction);
- thirdly, that in all the circumstances England is clearly or distinctly the appropriate forum and the court ought to exercise its discretion to permit service out.

If there is an exclusive jurisdiction clause in favour of another (non-EU) court, the English court will almost always stay its proceedings in order to give effect to that clause.

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CONCLUSION C: ENGLISH COURT MUST REFUSE JURISDICTION UNDER RECAST BRUSSELS REGULATION

Where the defendant is domiciled in another Member State, and there is no basis on which the English court can take jurisdiction under the recast Brussels Regulation (including by submission to the jurisdiction – see Assumption iv), the court must refuse jurisdiction.

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CONCLUSION D: ENGLISH COURT HAS JURISDICTION UNDER RECAST BRUSSELS REGULATION

Where the English court has jurisdiction under the recast Brussels Regulation, it has no discretion to stay its proceedings on the ground that another court (whether in a Member State or elsewhere) is a more convenient forum. That was established in *Owusu v Jackson* (case C-281/02) [2005] QB 801 (see [Court has no jurisdiction to stay proceedings in favour of a non-contracting state](#)) at least insofar as jurisdiction is based on the domicile of the defendant. It seems likely that the same principle will apply where the English court's jurisdiction is based on some other article of the recast Brussels Regulation.

The court may however have a discretion to stay its proceedings in certain circumstances:

- Where there is a related action pending in the court of another Member State, and that action was commenced before the English proceedings, the English court has a discretion to stay its proceedings under article 30. For these purposes, 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. This discretion applies regardless of the basis on which the English court has jurisdiction under the recast Brussels Regulation. The court will however be slow to exercise the discretion where its jurisdiction is based on an exclusive jurisdiction clause in favour of the English court – see *Nomura International Plc v Banca Monte Dei Paschi Di Siena SpA* [2013] EWHC 3187 (Comm).
- Where prior proceedings involving the same cause of action and between the same parties have been brought in a non-Member State court, the English court has a discretion to stay its proceedings under article 33. This is a new provision: there was no equivalent under the original Brussels Regulation. The rule does not apply where the English court's jurisdiction is based on a jurisdiction clause under article 25. Further, it only applies where the other proceedings were first in time. On its face, it will not allow the English court to stay its proceedings in favour of proceedings in a non-Member State court where the English proceedings were commenced first. There are conflicting first instance decisions on whether or not the court had a power, under the original Brussels Regulation, to stay in favour of parallel proceedings in a non-Member State court – see [Parallel proceedings in English and non-EU courts: To stay or not to stay?](#)
- It is also unclear whether a Member State court has a discretion to stay its proceedings in favour of a non-Member State court where there are grounds for exclusive jurisdiction equivalent to article 24 in favour of that court. In *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm) the English High Court stayed proceedings against an English domiciled defendant on the basis that the object of the proceedings was the validity of resolutions made by a Ukrainian company – see [Commercial Court stays proceedings in favour of Ukrainian courts in landmark decision](#).
- It seems that a Member State court does have a discretion to stay its proceedings in favour of a non-Member State court where there is an exclusive jurisdiction clause in favour of that court. The European Court of Justice (now known as the CJEU) decision in *Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) appears to suggest that there is such a discretion, although it is not entirely clear, and a number of first instance English decisions have held that a stay can be ordered despite *Owusu* – see [When can the court stay proceedings against an English domiciled defendant in favour of proceedings in a non-EU court?](#) The English court will normally stay its proceedings to give effect to the parties' choice of jurisdiction.
- The court also has a general power to order a temporary stay on case management grounds, but this is likely to be exercised only rarely.

NOTES

This decision tree has been prepared as a quick reference guide to help determine whether the English court has jurisdiction over proceedings commenced on or after 10 January 2015 under the recast Brussels Regulation (Regulation (EU) No 1215/2012). For proceedings commenced before that date, the original Brussels Regulation (Regulation (EU) No 44/2001) continues to apply and so the decision tree is not applicable.

The decision tree is necessarily a simplification of complex issues and should be read subject to the assumptions and with reference to the detailed notes which can be accessed by clicking on the relevant box.

In the decision tree and notes:

- References to a Member State are to Member States of the European Union (EU).
- References to article numbers are to articles of the recast Brussels Regulation.

ASSUMPTIONS

i Civil or commercial matter

Article 1 limits the application of the recast Brussels Regulation to civil and commercial matters. It does not apply to revenue, customs or administrative matters, the liability of the state for acts and omissions in the exercise of state authority, the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, insolvency, social security, wills and succession. It is not always straightforward to determine whether a matter is a civil or commercial matter, or comes within the exclusions. There is a substantial body of CJEU case law on these issues, for example on when the insolvency exclusion applies.

The decision tree assumes that the matter in question is a civil or commercial matter and therefore falls within the scope of the recast Brussels Regulation.

ii Arbitration agreement

Article 1 also excludes arbitration matters from the scope of the recast Brussels Regulation. There was a similar exclusion in the original Brussels Regulation, but its effect was undermined to some extent by the case law of the European courts. In particular, in *West Tankers Inc v Allianz SpA* (case C-185-07) [2009] AC 1138, the CJEU held that a preliminary issue concerning the application of an arbitration agreement, including in particular its validity, came within the scope of the Regulation if the main subject matter of the proceedings came within the Regulation.

This narrow interpretation of the arbitration exception gave rise to various problems for EU-seated arbitrations. In particular, a counterparty could delay resolution of a dispute by starting a so-called “torpedo” action in another Member State on the merits, claiming that the arbitration agreement was invalid. The court of the seat would then be prevented from considering the validity of the arbitration agreement or referring the parties to arbitration (due to the rules on parallel proceedings which require any Member State court to stay its proceedings in favour of the court in which proceedings were commenced first).

To address these issues, the recast Brussels Regulation clarifies, at recital 12, that there is an absolute exclusion of arbitration from its scope. This means that:

- Any Member State court can refer parties to arbitration, stay or dismiss proceedings and examine whether an arbitration agreement is null, void, inoperative or incapable of being performed.
- A Member State court need not wait for the decision of another Member State on the validity of an arbitration agreement, even if the question has been referred to that other court first.
- If an arbitral award and a Member State court judgment conflict, a Member State may enforce the arbitral award (if considered valid) under the New York Convention in preference to the court judgment.

The decision tree assumes that there is no arbitration agreement under which an arbitral tribunal has jurisdiction to determine the issues in dispute.

iii Grounds of exclusive jurisdiction

Under article 24, there are five categories of case in which a Member State's courts have exclusive jurisdiction, regardless of the domicile of the parties (including, as clarified by recital 14 of the recast Brussels Regulation, whether they are domiciled within or outside the EU).

If any of these categories apply to give another Member State exclusive jurisdiction, the English court is required under article 27 to declare that it has no jurisdiction over the matter. The decision tree assumes none of these categories apply:

- Land: in proceedings concerning rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction.
- Companies and associations: in proceedings concerning the validity of the constitution, the nullity or the dissolution of companies or associations, or the validity of decisions of their organs, the courts of the Member State in which the company or association has its seat have exclusive jurisdiction.
- Public registers: in proceedings concerning the validity of entries in public registers, the courts of the Member State in which the register is kept have exclusive jurisdiction.
- Intellectual property: in proceedings concerning the registration or validity of patents, trademarks, designs or other similar rights, the courts of the Member State in which the relevant right was deposited or registered, or the deposit or registration has been applied for, have exclusive jurisdiction.
- Enforcement: in proceedings concerning the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced have exclusive jurisdiction.

iv Entering an appearance

The decision tree assumes that the defendant has not entered an appearance to the claim, ie acknowledged service or filed a defence. Under article 26, a Member State court will have jurisdiction where the defendant enters an appearance, unless it was done only to contest the court's jurisdiction.

So, the English court may proceed with an action if the defendant has filed a defence, even if another Member State court would normally have had jurisdiction for example because of an exclusive jurisdiction clause in its favour. This does not however apply where another Member State court has exclusive jurisdiction under article 24 (see above).

v Insurance / consumer contracts / employment

The recast Brussels Regulation has special provisions for insurance contracts, consumer contracts and individual contracts of employment, in each case designed to protect the party which is seen to be the weaker party to the contractual relationship (ie the insured, consumer or employee, respectively). The decision tree assumes that none of these apply to the matter in question.

In broad summary, the weaker party may be sued only in the courts of the Member State in which he or she is domiciled. Conversely, the weaker party has a choice of where to sue the stronger party. This includes:

- for an insurer, the Member State where the insured is domiciled or, if there are co-insurers, where proceedings have been brought against the lead insurer or, if the case involves liability insurance or insurance over immovable property, where the harmful event occurred;
- for a trader, the Member State where the consumer is domiciled (regardless of whether the trader is domiciled within or outside the EU); and
- for an employer, the Member State where the employee habitually carried out his or her work or, if that was not in any one country, where the business which engaged the employee was situated (regardless of whether the employer is domiciled within or outside the EU).

The extension of the rules relating to consumer and employment contracts to non-EU domiciled traders and employers is a new feature of the recast Brussels Regulation. The equivalent provisions under the original Brussels Regulation applied only where the trader or employer was EU domiciled.

vi Provisional / protective measures

Article 35 allows a Member State court to grant provisional, including protective, measures (eg a freezing injunction) in respect of proceedings in another Member State. The decision tree assumes the matter in question is a substantive claim rather than an application for provisional measures.

vii Criminal acts / cultural objects / salvage of cargo

Article 7 includes three further categories of special jurisdiction, not mentioned in the decision tree, which allow a defendant domiciled in one Member State to be sued, in the alternative, in the courts of another Member State in certain circumstances, namely: civil claims based on acts giving rise to criminal proceedings; civil claims for the recovery of "cultural objects", and disputes concerning payment for the salvage of cargo or freight. The decision tree assumes that none of these categories apply.

viii Third party claims or counterclaims

Under article 8(2) and (3), counterclaims arising from the same contract or facts on which the original claim was based, and third party proceedings, may be brought in the court in which the original claim is pending. The decision tree assumes that this does not apply.

ix Denmark

Questions of jurisdiction as between Denmark and other EU Member States will continue to be governed by the original Brussels Regulation (which applies to Denmark from 1 July 2007 under an agreement between Denmark and the rest of the EU) until Denmark implements the recast Brussels Regulation. It has notified the European Commission that it intends to do so, but the date on which it will take effect is not yet known. The decision tree assumes Denmark will have put in place the necessary implementing legislation.

x EFTA states

Questions of jurisdiction as between EU Member States and the EFTA states (Norway, Switzerland and Iceland) continue to be governed by the 2007 revised Lugano Convention, which is in very similar terms to the original Brussels Regulation. (For claims commenced before particular dates in 2010 / 2011, depending on which EFTA state is in question, the original 1988 Lugano Convention applies.) The decision tree assumes that the Lugano Convention does not apply, as there is no exclusive jurisdiction clause in favour of an EFTA state, the defendant is not domiciled in an EFTA state, and there are no parallel proceedings in an EFTA state.

xi Scotland and Northern Ireland

Questions of jurisdiction as between the three different jurisdictions within the United Kingdom (England and Wales, Scotland and Northern Ireland) are decided by reference to the Civil Jurisdiction and Judgments Act 1982. This applies rules similar to the Brussels Regulation (both the original and the recast versions). The decision tree assumes that there is no relevant connection with Scotland or Northern Ireland that would give jurisdiction to those courts.

xii Unified Patent Court

The recast Brussels Regulation was amended by Regulation (EU) No 542/2014 to take account of the agreement between certain Member States establishing the Unified Patent Court. The decision tree assumes that the matter in question does not fall within that agreement.

xiii Mexico

Where there is an exclusive jurisdiction clause in favour of Mexico in an agreement concluded on or after 1 October 2015, the Hague Convention on Choice of Court Agreements will apply. The decision tree assumes this is not the case.

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