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**EXCLUSIVE JURISDICTION CLAUSES IN
COMMERCIAL CONTRACTS**

The Legal Regimes

- Regulation (EU) No 1215/2012 (“the Recast Regulation”)
- Regulation (EU) No 44/2001 (“the Brussels I Regulation”) / the Lugano Convention
- English common law discretions
- The Hague Convention on Choice of Court Agreements

Determining the Court's Jurisdiction

- No matter how clear the legislation on jurisdiction may be, there may often be room for argument (and therefore incurred time and expense)
- The parties can provide clear guidance to the court by writing a clear, express and unequivocal jurisdiction clause in their contract
- A jurisdiction clause may be 'exclusive' (i.e. provides for one specific court to have jurisdiction) or 'non-exclusive' (i.e. provides for more than one court or legal system to take jurisdiction)
- Under the Recast Regulation, a choice of court must be in writing (or evidenced in writing)

The Recast Regulation - applicability

- The Recast Regulation applies to proceedings commenced on or after 10 January 2015
- The Recast Regulation is only applicable to “civil and commercial” matters (*Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm))
- The Recast Regulation is similar but different to the previous legislation
- Importantly, Article 25 of the Recast Regulation shows that an express party-chosen choice of court will be respected (*Re Stemcor Trade Finance Ltd* [2016] BCC 194)
- Article 25 does not require either party to be domiciled in the European Union
- But they must have chosen a court within the European Union

The Recast Regulation – how the courts apply it

- Where the English courts are chosen in an exclusive jurisdiction clause, the English court will take jurisdiction
 - NB where one party “for the benefit of” the other party agrees to a non-exclusive jurisdiction clause, this cannot subsequently be viewed as an “optional” exclusive jurisdiction clause (*Perella v Codere* [2016] EWHC 1182 (Comm))
- Where a foreign court is chosen in an exclusive jurisdiction clause, the English court may take jurisdiction but must stay proceedings if the chosen court’s jurisdiction is invoked
- If the foreign court takes jurisdiction, then the English court must decline jurisdiction

Recast Regulation – how the courts apply it (continued)

- What if there are multiple and related contracts containing inconsistent jurisdiction clauses?
 - If the court can see that the dispute arises out of one specific contract, then that contract’s jurisdiction clause is adopted and upheld (*Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998)
 - If not, the court will try to see which agreement is “at the commercial centre of the transaction” (*UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585)
- What if the subject matter is excluded?
 - E.g. insurance-related proceedings (*XL Insurance* [2015] EWHC 3431 (Comm))
 - E.g. possibly schemes of arrangement (*Re Metinvest* [2016] ILPr 19)

The Recast Regulation - priority

- Under the Brussels I Regulation, any court after the court “first seised” was obliged to stay proceedings until the first court made a decision on jurisdiction
- Under the Recast Regulation, an exclusive jurisdiction clause will defeat this rule.
- A chosen court will always have priority over the court “first seised”
- This will prevent the race to jurisdiction

Where the Recast Regulation does not apply

- The Brussels Regime (comprising the Brussels I Regulation and the Lugano Convention) still applies to civil/commercial matters commenced before 10 January 2015 (*Bohez v Wiertz (C-4/14)* [2015] ILPr 43)
- The Brussels I Regulation applies to jurisdictional issues as between EU Member States and Denmark (by special separate agreement)
- The Lugano Convention applies to jurisdiction/enforcement issues as between Iceland, Switzerland, Norway, pre-2004 EU States and Poland

The Hague Convention on Choice of Court Agreements

- The Hague Convention entered into force on 1 October 2015
- It is applicable to EU Member States (except Denmark), Mexico and Singapore. The USA and Ukraine have signed but not ratified the Convention
- The definition of an 'exclusive' choice of court agreement in the Convention (Article 3) is a technical one:
 - The chosen court must be a court in a Contracting State
 - The choice of court must be expressly to the exclusion of any other forum

The Hague Convention (continued)

- The Hague Convention is aimed at increasing trade and promoting investment by providing certainty to jurisdictional choices and issues
- Parties to the Hague Convention are obliged to uphold a jurisdiction clause in favour of the contracting parties' courts
- By Article 5(2) a chosen court is not able to decline jurisdiction, even if it thinks another forum is more convenient or appropriate
- However, the jurisdiction clause will not be enforced if it is null and void under the domestic law (including conflicts of law rules) of the state where it is sought to be enforced