

## Feature

### KEY POINTS

- In an action for the inducement of the breach of an exclusive English jurisdiction clause the place where the harmful event had occurred was Germany where the litigation and expenditure had taken place.
- Consequently Article 5(3) of the Regulation did not allow the tort action to proceed in England.
- The need for such actions will be greatly reduced under the Recast Regulation as it gives priority to the chosen court to decide whether it has jurisdiction, preventing many such breaches in the first place.
- No predictions can be confidently made as to the jurisdiction, recognition and enforcement regime post-Brexit.

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# Marzillier and the enforcement of exclusive English jurisdiction clauses

In *AMT Futures Limited v Marzillier* [2017] UKSC 13; [2017] 2 WLR 853 the UK Supreme Court held that a claim for inducing breach of an exclusive English jurisdiction clause could not proceed in England, as Germany was the place where the harmful event had occurred. The litigation and the consequent expenditure had been incurred in Germany. This article considers *Marzillier*, the effect of Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Recast Regulation) and (briefly) the potential effect of Brexit.

### THE FACTS

Contracts between a UK derivatives broker (AMT) and German investor clients contained English law and exclusive English jurisdiction clauses. Losses were suffered on trades by the German clients who, on the advice of their lawyers, Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft mbH (Marzillier), sued AMT in Germany. AMT spent over £2m in settlement, fees and other costs in Germany, and claimed in England against the clients for breach of the jurisdiction clauses and against Marzillier for inducing breach of contract, in particular the English jurisdiction clauses.

An action may be brought against a defendant for inducing a breach of contract between the claimant and a third party without reasonable justification or excuse (see generally section 2, chapter 24 of *Clerk & Lindsell on Torts*, 21st edn). In *Marzillier* it was alleged that the lawyers had conducted a campaign to find AMT clients and persuade them to bring claims in accordance with a standard model, and in doing so to have acted unlawfully and in breach of professional obligations by making use of stolen client lists, and had taken an improper financial interest in the funding arrangements so as to circumvent the German law prohibition on lawyers charging performance-related fees.

Marzillier is domiciled in Germany and the default position under Art.2 of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Regulation) is that this is where it should be sued. However, AMT argued that the special jurisdiction provisions in Art.5(3) of the Regulation applied to allow claims in England. AMT argued that although England was not the place where the event giving rise to the damage occurred, it was the place where the damage occurred.

In this regard, while Art.5(3) allows a claim to be brought in matters relating to tort, delict or quasi-delict 'in the place where the harmful event occurred', the Court of Justice of the European Union (CJEU) case law has established that jurisdiction provisions are to be given autonomous meanings and that the "place" referred to in Art.5(3) covers both where the damage occurred and where the event giving rise to it occurred (*Handelskwekerij GJ Bier NV v SA Mines de Potasse d'Alsace* (Case 4320/74) [1978] QB 708). The claimant can choose where to sue if he has a choice of jurisdiction. The CJEU has developed a number of special rules when it has not been possible to easily identify one place where

harm occurred. This can arise, for example, where libellous material causes harm to the claimant in several member states (*Shevill v Presse Alliance SA* (Case C-68/93) [1995] 2 AC 18) or where publication of material on the Internet causes harm worldwide (*eDate Advertising GmbH v X* (Cases C-509/09 and C-161/10) [2012] QB 654). It is likely that because of technological advances such rules will require further adoption and refinement in the future.

### THE JUDGMENTS

Although it lost before Popplewell J, Marzillier succeeded before the Court of Appeal (CA) (which held in its favour without 'any great enthusiasm') and the Supreme Court (SC). The SC held that it was straightforward here to identify where the relevant harm occurred and there was no need for any special rule. The raising of the proceedings in Germany was the event which gave rise to the damage. Since litigation and its expenditure had occurred in Germany then that was where the harmful event had occurred.

Popplewell J had (partly) relied on *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* (The Swedish Club) [2009] EWHC 716 (Comm). In *Dolphin*, Turkish underwriters and the claimant agreed that money should be paid by the P&I Club to the claimant in the UK. The club was aware of this but instead paid the money to the underwriters. The claimant brought proceedings against the club for procuring breach of contract. The harmful event was held to have occurred in the UK. Similarly, Popplewell J held that in cases where the tort or delict involved the claimant

being deprived of a contractual benefit, such as that conferred by an exclusive jurisdiction clause, the damage was likely to have occurred in the place at which the claimant would have received that benefit.

However, the SC held *Marzillier* could be distinguished from *Dolphin*, where the relevant contractual obligation was the positive obligation to pay money into the claimant's bank account in England. AMT here incurred damage in Germany by engaging in the German proceedings and settling claims there. The direct harm suffered was the expenditure caused by those proceedings.

A reference to the CJEU was refused: the matter was *acte clair* and there was no complexity in identifying where the relevant harm had occurred which might cause the CJEU to develop a special rule.

## COMMENT

The result could be criticised as distancing the English courts from determination of issues involving English exclusive jurisdiction clauses and reducing the protection afforded to them. This was recognised by the upper courts who, in the end, followed the strict principles under which the Regulation operates. These are that contractual and tortious actions are distinguished, the special jurisdiction provisions create a link between the courts who may hear the dispute and the substance of the dispute and any derogations from the domicile principle are to be strictly construed. Any party who wishes to engage a special jurisdiction provision must bring itself clearly within its parameters.

Parties have tried to invoke the connection required by Art.5(3) by relying on a more tenuous link. However, generally the CJEU has been careful not to allow indirect or consequential harm to be sufficient (see eg *Dumez France SA v Hessische Landesbank* (Case C-220/88) [1990] ECR I-49 and *Marinari v Lloyd's Bank Plc* (Case C-364/93) [1996] QB 217). To do otherwise would risk undermining the domicile principle. Thus, it was insufficient that financial loss was felt in the diminishment of the totality of assets in one country when the direct loss of assets was in another contracting state (*Kronhofer*

*v Maier* (Case C-168/02) [2004] 2 All ER (Comm) 759). In *Marzillier*, although the SC accepted that it was possible there may have been some damage to AMT's business model due to the German proceedings since the purpose of the exclusive jurisdiction clause had been to preserve the focus of AMT's business in London, any such loss of focus was consequential on the direct harm caused by the German proceedings.

Therefore, since the direct harm and its consequences occurred in Germany it was logical that under Art.5(3) any tort actions should also be pursued there. Hence the SC followed what is now the CJEU orthodoxy on Art.5(3).

Parties, including lenders and financial institutions, should therefore consider carefully where any loss due to an alleged tort was suffered. Suing in a foreign jurisdiction may be inconvenient and costly, and procedural or substantive considerations may arise. There is also the inconvenience that any contractual claims brought against the actual contract breaker in England (which can proceed following *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T*) [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544) will be separated from tort claims against third parties. This may give rise to the potential for conflicting judgments. However, *Marzillier* makes clear that it is the terms of the relevant rule which are important and it is irrelevant that it would be inconvenient that one jurisdiction cannot deal with all aspects or issues of a dispute.

Indeed, any joined proceedings in similar circumstances would have to be raised before the courts of the original action. It seems unlikely that such claims would succeed if those courts have previously determined that they did have jurisdiction and/or that the jurisdiction clause was inapplicable or void. Thus, *Marzillier* may render actions for inducement of breach of an exclusive jurisdiction clause by a third party difficult to pursue in the European context. It seems that trying to avoid the outcome, perhaps by arranging payment to be made in the UK, is unlikely to work since any expenditure is likely to be regarded as the direct outcome

of the foreign proceedings and the means of how and where it was funded regarded as the remoter indirect consequence.

## THE ALEXANDROS T AND MUTUAL TRUST AND CONFIDENCE

The party breaching an English exclusive jurisdiction clause can be sued in England. In *The Alexandros T* (above) the CA held that although an anti-suit injunction would be contrary to EU law, EU law did not prevent enforcing causes of action in respect of breaches of an exclusive jurisdiction clause by awarding damages and other relief. Therefore, declarations, damages and indemnities in respect of the wrongful commencement of Greek proceedings were allowed. Subsequently, Flaux J held that he could award damages in lieu of an injunction and order specific performance of the settlement agreement (see [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep 579). Those decisions have been discussed previously [see Jurisdiction agreements. Declarations, damages and compatibility with Regulation 44/2001 [2011] 11 JIBFL 705] as has the potential argument that the CJEU may consider that they are incompatible with the principles of mutual trust and confidence.

Could the same be argued about an action for inducement of breach of a jurisdiction clause against a third party? This did not require an answer from the upper courts in *Marzillier* since they held that there was no jurisdiction anyway. The CA, citing *The Alexandros T*, did state that any such argument was unsound as the injunction did not preclude anyone from commencing proceedings in Germany but merely precluded *Marzillier* from inducing the commencement of proceedings. Further, in the CA's view, the claim for damages was not a collateral attack on the assumption of jurisdiction by the German courts but a claim for damages in respect of loss resulting from inducement of the breach of an English law contract.

It is not intended to rehash the arguments in the previous article. However, when it is posited that *Marzillier* had induced a breach of contract the argument contains

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within it the suggestion that that assumption of jurisdiction by the German courts was somehow wrong. It is notable that in *Marzillier*, challenges to the German court jurisdiction were made by AMT in a number of cases. However, most of these were unsuccessful. In one example the German court dismissed the challenge saying that the jurisdiction clause was not wide enough to cover the action framed in German tort law. However, if any action is then brought against advisers that they have thus induced a breach of the jurisdiction clause then it may be viewed by the CJEU as a collateral attack on another Member State's judgment and incompatible with mutual respect. In *Marzillier* itself, AMT had indicated that claims would not be made against anybody who had obtained a final judgment on the merits and the CA itself regarded the lawyers as not being entitled to benefit from any issue estoppel as they had not been parties to the German proceedings.

In any case, in England such incompatibility arguments will not work. *The Alexandros T* has been applied in *Barclays Bank Plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri* [2016] EWCA Civ 1261 (a case under the Regulation). There, an Italian pension fund (the fund) commenced proceedings alleging breach of the Italian Civil Code, classified as tort claims, in Italy against the bank in respect of a conditional asset exchange letter and a professional client agreement. The fund also claimed a declaration in the Italian proceedings that because of the bank's misconduct their agreements should be declared null and void or should be cancelled for fraud or mistake. The bank claimed in English proceedings that the Italian proceedings were in breach of English jurisdiction clauses and sought related damages and declarations. The fund applied for orders under Articles 27 (*lis pendens*) and 28 (related actions) of the Regulation and the bank applied for summary judgment.

The fund failed at first instance partly on the basis that although in the Italian proceedings the fund had attacked the validity of the substantive agreements this

was insufficient to amount to an attack on the jurisdiction agreements, which like arbitration agreements, constituted separate agreements from the main contract. It appealed and also filed a new "brief" in the Italian proceedings alleging that the jurisdiction clauses were invalid thus attempting to remedy the lacuna. The CA refused reliance on the brief: the Italian court only became seised of the claims in the brief at the time it was filed and therefore after the English court was seised. On the main issue, the CA, like the judge, followed *The Alexandros T* and held that Art.27 did not apply as the cause and object were not the same in the two proceedings. In addition, an Art.28 discretionary stay was refused due to the English jurisdiction clauses, the speed at which the English courts could dispose of the issue and the fact that the Italian proceedings had been deliberately structured to enable the Italian court to assume jurisdiction.

The CA also allowed summary judgment. It followed *The Alexandros T* in rejecting the fund's argument that the bank would be likely to rely on such judgment as giving rise to a binding decision which would pre-empt, and thus interfere with, the jurisdiction of the Milan court to determine the meaning and effect of the jurisdiction clauses, and that this would infringe the principle of mutual trust.

Thus, in *Barclays Bank* the retrospective attempt to remedy the defect of not effectively impugning the jurisdiction clause in the initial Italian proceedings failed. Whether further efforts to try and seise foreign courts first in respect of the validity of English jurisdiction agreements succeed in torpedoing actions in England for breach of those clauses remains to be seen. However, as the authorities suggest, it appears that English courts will not be easily persuaded.

### THE RECAST REGULATION

The Recast Regulation is now in force and applies to legal proceedings instituted on or after 10 January 2015. Art.31(2) states that where a Member State court on which an Art.25 agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings

until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. Under Art.31(3) when the chosen court has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court. The Recast Regulation also contains special protective provisions for consumers, insurance policyholders and employees.

These provisions will, in the European context, reduce the necessity of relying on actions for inducement as in *Marzillier* or for breach of the jurisdiction agreement as in *The Alexandros T* and reduce the need for anti-suit injunctions. This is especially so now that the Regulation requirement that at least one of the parties to the jurisdiction agreement be domiciled in a Member State has been removed meaning that more exclusive jurisdiction agreements will fall within the Recast Regulation. The wronged party ought to start proceedings in the chosen court so that that court can establish jurisdiction. Any default in not adhering to the jurisdictional provisions and its consequences can therefore be stymied early on. However, where there is some expenditure incurred in defending the foreign proceedings until the chosen court has decided then there may still, depending on the circumstances, be some need to rely on *The Alexandros T*.

There have been few English cases on Art.31. One of interest to banks and other financial institutions is *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm); [2017] 1 Lloyd's Rep. 273. As is well known, international financial documentation such as loan agreements often contain "asymmetric jurisdiction clauses". These contain different provisions for jurisdiction depending on who initiates proceedings. Usually the borrower can sue in just one country but the lender can sue anywhere it chooses assuming those courts have jurisdiction. English courts have usually treated such clauses as valid. In *Liquimar* the question arose whether asymmetric clauses were exclusive jurisdiction clauses for

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the purposes of the Recast Regulation and therefore whether Art.31(2) applied.

In brief, notwithstanding the asymmetric jurisdiction clauses providing for them to sue in England, the borrowers commenced Greek proceedings against the bank in respect of loans and guarantees and for damages in tort and under the Greek Civil Code for loss of their vessel's use as well as moral damages. Subsequently, the bank commenced English proceedings claiming declarations and damages and/or an indemnity regarding breach by the borrowers of the jurisdiction clause. The borrowers applied under Art.29 (*lis pendens*) of the Recast Regulation to stay the English proceedings pending determination of the parallel proceedings in Greece.

In what is a useful decision for banks Cranston J held that the natural meaning of the words 'an agreement [which] confers exclusive jurisdiction' in Art.31(2) included asymmetric jurisdiction clauses. It did not matter that the exclusive part of the agreement applied only in respect of claims by the borrowers alone and the clause would apply differently when the bank sued them. In reaching this decision the judge relied on the words of Art.31(2) and recital 22 and the Recast Regulation's aims. Since the borrowers had agreed to sue only in England their proceeding in Greece would undermine this agreement and foster abusive tactics if allowed. Further, his lordship held that under Art.31(2) if the English court decided it had jurisdiction it was able to proceed with the case irrespective of how far advanced the Greek proceedings were. The borrowers had also requested that the related claims – that the proceedings in Greece were in breach of the jurisdiction clauses and for damages for that breach – should be stayed under Art.30 of the Recast Regulation. This was rejected: simply put, the English courts were best placed to rule on construction of an exclusive English jurisdiction clause.

Although this case is unlikely to be the last word on the matter it does show that the scope for abuse is much reduced under the Recast Regulation. *Dicta* in the case also suggests that the English courts will be receptive to the argument that exclusive

jurisdiction clauses in Article 3(a) of the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention) also extend to asymmetric clauses.

**BREXIT**

Any discussion on Europe and Brussels would not be complete without mentioning Brexit. However, it is not proposed to discuss the point in detail, first because of the already burgeoning literature and second because any opinion is subject to many imponderables.

For example, the UK may maintain ties with the current jurisdictional regime, such as a bilateral EU-UK treaty based on the Recast Regulation, meaning that it has to observe (some) diffidence to community law principles or take due account of CJEU judgments. In addition, post-Brexit the UK is likely to sign the Hague Convention and/or the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters between EU Member States and European Free Trade Area members. It is briefly noted that these conventions contain important limits – for example, the Hague Convention does not extend to carriage contracts and the Lugano Convention requires that one of the parties to the agreement be domiciled in a Contracting State in contrast to no such requirement in the Recast Regulation and the Hague Convention. However, adoption of some or all of these would assist the protection of exclusive jurisdiction agreements after Brexit.

A hard Brexit in the conflicts of law arena could diminish the importance of mutual trust and confidence and the UK courts would (probably) become free to grant anti-suit injunctions within the European context. Thus, actions for breach of and/or inducement of breach of an exclusive jurisdiction agreement would become less necessary as an early injunction could prevent any breach.

In a hard Brexit world, without further jurisdictional treaties, in the absence of presence or submission the English jurisdiction clause would provide the basis for jurisdiction against the actual contract breaker and a suitable jurisdictional gateway

would be required in paragraph 3.1 of Practice Direction 6B (or future equivalent) of the Civil Procedure Rules against any tortfeasor inducing the breach. This could perhaps be as a necessary or proper party to the claim against the contracting party or in its own right as a tort claim. Regarding the latter, currently paragraph 3.1(9), applying to claims made in tort, largely reflects Art.5(3) of the Regulation. In interpreting this, English courts have accepted a similar argument to the CJEU jurisprudence that the damage sustained within the jurisdiction has to be direct rather than indirect or consequential (see *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2016] 1 WLR 1814). Therefore, subject to further judicial consideration and rule amendments, *Marzillier* may be similarly decided even post-Brexit.

**CONCLUSIONS**

It may be argued that in *Marzillier* the English courts have reduced the effective enforcement of exclusive English jurisdiction clauses. However, the English courts have, it is respectfully submitted, followed CJEU jurisprudence regarding Art.5(3). Moreover, an action for damages and/or declarations against the actual contract breaker can be maintained and may provide a substantial remedy as demonstrated in *Barclays Bank*. The problem should be less acute following the Recast Regulation where the court seised on the basis of the jurisdiction agreement has priority in determining jurisdiction. Less safe are any predictions as to what may occur post-Brexit. ■

**Further Reading:**

- Jurisdiction agreements, declarations, damages and compatibility with Regulation 44/2001 [2014] 11 JIBFL 705.
- Jurisdiction clauses in the English courts: is there a presumption of exclusivity? [2016] 1 JIBFL 38A.
- LexisNexis Loan Ranger blog: Establishing the extent of the UK court's jurisdiction (*AMT Futures Ltd v Marzillier and others*).