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Thwarting Torpedoes and Other Clarifications: Recast Brussels Regulation in Force From 10 January 2015

The European Parliament and Council update the Regulation on jurisdiction and the recognition and enforcement of judgments within the EU to improve clarity and eliminate stalling tactics.

By [Oliver Browne](#)

One of the relatively unsung success stories of the European Union (and its predecessors) is its experiment in judicial co-operation. The first major component of this experiment was the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Brussels Convention was updated, and partly superseded, by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regulation 44/2001 (now referred to as the **Original Brussels Regulation**) has been recast by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (referred to as the **Recast Brussels Regulation**).

For those dealing with transactions and disputes across borders in Europe, these fundamental pieces of legislation address two very important issues: which EU courts have jurisdiction, and how judgments from one Member State can be recognized and enforced in another Member State. They also touch on a number of other features of international disputes including, for example, the relationship between arbitration and litigation and the validity of court selection clauses.

The Recast Brussels Regulation entered into force on 10 January 2015. The changes it introduces are relatively limited. Set out below are details of the most important:

- **Abolition of *exequatur*:** The Recast Brussels Regulation has simplified the system for enforcing judgments across Member States, and has reduced costs and delays, by abolishing *exequatur*. This was an intermediate procedure required by the Original Brussels Regulation as part of the enforcement process whereby judgments were formally recognized before they could be enforced. The Regulation now also promotes the use of standard forms to facilitate the recognition and enforcement of foreign judgments by the competent authorities.
- **Extension of the jurisdiction rules in the Regulation to disputes involving defendants who are not domiciled in an EU State:** The Original Brussels Regulation contains jurisdiction rules which are mainly applicable if defendants are domiciled in Member States. The Recast Brussels Regulation applies those rules to non-EU defendants, allowing those defendants to be sued within the EU in certain circumstances — for example, in the case of certain insurance, consumer and employment contracts.
- **Changes to the *lis pendens* rules:** Under the Old Brussels Regulation, it was possible to commence so-called “torpedo” actions (see the European Court of Justice decision in *Gasser (Erich) GmbH v MISAT Srl* C-116/02 [2005] QB 1, [2005] 1 All ER (Comm) 538). In “torpedo” actions, claims are deliberately brought in slow moving Courts in breach of exclusive jurisdiction clauses. This strategy could potentially delay proceedings, as the court selected in the jurisdiction clause was obliged to stay proceedings before it until the court first seized determined whether it had jurisdiction. The Recast Brussels Regulation now says that proceedings in breach of exclusive jurisdiction clauses must be stayed until the court selected in the jurisdiction clause determines whether it has jurisdiction. This change hopefully will significantly reduce “torpedo” actions and forum shopping.
- **Arbitration exception:** Another significant change relates to the nature of the “arbitration exception” (*i.e.* the provision expressly excluding arbitration from the scope of the Recast Brussels Regulation), which had been heavily debated. The changes are generally supportive of arbitration, and the primacy of the New York Convention, and address some of the difficulties following the ECJ’s decision in *Allianz SpA v West Tankers Inc* (Case C-185/07). In that case, an anti-suit injunction from the court of the seat of arbitration aimed at preventing litigation in another Member State was held to be contrary to the Brussels Regulation. Now, the Recast Brussels Regulation clarifies that the Courts of Member States should not be prevented from referring parties to arbitration, from staying or dismissing proceedings in favour of arbitration, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed. However, the wide-ranging reforms initially proposed have not fully materialized and some have criticized the Recast Brussels Regulation for not going far enough.
- **Court selection clauses:** The Recast Brussels Regulation expressly states that court selection clauses are separable agreements on jurisdiction and will be treated as independent of the other terms of the contract in which they are contained. The validity of court selection clauses cannot now be contested solely on the ground

that the contract is not valid. Court selection clauses now fall within the Recast Brussels Regulation more easily: the requirement that the parties to agreements containing such clauses must include at least one party domiciled in a Member State has been removed. This means that the domicile of the parties becomes less relevant and that parties can more easily establish whether the Recast Brussels Regulation applies. However, the requirement that the court selection clause selects a Member State court remains in place (so if a non-Member State court is selected, the relevant court selection clause falls outside the Regulation).

On balance, the Recast Brussels Regulation fine tunes an already successful piece of legislation and the changes discussed above are not wide-ranging and should be welcomed. However, there is some sense that an opportunity was missed by the regulators, particularly in relation to the scope of the arbitration exception, to provide even more clarity and certainty.

NEWS IN BRIEF

International Energy Charter Signals New Global Cooperation in the Energy Sector

Officials meeting in Brussels in November 2014 have agreed the text of the International Energy Charter, creating the framework for greater international cooperation in foreign investment and capacity building in the energy sector.

By [Catriona E. Paterson](#)

The International Energy Charter (the Charter) follows a four-year consultation process by the Strategy Group of the Energy Charter Conference with all interested States, and involved a number of States not currently party to the Energy Charter Treaty (the ECT) such as China and India.¹

The Charter's primary objectives were to create a platform to address challenges facing the energy industry, modernize the European Energy Charter – the original, non-binding, political declaration of engagement in the Energy Charter Process which was a precursor to the ECT – and enhance established principles of energy cooperation.

The new Charter contains several provisions addressing the modern challenges facing the energy industry, including provisions:

- Reflecting the increased demand for energy from developing countries. The Charter encourages cooperation to enhance capacity building and to share research.
- Reflecting the need to focus on sustainable, environmentally-friendly energy production. Signatories agree to take steps towards making renewable energy sources and clean technologies more financially competitive in the energy market and to promote low emission technologies.
- Acknowledging that energy generation from a diverse range of sources and supply routes will be critical to achieving energy security for all.

The Charter also reiterates some of the fundamental principles seen in the ECT, allowing States which are not currently signatories to the ECT to publicly declare their commitment to such principles, such as: the promotion of a favorable investment climate in the energy industry; the importance of access to adequate dispute settlement mechanisms; and the need for political and economic cooperation to develop free trade in efficient cross-border energy markets.

The Netherlands will host a high-level ministerial conference in May 2015 at which States are expected to sign and adopt the Charter. A number of States that are not currently signatories of the ECT have indicated their intention to do so.

The Charter is a political declaration of intent and as such will not give rise to enforceable obligations on the signatory States. Nevertheless, the text represents a positive step towards strengthening international energy cooperation insofar as it sets out the framework for modernizing the ECT. The Energy Charter Secretariat has also expressed hopes that the Charter may ultimately encourage a number of new signatories to the ECT, expanding investment protection to additional States.

Better, Faster, Cheaper: CPR Offers New Rules for International Arbitration

Parties to disputes arising from cross-border business transactions may benefit from new rules for administered arbitration.

By [Dave McLean](#)

The International Institute for Conflict Prevention and Resolution (CPR) has released a new set of Rules for Administered Arbitration of International Disputes. The Rules, which went into effect on 1 December 2014, are for use in cross-border business transactions. They reflect best practices and address current issues in an international arbitration such as arbitrator impartiality, time to reach resolution and growing administrative costs.

Although CPR's heritage has been in the non-administered arena, the Rules provide for administered arbitration. Some of the new Rule's salient features include:

- **Time to Award:** CPR must approve any extension beyond one year from the constitution of the tribunal, effectively incentivizing tribunals to complete their work within 12 months.
- **Arbitrators:** CPR's global and industry-specific panel of arbitrators is comprised of experienced neutrals who have been vetted by CPR, although the parties retain the ability to designate for appointment any arbitrators of their choosing.
- **Confidentiality:** The arbitrators, parties, counsel and CPR are all subject to an express confidentiality requirement.
- **Screened Selection Process:** The parties may agree that the arbitrators can be appointed without knowing which party has selected them in order to ensure impartiality.
- **Capped Administrative Costs:** CPR's sliding fee schedule is capped at US\$34,000, absent certain circumstances. Arbitrators are compensated at their designated hourly rates.
- **Party Control:** The parties are able to control the process by providing only for those administrative functions needed. In this way the Rules are more streamlined than those of some other international organizations.
- **Settlement Opportunities:** The tribunal is authorized to propose settlement and assist the parties in initiating mediation at any stage of the proceedings.

The Rules can be viewed at www.cpradr.org.

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CIETAC's New Arbitration Rules for 2015

As of 1 January 2015, new CIETAC Arbitration Rules for 2015 bringing CIETAC arbitration into line with international best practice

By [Ing Loong Yang](#), [Tina Wang](#) and [Catriona E. Paterson](#)

The China International Economic and Trade Arbitration Commission (CIETAC) has published new Arbitration Rules which entered into force on 1 January 2015 (the 2015 Rules). The revisions are intended to bring the CIETAC Arbitration Rules into line with international best practice, and to address issues arising out of the break-away of CIETAC's former Shanghai and Shenzhen sub-commissions in 2012.

The 2015 Rules introduce key changes, including:

- **Emergency arbitrator procedure:** In line with recent changes to the rules of other arbitration institutions - such as the LCIA, ICC, SIAC and HKIAC - Article 23 and Appendix III of the 2015 Rules allow a party to apply to an emergency arbitrator, appointed by the CIETAC Arbitration Court, for interim emergency relief, before constitution of the tribunal. However, in Mainland-seated CIETAC arbitrations, an emergency arbitrator's scope of power is limited given that the arbitration law in Mainland China does not, as yet, provide for the enforcement of relief granted by emergency arbitrators. Nonetheless, a Mainland-seated emergency arbitrator may still be able to grant interim relief that is not reserved by the PRC courts, or which may be enforced in other jurisdictions (e.g. Hong Kong).

- **Multi-contract disputes:** The 2015 Rules have introduced a new provision at Article 14, which now permits a claimant to bring a single arbitration proceeding under multiple contracts provided that the:
 - Contracts consist of principal and ancillary contracts, or involve the same parties and “legal relationships of the same nature”;
 - Dispute(s) arise out of the same series of transactions;
 - Arbitration agreements are identical or compatible.
- **Joinder:** The newly introduced Article 18 allows any party to an arbitration to apply to CIETAC to join an additional party to the proceedings. CIETAC may decide not to join an additional party if the additional party is *prima facie* not bound by the relevant arbitration agreement, or if any other circumstance exists that makes the joinder inappropriate.
- **Consolidation:** Under the old rules, multiple arbitrations could only have been consolidated with the parties’ agreement. Article 19 changes this approach and provides for additional grounds on which multiple arbitrations may be consolidated. CIETAC may now consolidate multiple arbitrations if any of the following apply:
 - The claims are made under the same arbitration agreement;
 - The claims are made under multiple identical or compatible agreements which bind the same parties and involve “legal relationships of the same nature”;
 - The claims are made under multiple identical or compatible agreements and the contracts consist of principle and ancillary contracts; or
 - All the parties have agreed to consolidation.

The 2015 Rules also attempt to resolve jurisdictional problems that may arise where an arbitration agreement refers disputes to CIETAC’s Shanghai and Shenzhen sub-commissions. Article 2(6) of the 2015 Rules provides that CIETAC’s Arbitration Court will accept the arbitration application and administer the case. However, in a decision issued on 31 December 2014, the Shanghai Intermediate People’s Court ruled that the Shanghai International Arbitration Centre (SHIAC) has jurisdiction to hear a dispute arising under an arbitration agreement that referred disputes to the CIETAC Shanghai sub-commission.² This decision is unlikely to be the last word on the subject, meaning that considerable uncertainty remains as to jurisdiction where an arbitration agreement refers disputes to the now-defunct CIETAC Shanghai and Shenzhen sub-commissions.

The 2015 Rules apply to all CIETAC arbitrations commenced on or after 1 January 2015, unless the parties agree otherwise. Arbitrations already accepted by CIETAC will continue to be governed by CIETAC’s 2012 Rules.

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IBA Issues Revised Guidelines on Conflict of Interest

Arbitration users and practitioners need to take heed of changes in current and future international arbitrations.

By [Jan Erik Spangenberg](#)

For the first time since their inaugural publication in 2004, the International Bar Association (IBA) has revised its Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). While the revision does not fundamentally alter the framework of the IBA Guidelines it does contain some important amendments and clarifications.

The IBA Guidelines were first published in 2004 to provide arbitrators, parties, and counsel as well as courts and arbitration institutions with guidance and to promote greater consistency with regard to conflicts of interests, impartiality and disclosure obligations in international arbitration. To this end, the IBA Guidelines set forth some “General Standards” with explanatory notes as well as “Red,” “Orange,” and “Green” lists of specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Since their adoption in 2004, the IBA Guidelines have frequently been used in international arbitration practice.

The revised Guidelines issued at the end of 2014 strive to reflect the accumulated experience of the Guidelines' usage and to address new developments in international arbitration practice since 2004.

With regard to the "General Standards," the 2014 Guidelines provide guidance on some important issues:

- **Third-party funders share identity of funded party:** General Standards 6(b) and 7(a) have been amended to stipulate that any person having a controlling influence on a party or a direct economic interest in the award to be rendered may be considered to bear the identity of that party and that such relationship must be disclosed. The explanation to this standard clarifies that third-party funders and insurers may have such economic interest. These amendments may require parties to disclose at the outset of an arbitration whether they have obtained third-party funding or have other relevant funding or insurance arrangements. These disclosures could have far-reaching implications, including an increase in applications for security for costs (which have recently been granted against third-party funded parties in investment arbitration).
- **Advance waivers do not discharge ongoing duty of disclosure:** The new General Standard 3(b) addresses the practice of "advance waivers", *i.e.* declarations by the parties that they will not challenge an arbitrator if he or she has a conflict of interest in the future. These waivers aim to avoid time delays and costs arising from late challenges to arbitrators. While not otherwise taking a position as to the validity and effect of advance declarations or waivers, the 2014 IBA Guidelines clarify that such waivers do not, in any case, exempt the arbitrator from his ongoing duty of disclosure.
- **Scope of IBA Guidelines extends to administrative secretaries:** New General Standard 6(a) extends the application of the IBA Guidelines to administrative secretaries and other individuals assisting arbitral tribunals or individual arbitrators, thereby recognizing arbitral tribunals' widespread use of secretaries and assistants. The new standard imposes a duty on the arbitral tribunal to ensure that this obligation is respected at all stages of the arbitration.
- **Duty to disclose counsel team:** Amended General Standard 7(b) also requires parties to disclose the identity of their arbitration counsel and relationships between their counsel and arbitrators. This duty extends to all members of a party's counsel team and requires disclosure both at the earliest opportunity and upon any change in the counsel team. The party's disclosure obligations have also been increased by General Standard 7(c), which now calls upon the parties to perform reasonable enquiries with regard to "any relevant information that is reasonably available to them."
- **Non-neutral party-appointed arbitrators:** The 2004 IBA Guidelines acknowledged the fact that some arbitration rules and domestic laws (*e.g.* some domestic arbitrations in the United States) permit party-appointed arbitrators to be non-neutral and excluded such arbitrators from the application of the IBA Guidelines. The new 2014 IBA Guidelines no longer make this exception and instead "equally apply to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed" (General Standard 5(a)). Even if the parties specifically agreed on the appointment of non-neutral arbitrators and waived any corresponding conflicts, under the new 2014 IBA Guidelines these arbitrators would remain bound by the Guideline's impartiality and independence obligations.

The "Red," "Orange," and "Green" lists have also undergone some minor changes:

- **Red list:** The Red list, which concerns situations which (depending on the facts of the case) give rise to justifiable doubts as to an arbitrator's independence and impartiality, now merely clarifies that an arbitrator who has a controlling interest in an entity that has a direct economic interest in the outcome of the arbitration has a non-waivable conflict.
- **Orange list:** In the Orange list, which concerns situations which may give rise to justifiable doubts as to an arbitrator's independence and impartiality, two new notable provisions were included. First, with regard to the relationship between an arbitrator and another arbitrator or counsel, an existing enmity has been added as a potential conflict. Such enmity may arise from another prior or concurrent arbitration where an arbitrator and counsel appear on opposing sides. A similar provision has been included with regard to the relationship between an arbitrator and a party or other individuals or entities involved in the arbitration. Second, the situation of an arbitrator and another arbitrator, or counsel, currently acting or having acted together within the past three years as co-counsel, has also been added as a potential conflict.
- **Green list:** The Green list, which concerns situations where no appearance of a conflict exists, now includes the situation in which an arbitrator teaches in the same faculty or school as another arbitrator or counsel, or holds an office in a charitable or professional association or participated in conferences, seminars, or working parties with another arbitrator or counsel. The list also includes the relationship of an arbitrator with a counsel, or a party or its affiliates through a social media network.

The 2014 IBA Guidelines substitute the 2004 Guidelines effective immediately. Like their predecessor, the 2014 IBA Guidelines do not constitute legal provisions and do not override any applicable national law or arbitral rules the parties chose. Their impact therefore will depend on the international arbitration communities' acceptance of the 2014 IBA Guidelines. Parties and their counsel are well advised to look out for the relevant changes, some of which have been outlined in this article, in current and future arbitrations, so as to avoid unnecessary delay resulting from insufficient or incomplete compliance with disclosure obligations.

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Endnotes

- ¹ The ECT was signed in December 1994 and came into force in April 1998. It puts in place a regime for transparency, stability and cooperation in the energy sector. The ECT has been signed by 52 State Parties, the European Union and EURATOM.
- ² *Ni Laibao and Liu Donglian v. Soudal Investment Limited*, (2012) Hu Er Zhong Min Ren (Zhong Xie) Zi No.5.

INTERNATIONAL ARBITRATION NEWSLETTER

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About the Publication

Latham & Watkins International Arbitration Newsletter is a regular publication produced by the firm's global International Arbitration team designed to highlight important news, legal issues and developments in a practical and informative way.

If you have any questions about this publication please contact a lawyer on the editorial team, [Sebastian Seelmann-Eggebert](#), [Philip Clifford](#), [Catriona E. Paterson](#) and [Jan Erik Spangenberg](#).

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