BRUSSELS REGULATION (RECAST): ARE YOU READY?

18 March 2015

Contributed by Sarah Garvey

This article has been updated following the entry into force of the Brussels Regulation (recast). Click here to see our updated article.

This article considers the key changes in the Brussels Regulation (recast) for commercial parties.

This article looks at the concerns with Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation) and examines how far they are addressed by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Regulation (recast)). In particular, this article considers the following key changes made by the Brussels Regulation (recast) for commercial parties:

- Amendments to the rules relating to jurisdiction agreements, expanding the scope of the application of those rules.
- Changes to the related actions (or *lis pendens*) provisions where there is an exclusive jurisdiction clause. These amendments are aimed at addressing the problem of the so-called "Italian torpedo". In short, a new provision frees up a member state court specified in an exclusive jurisdiction clause to proceed to determine a dispute, even if proceedings have been commenced first (in breach of contract) before another member state court. This amendment effectively disapplies the "first-in-time" rule in the Brussels Regulation where there is an exclusive jurisdiction clause, a rule that has been frequently (and, in the authors' view, rightly) criticised by commercial parties.
- New rules concerning third state (that is, non-EU) matters and defendants, principally a new provision introducing a limited international *lis pendens* rule.
- An enhanced arbitration exclusion.
- The abolition of *exequatur*, further simplifying the recognition and enforcement of member state judgments in other member states.

The Brussels Regulation (recast) has also changed the rules relating to consumers and employment contracts, but those changes are not considered in this article. There are also some relatively minor changes to the rules relating to insurance contracts, again not considered in this article.

Brussels Regulation and Brussels Regulation (recast)

The Brussels Regulation is the key European instrument on jurisdiction and enforcement issues in civil and commercial matters. It is applied by the courts of all 28 EU member states.

The Brussels Regulation has undergone an extensive period of review and, from 10 January 2015, the revised Brussels Regulation (that is, the Brussels Regulation (recast)) will be applied by member state courts. Following a detailed consultation, the UK opted into the Brussels Regulation (recast), and it will also be applied by Denmark.

The Brussels Regulation is widely considered to have been a successful European instrument. However, there have been concerns about aspects of its application, in particular in relation to its *lis pendens* provisions (that is, its provisions concerning related proceedings). Frequently, concerns have focused less on the language of the Brussels Regulation itself and more on its application by member state courts and the Court of Justice of the European Union (**CJEU**), often raising delicate issues as to the "mutual trust" between member state courts (see, for example, the controversial CJEU decision in *Erich Gasser GmbH v MISAT Srl*, discussed further below). The Brussels Regulation (recast) seeks to address several of these concerns. The key changes in the Brussels Regulation (recast) for commercial parties are considered in detail below (see *Key changes under Brussels Regulation (recast)*).

Overview of Brussels Regulation (recast)

The Brussels Regulation (recast) will apply to legal proceedings instituted on or after 10 January 2015 (Article 66(1)). The existing Regulation will be repealed (Article 80), save that it will continue to apply to judgments given in proceedings instituted before 10 January 2015 (Article 66(2)).

While there are many important amendments in the Brussels Regulation (recast), much remains the same, for example:

- The default rule under the Brussels regime (that defendants should be sued the courts of their domicile) remains untouched in the Brussels Regulation (recast) (now Article 4).
- The alternative grounds to found jurisdiction remain unrevised. This means that for contractual claims, an alternative jurisdictional ground may be for proceedings to be brought in the courts of the place of performance of the contract (now Article 7(1)(a)). (There was a case made for extending the contractual jurisdictional grounds to include a provision whereby if a contract was governed by the law of a particular member state, the courts of that member state could take jurisdiction (reflecting the English common law, governing law jurisdictional gateway at CPR 3.1.(6)(c)). This proposal was not pursued.)
- In matters relating to tort, proceedings may be brought in the place where the harmful events occurred or may occur (now Article 7(3)).
- The further alternative jurisdictional grounds where there are related proceedings, outlined in existing Article 6 are largely unchanged. For example, where there are multiple defendants and the claims are closely connected, a claimant may bring proceedings in the place where one of them is domiciled (now Article 8(1)). As regards third party proceedings, a claimant may bring proceedings in the court seised of the original proceedings (now Article 8(2)).

The scope of the Brussels Regulation (recast) also remains largely unchanged although its provisions do seek to clarify

the extent of the arbitration exclusion in Article (1)(2)(d) (see further below). In addition, it updates and extends the exclusion at Article (1)(2)(a) relating to the status or legal capacity of natural persons and rights in property arising out of a matrimonial relationship, to cover rights in property arising out of relationships "deemed by the law applicable to such relationship to have comparable effects to marriage". The Brussels Regulation (recast) also expressly excludes "maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1(2)(e)) and "wills and succession, including maintenance obligations arising by reason of death" (Article 1(2)(f)).

The numbering of the Articles has changed however (even where the text has not) meaning practitioners will need to relearn references.

While many of the amendments introduced by the Brussels Regulation (recast) are helpful, there is a sense (especially in the context of "third state" (that is, non-EU) matters) that more could have been done, and opportunities have been missed. That said, many of the most controversial proposals were abandoned during the course of negotiations. In particular, the Commission's ambitious plans to extend the Brussels regime to cover all third state matters were dropped.

Key changes under Brussels Regulation (recast)

New rules on jurisdiction agreements (Article 25)

The existing Brussels Regulation recognises and respects jurisdiction agreements, subject to certain limitations and exceptions. For a jurisdiction clause to satisfy the test set out in existing Article 23, the following conditions must be met:

- At least one party must be domiciled in a member state.
- A member state court must be specified in that jurisdiction clause.

The Brussels Regulation (recast) introduces several changes to this important provision. The changes to Article 25 are set out below:

Brussels Regulation: Article 23	**Brussels Regulation (recast): Article 25**
"If the parties, **one or more of whom is domiciled in a Member State,** have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."	"If the parties, **regardless of their domicile,** have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, **unless the agreement is null and void as to its substantive validity under the law of that Member State**. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

Perhaps the most significant change here is that the domicile requirement for parties to an Article 25 jurisdiction agreement has been dropped, so a jurisdiction clause will fall within the scope of Article 25 even if none of the parties are domiciled in a member state. This change has significantly expanded the scope of those jurisdiction agreements captured by the Brussels regime. This amendment has the beneficial consequence of removing the need for a detailed (and potentially costly) enquiry as to the domicile of the parties to any contract. It also means that the procedural rule that allows service out of the jurisdiction without the permission of the English court where there is a Brussels Regulation jurisdiction agreement (currently CPR 6.33(2)(b)(ii)) will presumably cover from January 2015 all jurisdiction agreements under the Brussels Regulation (recast). This change means that, when the English court is specified in a jurisdiction clause in a commercial contract, a claimant is unlikely to require permission to serve proceedings out of the jurisdiction, even if neither the claimant nor the defendant is domiciled in the EU. A collateral consequence of the Brussels Regulation (recast) may be to make the common law jurisdictional gateway at PD6B.3.1(6)(d) largely redundant.

Secondly, there is a new rule and a new recital concerning the governing law to be applied to consider the validity of the jurisdiction clause. Article 25(1) effectively provides that the question of whether a jurisdiction agreement is null and void as to its substantive validity will be determined under the law of the member state identified in the jurisdiction agreement. A new recital 20 underlines this principle, providing that where a question arises as to whether a clause "is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement". These amendments and the new recital provide some certainty as to which governing law is to be applicable to determine such questions, at least where there is an exclusive jurisdiction clause. What is less clear, however, is how this rule will be applied by member state courts in the context of a dual exclusive clause or a "hybrid" jurisdiction clause. It is also unclear what is meant by "substantive" validity or whether parties can disapply this new rule and choose a different law to govern a jurisdiction clause.

The third key change introduced in the Brussels Regulation (recast) in respect of jurisdiction agreements is a new Article 25(5) which provides that "an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". This new provision enshrines the principle of separability into EU law. In terms of the efficient resolution of disputes, this is a helpful addition. Even if a claim is made that the contract is invalid, the parties (and member state courts) can be clear as to which courts will resolve this dispute (unless perhaps the jurisdiction agreement itself is being impugned). This practical approach (largely mirroring the English common law position) reduces the risk of abuse.

The limits on party autonomy in the employment, consumer and (more controversially) insurance context remain.

Remaining concerns

While sweeping away the requirement regarding the domicile of the parties, Article 25 remains confined to jurisdiction clauses that designate member state courts. This restriction means that there is still no uniform position across member state courts as to whether or not a jurisdiction clause in favour of a third state (for example, a New York jurisdiction clause) would be respected by them. As discussed further below, following the CJEU's decision in *Owusu v Jackson* (Case C-281/02) [2005] EUECJ) there remains an unanswered question as to whether a member state court has discretion to stay proceedings brought before them (perhaps as the place of the defendant's domicile) where those proceedings have been brought in breach of contract because is the contract contains a third state jurisdiction clause. Indeed, there is a view that third state jurisdiction clauses are now more vulnerable and less likely to be respected under the Brussels Regulation (recast) (given the introduction of a new international *lis pendens* rules and the terms of recital 24 (see below). The Commission's response to this concern appears to be to suggest that these matters will be dealt with

(see below). The Commission's response to this concern appears to be to suggest that these matters will be dealt with when the EU ratifies the Hague Convention on Choice of Courts Agreements of 30 June 2005 (**Hague Convention**). Given that currently only Mexico has ratified the Hague Convention (and the Convention covers only exclusive clauses), it is submitted that this is a less than ideal response to the point. The Brussels Regulation (recast) was an opportunity to address this issue.

Further, the much debated decision in *Ms X v Banque Privée Edmond de Rothschild* (French Supreme Court, First Civil Chamber, 26 September 2012, No 11-26.022), which declared a hybrid or asymmetric jurisdiction clause void as contrary to Article 23 of the Brussels Regulation, created unhelpful uncertainty regarding the enforceability of these widely used clauses. The French court's decision has been widely criticised (see, for example, the robust defence of such clauses by Popplewell J in obiter comments in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another* [2013] EWHC 1328 (Comm). Nevertheless, it is unfortunate that the status under EU law of such heavily-used clauses was not put beyond doubt in the Brussels Regulation (recast). This is another missed opportunity.

Revisions to the related actions (or *lis pendens* rules)

Perhaps the most significant criticism of the Brussels Regulation among commercial parties, or at least the one most frequently articulated, is that the *lis pendens* rules aimed at preventing parallel proceedings before member state courts and inconsistent judgments are open to abuse.

Under the Brussels Regulation, if proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, Article 27 provides that the court second seised must stay its proceedings until the court first seised has determined whether it has jurisdiction to hear the claim. That is the case even if the proceedings were brought in the first seised courts in breach of a jurisdiction clause (*Gasser v MISAT*). While the rationale behind the *lis pendens* rule is a sensible one in theory, in practice the rigidity of this first-in-time rule has allowed it to be abused by potential judgment debtors who agreed in their contracts to litigate disputes exclusively in the courts of one jurisdiction but who want to delay judgment being entered against them in those courts. They do this by commencing proceedings quickly in the courts of another, generally slow moving, jurisdiction as soon as a dispute arises (Italy and Greece often being the preferred choice), perhaps seeking a declaration of non-liability. When the potential judgment creditor then commences proceedings in the courts chosen in the jurisdiction clause, those courts are forced to stay their proceedings pending a decision on jurisdiction from the court first seised. This tactic, widely known as the Italian torpedo, is a concern for commercial parties because it can lead to significant delay in obtaining judgment and in some cases can render judgment ineffective. It has also resulted in a rush to the courts, as parties who want to ensure they can litigate in their agreed forum find themselves forced to commence proceedings pre-emptively in the chosen courts so as to protect themselves from this kind of abuse, in circumstances where they might otherwise have sought to settle the litigation without involving the courts.

It was clear from the early stages of the reform process that the Commission had listened to and intended to deal with the concerns expressed by commercial parties and practitioners about the Italian torpedo. There was recognition from the outset that the Brussels Regulation could do more to prevent litigants from bringing proceedings in bad faith in a non-chosen forum simply to delay resolution of the dispute in the courts chosen by the parties in their jurisdiction agreement.

The Commission's recognition of the need to deal with this problem has translated into a series of helpful new provisions in the Brussels Regulation (recast). Recital 22 now talks about the need to enhance the "effectiveness of exclusive choice of court agreements" and the need to avoid "abusive litigation tactics". A revised "first-in-time" rule has been included, which seeks to deal with the Italian torpedo by freeing a court chosen in an exclusive jurisdiction clause to determine whether it has jurisdiction regardless of whether it was first seised of the relevant proceedings. So, the "first-in-time" rule (now at Article 29) is expressed to be without prejudice to Article 31(2) which provides that:

"… where a court of a Member State on which an agreement as referred to in Article 25 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."

The clear implication of this rule is that the court designated in an exclusive jurisdiction clause can continue to hear a claim without waiting for the court first seised to stay its proceedings. Article 29(2) imposes some communication requirements upon member state courts if requested to notify another member state court when they were seised with proceedings (Article 32).

This revision is to be welcomed. Article 31(2) is a helpful amendment for commercial parties and the EU should be applauded for listening to feedback and seeking to deal with this problem.

Remaining concerns

There are some potential difficulties with the new provisions. In particular:

- Perhaps the most significant defect in the new rule is that it is unclear whether it could be relied on by parties with the benefit of a hybrid or asymmetric jurisdiction clause as it is unclear whether such clauses could be described as "exclusive" jurisdiction clauses for the purposes of this rule. It may be possible to argue that such clauses do operate as exclusive jurisdiction clauses for one party or group of parties (generally the obligors in the lending context and the issuer in the capital markets sphere), because those parties can only bring proceedings in the chosen courts (even though the other parties, the lenders/dealers, are free to litigate elsewhere). However, it is not clear whether the CJEU would take this approach. This lack of clarity is particularly unfortunate given that asymmetric clauses are ubiquitous in the lending and capital markets contexts and given that many of the most vocal criticisms of the Brussels Regulation came from parties who regularly include such provisions. (It is also worth mentioning that, for obvious reasons, the rule does not apply to non-exclusive jurisdiction clauses because the parties to such clauses expressly contemplate that courts other than the chosen courts may validly hear proceedings).

- It is also unclear precisely how a non-chosen court should approach its obligations under Article 31(2). The rule applies where there is an agreement conferring exclusive jurisdiction on a particular court. However, it is unclear whether the non-chosen court must itself apply any particular test to determine whether there is in fact an agreement conferring exclusive jurisdiction on a particular court. The intention behind the new rule clearly seems to be that it is the court designated in the jurisdiction agreement that decides whether it is valid, but the non-designated court must surely have to consider, at least at a threshold level, whether such a clause does exist, otherwise this rule would be open to its own abuses.

- Recital 22 states expressly that Article 31(2) will not apply where parties have entered into conflicting jurisdiction clauses, but in many cases it may be difficult to determine whether jurisdiction clauses do indeed conflict or whether they in fact seek to apply to different disputes.

Finally, Article 31(2) is designed to allow the court chosen in a jurisdiction clause to continue with its proceedings

Finally, Article 31(2) is designed to allow the court chosen in a jurisdiction clause to continue with its proceedings although another member state court has also been seised of the same proceedings. It is not designed to speed up any decision by a non-chosen court on jurisdiction. (There had been a proposal, which was dropped in negotiations, to set a deadline within which member state courts had to determine jurisdictional issues.) While the rule largely removes the incentive to bring proceedings in a non-chosen court in the first place (as it will not now have the effect of torpedoing the proceedings in the chosen court), if a party does wish to act tactically and commence proceedings in the "wrong" court, simply to increase the time and cost burden on its counterparty, this rule will not entirely prevent that.

Third state matters: new international *lis pendens* rule (Articles 33 and 34)

The Brussels Regulation does not expressly deal with the position where proceedings are commenced in a member state in circumstances where:

- Proceedings are already ongoing in a third state.
- The dispute is about, for example, property rights or validity of corporate decisions and the property or company is located in a third state.
- The dispute falls within the scope of a third state jurisdiction clause.

The infamous CJEU decision in *Owusu* that a member state court seised on basis of the defendant's domicile (current Article 2) could not decline jurisdiction in favour of a third state, even if the third state was a more appropriate forum, conspicuously left these important jurisdictional questions unanswered.

This uncertainty over whether or not member state courts have any discretion to stay proceedings brought before them has been a recurrent criticism of the Brussels Regulation, particularly post-*Owusu*. Under the current regime, it is difficult to advise clients with certainty on whether member state courts might accept or decline jurisdiction given lack of CJEU authority, arguably inconsistent English authority and potentially different approaches in other member state courts. It is also difficult for third state courts to assess how member states might deal with these issues.

The Brussels Regulation (recast) has sought to address one of these three areas of uncertainty, namely where there are related proceedings in a third state.

New rules at Articles 33 and 34 provide member state courts with discretion to stay proceedings to take into account proceedings involving the same cause of action and the same parties or related proceedings pending before the courts of a third state.

There are, however, the following significant restrictions on the exercise of this decision:

- Most importantly, proceedings in the third state must have been started first.
- For related proceedings only, it must be expedient to hear actions together to avoid irreconcilable judgments resulting from separate proceedings.
- It must be expected that the judgment of the third state is capable of recognition and, where applicable, enforcement in the member state which is considering whether to grant a stay. It is unclear whether this means that it must be established that a judgment debt of the relevant third state would be enforceable pursuant to a reciprocal enforcement treaty or whether it would be sufficient to establish that, for example, it is usually possible to enforce judgments from the relevant jurisdiction by subject to certain standard exceptions.
- A stay must be "necessary for the proper administration of justice". Recital 24 provides some guidance on how this discretionary element should be approached.

Recital 24 refers to the need for a member state court to assess "all the circumstances of the case before it". It notes such circumstances may include connections between the facts of the case or parties and the third state concerned, the stage of proceedings and whether or not the third state court might be expected to give a judgment in a reasonable time. Interestingly, it provides that the assessment may also include consideration of whether a third state court would have "exclusive jurisdiction in the particular case in circumstances where a court of a member state would have exclusive jurisdiction". Presumably, this would include where there is an exclusive jurisdiction agreement in favour of a third state court.

Member state courts may dismiss the (presumably related) proceedings if third state proceedings "are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State" (Article 34(3)).

The courts of member states shall apply Article 34 on the application of one of the parties, or where possible under national law, of its own motion (Article 34(4)).

Member state courts can, however, continue proceedings notwithstanding the new international *lis pendens* rule if any of following apply:

- There is no longer a risk of irreconcilable judgments (for related proceedings only).
- Proceedings in a third state are themselves stayed or discontinued.
- Proceedings in a third state are unlikely to be concluded within reasonable time.
- The continuation of proceedings before a member state court is required for proper administration of justice.

Remaining concerns

There has been a mixed reaction to this new rule.

The test for a stay is very high: "first-in-time", expediency, necessity and a judgment "capable of recognition" in a member state. There is also likely to be litigation as to what many of these new provisions mean. Where there is a third state jurisdiction clause, member state courts may also find themselves in the unhappy position of effectively sanctioning a breach of contract if this high test is not met (raising potentially awkward questions of comity).

Concerns have been raised that the requirement for third state proceedings to be first-in-time may increase the likelihood of parties initiating pre-emptive proceedings in third state courts, to establish their "first-in-time" position. Also, conceivably parties (potential judgment debtors perhaps) may initiate pre-emptive proceedings in a member state, perhaps the member state in which the counterparty is domiciled, in breach of a third state jurisdiction agreement. It may do so with a view to arguing that the member state court has mandatory jurisdiction and has no discretion to stay those

do so with a view to arguing that the member state court has mandatory jurisdiction and has no discretion to stay those proceedings because the Brussels Regulation (recast) only contemplates member state courts granting a stay on the basis of a third state jurisdiction clause where proceedings have already been commenced in that third state. While a third state court may simply ignore any proceedings brought in a member state court in breach of contract and continue with its proceedings (in other words, there would not be an "Italian torpedo" situation, as such a court would not be bound by common rules promoting principles such as mutual trust), parties would still face the expense and distraction of dealing with litigation on more than one front.

There is a strong sense that the Brussels Regulation (recast) is a missed opportunity to address the other areas left unanswered post-*Owusu*.

The arbitration exclusion

The Brussels Regulation deals with arbitration very succinctly. It simply provides at Article 1(2)(d) that arbitration is excluded from its scope. While this provision is simple and clear, the lack of detail on how the exclusion should be applied in practice has meant that the boundaries between the jurisdiction of member state courts to act in support of arbitration in accordance with national law and their jurisdiction to act under the Brussels Regulation have been unclear. The CJEU sought to provide some clarity on these boundaries in the now infamous *West Tankers* decision (*Allianz SpA v West Tankers Inc* (Case C-185/07), discussed in *, West Tankers ECJ decision*, but with rather unhappy results. The question for the CJEU was whether the English court could grant West Tankers an anti-suit injunction preventing Allianz continuing with litigation in Italy on the basis that Allianz was bound to resolve its dispute with West Tankers by arbitration in England and that, as arbitration is outside the scope of the Brussels Regulation, the English court should not be prevented from granting such an injunction. The CJEU found that the claim brought by Allianz in Italy was a claim for damages within scope of the Brussels Regulation and that the preliminary question as to whether the arbitration clause was valid was therefore also within the scope of the Brussels Regulation and was a question which the Italian courts could decide. As such, the English courts could not grant an anti-suit injunction.

While on the face of it, the decision in *West Tankers* focused on the issue of the availability of anti-suit relief, the implications of the decision were much wider. In effect, the decision gave parties to arbitration agreements the green light to act abusively, allowing them to bring substantive proceedings falling within the scope of the Brussels Regulation in the courts of the member state most likely to find the arbitration clause invalid, and rendering the party wishing to uphold the arbitration agreement and other member state courts (including the courts of the seat of the arbitration) powerless to prevent this. Further, the courts of those other member states must subsequently have to enforce any judgment on the merits given by the member state court that heard the substantive claim in breach of the arbitration clause.

Enhanced arbitration exclusion

Various proposals to clarify the extent of the arbitration exclusion were put forward by interested parties (and, indeed, the Commission's own expert group) during the progress of the Brussels Regulation (recast) through the legislative process. The approach ultimately taken in the Brussels Regulation (recast) is, on the face of it, a rather odd one, as almost all of the amendments made to it to deal with this issue have been made to the recitals rather than the main text of the Regulation. The amendments are, however, helpful in undoing many of the negative effects of *West Tankers*.

New recital 12 restates that the Brussels Regulation (recast) should not apply to arbitration and, specifically, that it should not prevent the courts of member states 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, in accordance with their national law. The second paragraph of recital 12 goes on to provide that a ruling given by a court of a member state as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in the Brussels Regulation (recast), regardless of whether the court decided on this as a principal issue or as an incidental question. So parties will now have less incentive to bring proceedings in a member state simply with a view to obtaining an order that their arbitration agreement is invalid, because such an order will not be capable of recognition in other member states.

Recital 12 provides (at paragraph 3) that where a court of a member state has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with the Brussels Regulation (recast). However, this rule is expressed to be without prejudice to the competence of the courts of member states to decide on recognition and enforcement of arbitral awards in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (**New York Convention***)*. Further, Article 73(2) of the Brussels Regulation (recast) provides expressly that the New York Convention will take precedence over the Regulation. It seems, therefore that a member state court can recognise arbitral awards even if there has been a conflicting judgment in another member state (see further below).

Finally, Recital 12 also helpfully clarifies that the Brussels Regulation (recast) will not apply to actions or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure, nor to any action or a judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

For further discussion, see *Article, Brussels Regulation reform: where does this leave arbitration?*.

Remaining concerns

Some areas of uncertainty remain. In particular, it is not entirely clear how the rule that the New York Convention takes precedence over the Brussels Regulation (recast) will operate in practice. Does it mean that if a member state court is asked to enforce an arbitration award from a tribunal seated in one jurisdiction and a conflicting judgment from the courts of another member state, the enforcing court can enforce the award and refuse to enforce the judgment? Also, what about anti-suit relief? Is there an argument that this relief may now be available now that the arbitration exclusion has been reinforced?

Exequatur

While often not a major concern for commercial parties, the abolition of *exequatur* was a key Commission goal of the reform process, as concern was raised on a political level that the mechanism in the Brussels Regulation for the recognition and enforcement of member state judgments in other member states was cumbersome and impeded the free movement of judgments. The Brussels Regulation (recast) will introduce a simplified mechanism for the recognition and enforcement of member state judgments in other member states, eliminating the need for a declaration of enforceability in the courts of the member state in which enforcement is sought. Instead, a judgment creditor will simply have to present a copy of the judgment and a standard form certificate and can then begin the enforcement process. Further, the Brussels Regulation (recast) provides that if the judgment being enforced contains measures which are not known in the member

Regulation (recast) provides that if the judgment being enforced contains measures which are not known in the member state of enforcement, the enforcing court can adapt them to a measure known to that member state (Article 54). The grounds for refusing recognition and enforcement remain largely unchanged, however (including the public policy provision).

Conclusions

The Brussels Regulation (recast) undoubtedly introduces several improvements into this significant EU instrument. In particular, the revisions to the lis pendens rules are to be welcomed and are likely to have a material impact on commercial parties' conduct. Parties may seek to reassess their disputes clauses and perhaps opt in greater numbers for exclusive clauses, so as to take advantage of this new rule. On the other hand, uncertainties remain concerning third state matters and in particular third state jurisdiction agreements (not necessarily alleviated by the future ratification of the Hague Convention) and there is a risk that the new international lis pendens rules will lead to an increase in tactical litigation.