

Brussels Regulation (recast): an update

This article considers the key changes in the Brussels Regulation (recast) (Regulation (EU) 1215/2012, the **Recast**) for commercial parties. Specifically, it considers:

- Amendments to the rules relating to jurisdiction agreements, expanding the scope of 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 Recast 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 mechanism for the recognition and enforcement of member state judgments in other member states.

The Recast has also changed the rules relating to consumer, insurance and employment contracts, but those changes are not considered in this article.



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The original Brussels Regulation and the Recast

The original Brussels Regulation (Regulation (EC) 44/2001) was the key European instrument on jurisdiction and enforcement issues in civil and commercial matters. It was applied by the courts of all 28 EU member states. Since 10 January 2015, however, member state courts (including those in the UK and Denmark) have applied the Recast and the original Brussels Regulation has largely been repealed.

The original Brussels Regulation is widely considered to have been a successful European instrument. However, there had been concerns about aspects of its application, in particular in relation to its *lis pendens* provisions (that

is, the provisions concerning related proceedings). Frequently, concerns focused less on the language of the original 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 Recast seeks to address several of these concerns. The key changes in the Recast for commercial parties are considered in detail below.

Overview of the Recast

The Recast applies to legal proceedings instituted on or after 10 January 2015 (Article 66(1)). The original Regulation has been 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 Recast, much remains the same, for example:

- The default rule under the Brussels regime (that defendants should be sued in the courts of their domicile) remains untouched in the Recast (now Article 4).
- The alternative grounds to found jurisdiction remain unrevised. So, for example, for contractual claims, proceedings may 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 PD6B para 3.1.(6)(c)). This proposal was not pursued.) Similarly, in matters relating to tort, proceedings may be brought in the place where the harmful event occurred or may occur (now Article 7(3)).

- The further alternative jurisdictional grounds where there are related proceedings, outlined in Article 6 of the original Brussels Regulation, are also 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 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, 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 has been updated and extended to cover rights in property arising out of relationships "deemed by the law applicable to such relationship to have comparable effects to marriage". The 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 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, it is right that some of the most controversial proposed amendments were abandoned during the course of negotiations, including the Commission's ambitious plans to extend the Brussels regime to cover all third state matters, which were unnecessarily broad and would have delayed the amendment process.

New rules on jurisdiction agreements (Article 25)

The original Brussels Regulation required member state courts to recognise and respect jurisdiction agreements in favour of member state courts, subject to certain limitations and exceptions (Article 23).

The Recast introduces several changes to this important provision. The changes, in what is now Article 25, are set out below:

Original Brussels Regulation: Article 23	The Recast: Article 25
<p>"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."</p>	<p>"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."</p>

Perhaps the most significant change here is that the domicile requirement for parties to a 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 (provided the courts of a member state have been chosen in the clause). This change has significantly expanded the jurisdiction agreements captured by the Brussels regime. It 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. For parties to agreements conferring jurisdiction on the English courts, 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 will apply widely, such that 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 (see new CPR 6.33(2)(b)(v), although note that, at the time of writing form N510 has not yet been updated).

A collateral consequence of the Recast for parties to agreements conferring jurisdiction on the English courts may be to make the common law jurisdictional gateway at CPR PD6B para 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 an Article 25 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 provide some certainty as to which governing law applies 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 or asymmetric jurisdiction clause. It is also unclear what is meant by "substantive" validity and whether parties can

disapply this new rule and choose a different law to govern a jurisdiction clause.

The third key change introduced in the 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 a 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 there is no express provision in the Recast in relation to such clauses. Following the CJEU's decision in *Owusu v Jackson* (Case C-281/02) (see below) there remains an unanswered question as to whether member state courts have 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 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 Recast than they were under the original Brussels Regulation given the introduction of a new international *lis pendens* rule in the Recast which only applies where proceedings have already been commenced in a third state and where certain other criteria have been met and given the terms of recital 24

(see below). The English courts at least appear to have taken the view that under the original Brussels Regulation member state courts retained a discretion to stay proceedings brought in breach of a third state jurisdiction clause. This is evident from the recent decision of Proudman J in *Plaza BV v The Law Debenture Trust Corporation PLC* ([2015] EWHC 42), where the court essentially gave reflexive effect to Article 23 of the original Brussels Regulation. There has been no authority to date under the Recast however, and the Commission's response to the concerns raised as to the lack of clarity in the Recast in relation to third state jurisdiction clauses appears to have been to suggest that these matters will be dealt with when the EU ratifies the Hague Convention on Choice of Court Agreements of 30 June 2005 (**Hague Convention**), which it is expected to do later this year. Given that currently only Mexico has ratified the Hague Convention, however, and that it covers only exclusive clauses, it is submitted that this is a less than ideal response to the point.

Further, the Recast has not put beyond doubt the question of whether hybrid or asymmetric clauses are permissible under EU law following 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). In that case the court declared a hybrid or asymmetric jurisdiction clause void on the basis that it was contrary to Article 23 of the original Brussels Regulation, creating 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* [2013] EWHC 1328 (Comm)). It is unfortunate that the status under EU law of such heavily-used clauses has not been clarified in the Recast. This is another missed opportunity.

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

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

Under the original Brussels Regulation, if proceedings involving the same cause of action and between the same parties were brought in the courts of different member states, Article 27 provided that the court second seised was obliged to stay its proceedings until the court first seised had determined whether it had jurisdiction to hear the claim. That was the case even if the proceedings were brought in the first seised courts in breach of a jurisdiction clause (*Eric Gasser GmbH v MISAT Srl*

Case C-116/02). While the rationale behind the *lis pendens* rule was a sensible one in theory, in practice the rigidity of this first-in-time rule allowed it to be abused by potential judgment debtors who agreed in their contracts to litigate disputes exclusively in the courts of one member state but who wanted to delay judgment being entered against them in those courts. They did this by commencing proceedings quickly in the courts of another, generally slow moving, member state as soon as a dispute arose (Italy and Greece often being the preferred choice), perhaps seeking a declaration of non-liability. When the potential judgment creditor then commenced proceedings in the courts chosen in the jurisdiction clause, those courts were forced to stay their proceedings pending a decision on jurisdiction from the court first seised. This tactic, widely known as the Italian

torpedo, caused concern for commercial parties because it could lead to significant delays in obtaining judgment and, in some cases, could render judgment ineffective. It also resulted in a rush to the courts, as parties who wanted to ensure they litigated in their agreed forum found 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 original 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 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. 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. This is put beyond doubt by recital 22, which refers to the need to provide

"an exception to the general *lis pendens* rule" in these circumstances and to the fact that "the designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings". Article 29(2) imposes requirements upon member state courts, if requested, to notify another member state court when they were seised (Article 32).

This revision is to be welcomed. The amendments are helpful 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 or 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 construe the clause in this way. 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 original 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 some 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 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 original Brussels Regulation did not expressly deal with the position where proceedings were commenced in a member state in circumstances where:

- proceedings were already ongoing in a third state;
- the dispute was about, for example, property rights or the validity of corporate decisions and the property or company was located in a third state; or
- the dispute fell within the scope of a third state jurisdiction clause.

The infamous CJEU decision in *Owusu*, where the court held that a member state court seised on the basis of the defendant's domicile 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.

The uncertainty over whether or not member state courts had any discretion to stay proceedings brought before them had been a recurrent criticism of the original Brussels Regulation, particularly post-*Owusu*. It was difficult to advise clients with certainty on whether member state courts might accept or decline jurisdiction given the lack of CJEU authority and arguably inconsistent authority in member states. It was also difficult for third state courts to assess how member states might deal with these issues.

The 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 discretion:

- Most importantly, proceedings in the third state must have been started first.
- For related proceedings only, it must be expedient to hear the 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 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 (subject to certain standard exceptions).
- A stay must be "necessary for the proper administration of justice". Recital 24 provides some guidance on how this element should be approached. It refers to the need for a member state court to assess "all the circumstances of the case before it" and it notes that 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.

The new rules also provide that member state courts may **dismiss** 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" (Articles 33(3) and 34(3)).

The courts of member states will apply Articles 33 and 34 on the application of one of the parties, or where possible under national law, of their own motion (Articles 33(4) and 34(4)).

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

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

REMAINING CONCERNS

There has been a mixed reaction to these new rules. 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.

Concerns have also 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, the provision may encourage parties (potential judgment debtors perhaps) to act tactically and 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, with a view to arguing that the member state court has mandatory jurisdiction and has no discretion to grant a stay because the Recast only contemplates a stay where proceedings have already been commenced in the third state. This is discussed in more detail above (see New rules on jurisdiction agreements). There is also a concern that, even where proceedings have been commenced first in a third state pursuant to a third state jurisdiction clause, member state

courts may find themselves in the unhappy position of effectively sanctioning a breach of contract if the high test for granting a stay as set out above is not met (raising potentially awkward questions of comity). 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 third state courts would have no obligation to grant a stay), parties would still face the expense and distraction of dealing with litigation on more than one front.

There is a strong sense that the Recast is a missed opportunity to address the other areas left unanswered post-*Owusu*.

The arbitration exclusion

The original Brussels Regulation dealt with arbitration very succinctly. It simply provided at Article 1(2)(d) that arbitration was excluded from its scope. While this provision was simple and clear, the lack of detail on how the exclusion should be applied in practice had 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 original Brussels Regulation had 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)), but with rather unhappy results. The question for the CJEU was whether the English court could grant an anti-suit injunction preventing the respondent continuing with litigation in Italy on the basis that the dispute should have been referred to arbitration in England. The CJEU found that the Italian proceedings fell within the scope of the original Brussels Regulation (as they were civil proceedings for damages) and that the preliminary question as to whether the dispute should be arbitrated was therefore also within the scope of the Brussels Regulation and was a question which the Italian courts could decide. As such, following the decisions of the CJEU in *Turner v Grovit* (Case C-159/02) and *Erich Gasser GmbH v Misat Srl*, 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 original 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 may subsequently have had to enforce any judgment on the merits given by the member state court that heard the substantive claim in breach of the arbitration clause.

The approach ultimately taken in the Recast in relation to the arbitration exclusion is, on the face of it, a rather odd one, as almost all of the amendments made in relation to arbitration have been made to the recitals rather than the main text. The amendments are, however, broadly helpful in undoing some of the negative effects of *West Tankers*.

New recital 12 restates that the 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 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 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 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York**

Convention). Further, Article 73(2) of the 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.

Finally, Recital 12 also helpfully clarifies that the Recast will not apply to actions or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of arbitrators or 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.

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 Recast will operate in practice. It is also unclear whether anti-suit relief may now be available to restrain a party from bringing proceedings in breach of an arbitration agreement now that the arbitration exclusion has been reinforced. See the recent opinion of CJEU Advocate General Wathelet in *Gazprom OAO* (Case C-536/13) in this regard. A decision of the CJEU itself is still awaited.

Recognition and enforcement

While often not a major concern in practice for commercial parties, the abolition of *exequatur* was a key Commission goal in 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 Recast has introduced 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 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 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.

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