Important changes to the EU rules on jurisdiction and the enforcement of judgments have recently taken effect under the recast Brussels Regulation (1215/2012/EU). Although the recast Brussels Regulation has been in force since January 2013, it only applies to legal proceedings started on or after 10 January 2015. The original Brussels Regulation (44/2001/EC) (the Brussels Regulation) continues to apply to proceedings started before that date (see box “Overview of key changes”).

This article considers the main changes effected by the recast Brussels Regulation, including:

- New provisions that concern the application of the lis pendens rule and so-called “torpedo actions”.

- A new discretion to stay proceedings where an identical or related action is pending in a non-EU member state court.

- The extension of the circumstances in which non-EU defendants have been brought into the scope of the recast Brussels Regulation.

- The extent and effect of the exclusion of arbitration from the ambit of the recast Brussels Regulation.

TORPEDO ACTIONS

Both the Brussels Regulation and the recast Brussels Regulation contain the lis pendens rule, which determines priority where parallel proceedings (that is, proceedings between the same parties and involving the same cause of action) are brought in the courts of different member states. The lis pendens rule is designed to avoid the same matters being litigated before the courts of different member states, as this can result in conflicting judgments (see box “The enforcement of judgments”).

The basic rule under the Brussels Regulation was that priority was given to the court first seised; that is, where proceedings were started first. Any other member state’s court had to stay its proceedings until the jurisdiction of the first court was established, regardless of whether the first action was brought in breach of an exclusive jurisdiction clause in favour of the second court. This was put beyond doubt by the European Court of Justice (ECJ) in Erich Gasser GmbH v MISAT Srl (C-116/02).

The problem

The lis pendens rule was open to abuse. A party that wanted to delay a judgment could race to issue proceedings in the courts of a member state that the parties had not contractually agreed would have jurisdiction.
So the court that was contractually agreed to have jurisdiction would then be forced to wait until the first court ultimately declared that it had no jurisdiction.

For example, a lender and a borrower might agree in their loan agreement that the English courts would have exclusive jurisdiction over any dispute arising out of the agreement. If the borrower ignored the agreement and started proceedings in, for example, the Italian courts for a declaration that it was not liable to the lender, under the Brussels Regulation, the lender would then be unable to pursue an action in England for repayment of the loan. If the Italian proceedings were started first, the English court would have to stay the action started by the lender unless and until the Italian court had declined jurisdiction, perhaps some years later.

This tactic, which became known as the Italian torpedo, could cause huge delays as procedures in member states vary substantially in terms of the time taken to decide a jurisdiction point.

The solution
Although the lis pendens rule under Article 29 of the recast Brussels Regulation is similar to the previous rule in Article 27 of the Brussels Regulation, in that priority is given to the court first seised, there is a new exception which is designed to defuse torpedo actions. Where the proceedings come within an exclusive jurisdiction clause in favour of a member state court and proceedings have been started in that court, the chosen court has priority regardless of which court was first seised. Under Article 31(2) of the recast Brussels Regulation (Article 31(2)), any other member state court must stay its proceedings unless and until the chosen court has declared that it has no jurisdiction under the relevant agreement.

So if the lender in the example given above commences an action in the English court, under the recast Brussels Regulation, the Italian court must stay its proceedings until the English court decides the question of jurisdiction. At that point, assuming that the English court is satisfied that the jurisdiction clause is valid and binding so that it has jurisdiction, the Italian court must decline jurisdiction.

Remaining uncertainties
Given that the application of the recast Brussels Regulation depends on when proceedings are brought, it is not clear how the rules will work where a torpedo action was launched in breach of an exclusive jurisdiction clause before 10 January 2015, but proceedings have been started in the chosen court after that date.

To continue the example referred to above, if the borrower started proceedings in Italy on 9 January 2015 and the lender started proceedings in England on 10 January 2015, it seems that the Brussels Regulation would apply to the Italian proceedings. So it is not at all clear that the Italian court would be required (and it may not even be permitted) to stay its proceedings in favour of the English court. But the recast Brussels Regulation would apply to the English proceedings, so it is equally not clear that the English court would be required (or permitted) to stay its proceedings.

There is also some uncertainty over how the new provisions will work where there is a unilateral jurisdiction clause, in which one party can bring proceedings in one jurisdiction only, while the other has the option to bring proceedings in any available jurisdiction. This sort of clause is common in finance transactions where, typically, the borrower will be required to bring an action in a particular jurisdiction but the lender has a choice.

To alter the example given above, a loan agreement gives exclusive jurisdiction to the English court in proceedings started by the borrower, but the lender can bring proceedings in any available jurisdiction. The borrower starts proceedings in Italy and the lender then starts proceedings in England based on, for example, the borrower’s domicile in England. While Article 31(2) now gives priority to the court chosen under an exclusive jurisdiction agreement, in this example, the English court does not have exclusive jurisdiction over proceedings started by the lender (as opposed to the borrower). So it is not at all clear that Article 31(2) requires the Italian court to stay its proceedings in these circumstances, and it is unclear which court has priority.

Overview of key changes
The main areas of reform under the recast Brussels Regulation (1215/2012/EU) are:

• Defusing so-called “torpedo actions”, where a party seeks to delay matters by starting proceedings in one EU member state court in breach of an exclusive jurisdiction agreement in favour of another member state court.

• Introducing new rules on staying proceedings in favour of prior proceedings in a non-member state.

• Extending the rules relating to jurisdiction agreements to apply where neither party is EU-domiciled.

• Extending the protective rules relating to consumer contracts and individual contracts of employment to apply to non-EU domiciled traders and employers in certain circumstances.

• Making member state judgments immediately enforceable across the EU.

• Clarifying the extent and effect of the exclusion of arbitration from the ambit of the recast Brussels Regulation.

The recast Brussels Regulation has no effect on the allocation of jurisdiction between the courts of the separate jurisdictions within the UK; that is, England and Wales, Scotland and Northern Ireland. This continues to be governed by the rules in Schedule 4 to the Civil Jurisdiction and Judgments Act 1982, which are similar to both the Brussels Regulation (44/2001/EC) and the recast Brussels Regulation.
basis that that court has a closer connection to the dispute and therefore would be a more appropriate forum for the case to be heard (Owusu v Jackson C-281/02; see News brief “Regulating jurisdiction: English courts’ discretion is curtailed”, www.practicallaw.com/2-200-6688). It seems likely that the same principle applies where the member state court’s jurisdiction is based on some other provision of the Brussels Regulation or the recast Brussels Regulation.

The problem

It is not clear, at least under the Brussels Regulation, whether proceedings brought in a member state can be stayed where:

• There are identical or related proceedings pending in a non-member state court.

• The nature of the action means that it should be heard in a particular non-member state; for example, a case concerning title to land in that country.

• Proceedings have been started in a non-member state under an exclusive jurisdiction agreement in favour of that state.

In each of these situations, there would be a clear requirement to stay the member state proceedings if the competing jurisdiction was within the EU, but it is not clear whether these rules can be given “reflexive effect”, or applied by analogy, in favour of non-EU courts.

The solution

Under Articles 33 and 34 of the recast Brussels Regulation (Articles 33 and 34), there is a new discretion to stay proceedings where an identical or related action is pending in a non-member state court, but only if the non-member state action was first in time and if certain other conditions are satisfied.

In particular, the non-member state judgment must be capable of recognition or enforcement in the member state and the member state court must be satisfied that a stay is necessary for the proper administration of justice. Also, the discretion to stay does not apply where the member state court’s jurisdiction is based on a jurisdiction clause in favour of that court.

Remaining uncertainties

Articles 33 and 34 only concern non-member state proceedings that are first in time. They do not address what happens if those proceedings are not first in time, but there is an exclusive jurisdiction agreement in favour of that court, or it is a type of case where, in equivalent circumstances, exclusive jurisdiction would be given to a member state due to the nature of the case; for example, land.

In Ferrexpo AG v Gilson Investments Ltd, the High Court stayed proceedings against an English-domiciled defendant on the basis that the object of the proceedings was the validity of resolutions made by a Ukrainian company (judgment of 2012 EWHC 721 (Comm); see News Brief “Brussels Regulation: reflexive interpretation applied”, www.practicallaw.com/1-519-6261).

If it had been, for example, a French company, the English court would have been obliged to stay its proceedings in favour of the French courts under the exclusive jurisdiction provisions in Article 22 of the Brussels Regulation (the equivalent provisions are in Article 24 of the recast Brussels Regulation). The court held that it could apply Article 22 of the Brussels Regulation reflexively, or by analogy, and stay in favour of the Ukrainian court.

Ferrexpo is a first instance decision and it remains to be seen whether a similar approach will be taken in other cases. Given that the recast Brussels Regulation could have, but did not, give an express power to stay in these circumstances, a court might be persuaded that it is not permitted to give reflexive effect to the rules in this way.

The enforcement of judgments

Under the Brussels Regulation (44/2001/EC), where a judgment creditor wished to enforce a judgment in another EU member state, the judgment would first have to be declared enforceable or registered in the member state of enforcement.

This process is known as exequatur, and was seen as unnecessarily time-consuming and costly, and an obstacle to the free circulation of judgments within the EU. It has therefore been abolished in the recast Brussels Regulation ([2012] 1215/2012/EU), although certain safeguards have been introduced for judgment debtors. Under Articles 45 and 46 of the recast Brussels Regulation, an interested party can apply for recognition or enforcement to be refused on the same limited grounds as before, including if:

• It would be manifestly contrary to public policy in the enforcing state.

• For default judgments, the defendant was not properly served with the proceedings in sufficient time to arrange for his defence.

• The judgment is irreconcilable with a judgment given between the same parties in the enforcing state.

Overall, this change should result in some increase in the speed of enforcement of member state judgments across the EU, without significant detriment to the rights of debtors.

The ECJ in Coreck Maritime GmbH v Handersveem BV suggested that a member state court could stay proceedings in favour of a non-member state that has the benefit of an exclusive jurisdiction clause (C-387/98). Although Coreck pre-dated Owusu, a number of first instance English court decisions have held that a stay can be ordered despite Owusu; for example, Konkola Copper Mines v Coromin ([2005] EWHC 898 (Comm)). But again, it is not clear whether a similar approach will be taken under the recast Brussels Regulation, given the absence of any provision dealing with the issue.

So there are still uncertainties. In general, it seems that the party that begins proceedings first will still have the advantage, even after the changes brought about by the recast Brussels Regulation. The only clear exception is where proceedings are begun in a member state in defiance of an exclusive jurisdiction clause in favour of another member state. Otherwise, the best advice may be to get in early.
The provisions in the recast Brussels Regulation, in common with the Brussels Regulation and the Brussels Convention before it, apply where a defendant is domiciled in a member state (see box “Timeline”). Even before the recent revisions, however, certain provisions applied where the defendant was not EU-domiciled. For example, if an agreement to which at least one party was EU-domiciled gave jurisdiction to the courts of a member state, then those courts would have jurisdiction regardless of whether the defendant was domiciled in or outside the EU.

When the recent revisions to the Brussels Regulation were being considered, there was a proposal to extend the rules to all defendants regardless of their domicile. That was rejected, so the English common law rules continue to give jurisdiction, where non-EU defendants are concerned, based on the claimant’s ability to serve proceedings on the defendant within the jurisdiction or to obtain the court’s permission to serve out of the jurisdiction under one of the gateways in Civil Procedure Rule (CPR) Practice Direction 6B paragraph 3.1; for example, a claim in respect of a contract made within the jurisdiction or a contract governed by English law.

The circumstances in which non-EU defendants have been brought into the scope of the recast Brussels Regulation have, however, been extended in certain respects.

**Jurisdiction agreements**

Article 25 of the recast Brussels Regulation (Article 24) gives jurisdiction to the courts of the member state chosen by the parties, regardless of their domicile. So, for example, a US company and a Japanese company have an English jurisdiction clause in their agreement, the English court will have jurisdiction under Article 25.

This is in contrast to the Brussels Regulation where the equivalent provision, Article 23(1), applied only if one or more of the parties were EU-domiciled. However, where non-EU parties had agreed on the jurisdiction of a member state court, under Article 23(3) of the Brussels Regulation, other member state courts had no jurisdiction until the chosen court had declined jurisdiction.

A practical consequence of the change under the recast Brussels Regulation is that, where there is an English jurisdiction clause, a claimant will not need the court’s permission to serve proceedings on the defendant out of the jurisdiction. This is because, simplifying slightly, under CPR 6.33(2), proceedings can be served out of the jurisdiction without the court’s permission where the English court has jurisdiction under the Brussels Regulation or, for proceedings started on or after 10 January 2015, the recast Brussels Regulation. Service will still need to be effected by a method permitted in the relevant jurisdiction, whether under the Hague Convention or otherwise, but the English court’s permission will not be needed to serve in that jurisdiction.

**Exclusive jurisdiction**

Article 24 of the recast Brussels Regulation (Article 24) gives exclusive jurisdiction over certain types of dispute to certain member state courts, regardless of the domicile of the parties. For example, where title to land is concerned, the courts in the member state where the land is situated are given exclusive jurisdiction. The most important of the exclusive jurisdiction provisions in a commercial context are found in Article 24(2), which concerns proceedings that have as their object the validity of the constitution, the nullity or the dissolution of companies or the validity of decisions of their organs. In those and related cases, exclusive jurisdiction is given to the member state where the company has its seat; that is, in the case of an English company, where it is incorporated.

In giving jurisdiction regardless of the domicile of the parties, Article 24 just repeats what is said in the equivalent provision in Article 22 of the Brussels Regulation. There was, however, some uncertainty because of the way that Article 22 of the Brussels Regulation was interpreted by the English court. In *Choudhary v Bhattar*, the Court of Appeal found that the words “regardless of domicile” in Article 22 of the Brussels Regulation should not be construed as having any application to a case where the person to be sued was not domiciled in a member state ([2009] EWCA Civ 1176). So, in other words, the court said that Article 22 of the Brussels Regulation only applied if the defendant was EU-domiciled.

This issue was also considered in *Dar Al Arkan Real Estate Development Co & another v Majid Al-Sayed Bader Hashim Al Refai & others* ([2014] EWCA Civ 715). The High Court in *Dar Al Arkan* considered *Choudhary* to be contrary to ECI authority and an error of the court in a way that would permit the Court of Appeal to depart from it. When *Dar Al Arkan* went to the Court of Appeal, it was not necessary to rule on the issue since the appeal was dismissed on other grounds. However, the Court of Appeal said that the High Court’s reasoning that *Choudhary* was erroneous appeared to be compelling.

Whether or not *Choudhary* was correctly decided, it seems clear from the recitals to the recast Brussels Regulation that the exclusive jurisdiction provisions under Article 24 are intended to apply to defendants that are domiciled outside the EU. Recital 14 states that a defendant that is not domiciled in a member state should, in general, be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seised (that is, for England, the common law rules). It also says that certain rules of jurisdiction in the recast Brussels Regulation should apply regardless of the defendant’s domicile in order to: protect consumers and employees; safeguard the jurisdiction of member states’ courts where they have exclusive jurisdiction; and respect the autonomy of the parties.

Therefore, the exclusive jurisdiction provisions should probably have applied to non-EU defendants under Article 22 of the Brussels Regulation in any event, but the argument is made even more compelling in relation to Article 24 as a result of the new Recital 14.

**Employment and consumer contracts**

Both the Brussels Regulation and the recast Brussels Regulation contain special provisions for certain types of contract, including employment and consumer contracts, that are designed to protect the weaker party to the contractual relationship; that is, the employee and the consumer, respectively.

Under the Brussels Regulation, these provisions applied only where the employer or trader was domiciled in a member state. The employer or trader would be deemed to be domiciled in a member state if it had a branch, agency or other establishment in that member state and the dispute arose out of the operations of that establishment.

Under the recast Brussels Regulation, a non-EU employer or trader may be sued in the EU in certain circumstances, even if it does not have an establishment in a member state. In particular:
The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention) was entered into between the original six EU member states. Although the Brussels Convention now applies only as between the pre-2004 member states and certain non-EU territories of member states, it is significant because much of the applicable case law in this area concerns the interpretation of provisions in the Brussels Convention that are similar to the current rules.

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention) was entered into between the then member states and the European Free Trade Association (EFTA). The Lugano Convention was in substantially the same terms as the Brussels Convention, as amended by intervening accession conventions.

The Brussels Regulation (44/2001/EC) replaced the Brussels Convention and made some significant, although not root and branch, changes (see News brief “Brussels Regulation on jurisdiction: consequential changes”, www.practicallaw.com/7-101-6681). It came into force in March 2002 for all member states except Denmark, which has an opt-out from implementing regulations in the area of freedom, security and justice. However, the Brussels Regulation now applies to Denmark under a 2005 agreement between Denmark and the rest of the EU.

A revised version of the Lugano Convention was introduced, which substantially mirrors the Brussels Regulation. It now applies between EU member states and the EFTA states; that is, Iceland, Norway and Switzerland.

The recast Brussels Regulation (1215/2012/EU) was published. From 10 January 2015 it applies to all EU member states.

- A non-EU employer may be sued in the member state where the employee habitually carries out his work, or last did so.
- A non-EU trader can be sued in the member state where the consumer is domiciled, provided that the trader directs commercial or professional activities to that member state and the contract falls within the scope of those activities.

So, under the recast Brussels Regulation, an employee who habitually works in England for a US employer can bring an action against that employer in England even if the employer has no establishment in England. Similarly, an English consumer who buys something over the internet from a US trader can sue the trader in England, as long as the trader has directed its activities to England.

This will be the case even if the contract of employment, or the sale agreement, purport to give exclusive jurisdiction to the courts of a non-EU country. These protective provisions under the recast Brussels Regulation can only be departed from by an agreement entered into after the dispute has arisen, unless the agreement gives extra rights to the employee or consumer as to where to bring an action.

THE ARBITRATION EXCEPTION

Arbitration has always, at least theoretically, been excluded from the application of the Brussels Regulation, so its reciprocal enforcement obligations did not apply as far as arbitration was concerned. Even so, there has been a troubled relationship between arbitration and the Brussels Regulation.

In Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc, the ECJ held that it was not open to a court of a member state to use an anti-suit injunction to effectively deprive another member state court seised of the dispute of the right to determine its own jurisdiction (C-185/07; www.practicallaw.com/2-385-1001) (see also News brief “West Tankers: end of the anti-suit in Europe?”, www.practicallaw.com/8-383-4278). It also held that an anti-suit injunction runs counter to the mutual trust that the member states accord to one another’s legal systems and judicial institutions, and on which the system of jurisdiction under the Brussels Regulation is based.

However, the implications of West Tankers were far wider. The ECJ held that a preliminary issue concerning the application of an arbitration agreement, including its validity, also comes within the scope of the Brussels Regulation. This meant that any member state court would be required to stay its proceedings pending a decision of another member state court that was first seised on the issue of the validity of an arbitration agreement.

The problem

This narrow interpretation of the arbitration exception effectively enabled a party to disrupt or delay resolution of a dispute by starting a torpedo action in one member state on the merits, claiming that a putative arbitration agreement was invalid (see “Torpedo actions” above). While the other party could continue with an arbitration and the tribunal could determine its own jurisdiction (as happened in West Tankers), if the seat of arbitration was in the EU, that party could not seek an anti-suit injunction to protect the arbitration agreement and stop the parallel proceedings.

In addition, following the ECJ’s jurisprudence in West Tankers, where a member state court
was seised of the question of validity of the arbitration agreement in a way that was ancillary or incidental to the proceedings before it, those proceedings fell within the Brussels Regulation, and another member state court was obliged to stay its proceedings pending determination of the question by the first member state court. This led to an inevitable risk of inconsistent decisions on both jurisdiction and the merits. Any resulting judgment on the merits in the torpedo action would be entitled to recognition and enforcement in the EU and beyond, potentially even before the arbitration tribunal had made an award.

**The solution**

There was considerable debate over how arbitration should be addressed in the recast Brussels Regulation. Various different suggestions were made, including providing for the court where the arbitration was seated to have jurisdiction to determine the validity of an arbitration agreement, and including an express reference in the recast Brussels Regulation to permit anti-suit injunctions where there were parallel court and arbitration proceedings.

The final version of the recast Brussels Regulation relies on the regime set out in the New York Convention (the Convention), to which all member states are signatories. The regime relies on the abilities of the member state courts to navigate a path between their obligations under the Convention and the recast Brussels Regulation.

At first glance, there appears to be little change in the recast Brussels Regulation, as Article 1(2)(d) continues to include an express exclusion of arbitration. Both Article 1(2)(d) and a new Article 73(2) of the recast Brussels Regulation (Article 73(2)) confirm that the recast Brussels Regulation should not affect the application of the Convention. Arguably, these two provisions should be sufficient to confirm the absolute exclusion of arbitration from the ambit of the recast Brussels Regulation while enshrining the precedence of the Convention. However, given past experience of the incursion of the Brussels Regulation into the arbitration sphere, it is perhaps unsurprising that the exclusion of arbitration has been clarified, in Recital 12 of the recast Brussels Regulation (Recital 12).

**Recital 12**

Recital 12 is designed to provide clarification of the scope of the arbitration exception. It:

- Adopts the language of Article 2(3) of the Convention and confirms that each member state court has the right to: refer parties to arbitration; stay or dismiss proceedings; and examine whether an arbitration agreement is null, void or inoperative or incapable of being performed (paragraph 1).

- Provides welcome confirmation that a member state court need not wait for the decision of another member state court on the validity of an arbitration agreement, even if the question has been referred to that other court first (paragraph 2). The statement that this remains the case, regardless of whether the court decided on this as a principal issue or as an incidental question, is crucially important.

West Tankers demonstrated that, by bringing substantive proceedings falling within the scope of the Brussels Regulation in the court of a member state in breach of the arbitration agreement, the preliminary or incidental question as to whether the arbitration clause was valid was also within the scope of the Brussels Regulation. This meant that the question of the validity of the arbitration clause could not be considered by another member state court while it was under consideration by the court first seised. Thankfully, paragraph 2 should remedy this problem.

Any member state court (most likely to be the court of the putative seat) will now be able to consider the question of validity, even if another member state court is seised of the issue first. Paragraph 2 also confirms that, even if a member state court were to decide, as a preliminary matter, that the arbitration agreement was invalid, other member state courts (including the court of the seat) need not be bound by that decision, but can reach their own conclusion.

Paragraph 3 of Recital 12 (paragraph 3) addresses the question of the enforcement of conflicting arbitral awards and member state court decisions. It has always been the case that there is potential for a member state court to find that an arbitration clause is invalid and proceed to a judgment on the merits while, at the same time, an arbitral tribunal accepts jurisdiction and delivers an arbitral award. In this situation, both the arbitral award and the court judgment would be enforceable across the EU; the former under the Convention and the latter under the Brussels Regulation.

Paragraph 3 now confirms that, if a member state court decides that an arbitration clause is invalid and proceeds to issue a judgment on the merits, this will be a judgment under the recast Brussels Regulation and should be enforced by other member state courts.

However, paragraph 3 stipulates that the enforcement of this court judgment is without prejudice to the competence of member states to decide on the recognition and enforcement of arbitral awards in accordance with the Convention, which takes precedence over the recast Brussels Regulation. If an arbitral award and a member state court judgment were to conflict, this language confirms that each member state court has the flexibility to enforce the arbitral award (if considered valid) under the Convention in preference to the court judgment. It is worth noting that Article 5 of the Convention should also provide enough scope for a court to refuse to enforce an arbitral award if it agrees with the member state court that produced the conflicting judgment (see box “The effect of Recital 12”).

**Remaining uncertainties**

The recast Brussels Regulation is a positive step for arbitration. While some have argued that it does not go far enough, it has removed a number of uncertainties and contradictions for arbitration brought about by ECJ case law. In particular, it has taken the sting out of the threat of a torpedo action in breach of an arbitration agreement because other member states are no longer paralysed until the court first seised has determined whether it has jurisdiction.

Yet there remain some circumstances for which the recast Brussels Regulation appears to provide no obvious solution. For example, party A issues proceedings in a member state court on the merits, arguing that a putative arbitration agreement is invalid. That court finds that there is no valid arbitration agreement and delivers a judgment on the merits. Meanwhile, party B has started arbitration proceedings seated in another member state, the tribunal has found that it has jurisdiction and is considering the merits of the dispute. Party A seeks to enforce the recast Brussels Regulation judgment in a member state court (it may or may not be the court of the seat). There is no arbitral award that could be enforced in preference to the court judgment under paragraph 3.
**The effect of Recital 12**

A dispute arises between Party A and Party B. Party A starts arbitration proceedings seated in London. Party B starts court proceedings on the merits in Spain, disputing the validity of the arbitration agreement.

- Can another EU member state court (likely to be the court of the seat) consider the validity of the arbitration agreement? **YES** (paragraph 1, Recital 12 of the recast Brussels Regulation (1215/2012/EU) (Recital 12).
- Can another member state court refer the parties to arbitration? **YES** (paragraph 1, Recital 12).
- Can another member state court take steps to progress the arbitration proceedings, such as appointing an arbitrator? **YES** (paragraph 1, Recital 12).
- Can another member state court issue interim relief in support of the arbitration? **YES** (paragraph 1, Recital 12).
- If the Spanish court issues a preliminary judgment on the putative arbitration agreement, must this judgment be enforced by other member state courts? **NO** (paragraph 2, Recital 12).
- If the Spanish court issues a judgment on the merits, must this be enforced by other member state courts? **YES** Unless there is a conflicting New York Convention award so the obligations of the court under the New York Convention are engaged (paragraph 3, Recital 12).

Although, arguably, this is not an issue unique to the relationship between the recast Brussels Regulation and the Convention, the language of Recital 12 will not provide any comfort to a party that wishes to enforce an award under the Convention in the member state court where the inconsistent judgment was made. In this case, there would be little chance that the court would reach any other decision than to uphold the court judgment, rule that the arbitration clause was invalid and refuse to enforce the award.

**Domestic arbitrations**

Perhaps unsurprisingly for a pan-EU regulation, there has been little focus on domestic awards; that is, awards made in the member state in which enforcement of a conflicting judgment is sought. Paragraph 3 allows a member state court to give precedence to its Convention obligations. However, the Convention only applies to awards made in the territory other than the state where recognition and enforcement is sought, and to awards not considered as domestic awards in the place of recognition and enforcement. In many, but not all, member states, awards made in that state will be considered to be domestic awards and the Convention will not apply.

If the enforcement of a judgment on the merits made by one member state is sought in a member state where an inconsistent domestic arbitration award has been made, the clarification in Article 73(2) and Recital 12 will not be relevant. The incoming judgment will be a recast Brussels Regulation judgment, and therefore entitled to recognition unless any of the grounds in Article 45 of the recast Brussels Regulation permit the court to refuse recognition. This will only be the case if the recast Brussels Regulation judgment is irreconcilable with a judgment given in a dispute between the same parties in the member state in which recognition is sought or where it is manifestly contrary to public policy. Given how narrowly public policy is construed within the EU, it is unclear whether or how this latter ground would be used.

However, depending on the arbitral seat, a party may be able to use an irreconcilable judgment as a shield. In England and Wales, this might include obtaining a judgment confirming the tribunal’s jurisdiction under section 32 of the Arbitration Act 1996 or having a final partial declaratory award as to jurisdiction from the tribunal recognised as a judgment under section 66 of the Arbitration Act 1996.

**Return of anti-suit injunctions?**

The recast Brussels Regulation clarifies that each member state court can consider the validity of an arbitration agreement and is not required to await or abide by the ruling of another member state on that question. A party should theoretically be free to choose whether or not to enter an appearance to contest the court’s jurisdiction, or simply ignore the proceedings and pursue the arbitration, relying on a member state’s right to apply the Convention over and above the recast Brussels Regulation on enforcement. However, few would welcome...
The confirmation of the validity of the arbitration agreement, and the weight of a court injunction against the counterparty, will be reassuring and, no doubt, many would prefer to use them.

If an English court issued an anti-suit injunction, it would seem likely that those English proceedings and any other member state proceedings on the question of the validity of an arbitration agreement would fall outside the scope of the recast Brussels Regulation. This might, at first glance, suggest that an anti-suit injunction would be permissible (this approach is reflected in the recent opinion of the Attorney General in Gazprom C-536/13; see News brief “Anti-suit injunctions: the beginning of the end for West Tankers?”, this issue). However, given the rationale behind the recast Brussels Regulation, it is not clear that the revision is intended to bring back the anti-suit injunction.

Attempts to introduce language allowing for anti-suit injunctions were removed from the final drafting of the recast Brussels Regulation and the right for every court to decide on the validity of an arbitration agreement is very clearly set out. As a result, it seems likely that anti-suit injunctions will remain a thing of the past between member states.

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