Impact of Brussels I's Recasting on Arbitration: Putting Enforcement Problems on Statutory Basis (Part I)

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Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (published in the Official Journal of the European Union on 20 December 2012) implements a new, recast version of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). This long-awaited amendment has been deemed as the proper avenue for clarification and streamlining of any problematic issues brought up in the course of Brussels I's application. Regarding one of the more sensitive issues, subject to long litigation sagas – arbitration – Regulation 44/2001's position remains unmoved: arbitration still falls outside the scope of the Regulation and the recognition and enforcement mechanism provided by it (Article 1(2)(d)). However, the new revised version of the Regulation, which will enter into force in 2015, makes an important en route mentioning of arbitration in its Recital 12, which on its surface seeks to confirm the already existing situation but bears the potential to effect a significant impact.

Imagine:

A company, X, is willing to purchase steel sheets from Y, a European-incorporated subsidiary of major Chinese steel producer. X is incorporated in Belgium and contracts for several million tons of steel sheets to be delivered to its place of business in Europe. The sale of goods contract between X and Y incorporates an arbitration clause stipulating that the parties shall resolve their disputes in the Chinese International Economic and Trade Arbitration Commission in Beijing (CIETAC).

The Belgian company suffers a period of financial distress and fails to make due payments on time. However, it claims that the delivered steel sheets are far from the quality contracted for and refuses to make outstanding payments. Y files a request for arbitration in CIETAC. X refuses to appear in the CIETAC proceedings, as it claims that the arbitration clause is invalid and thus the proper recourse should be state court litigation. Y has its seat in Germany with a number of branch offices in the European Union and X considers it more efficient to pursue recovery from their assets as well besides its claim at Y's headquarters in Germany. Therefore, X seeks refund of any payments as, it asserts, the poor quality of the steel sheets delivery is a breach of contract. X files against Y in Germany.

The German court rules that the arbitration clause is in fact void, as X submits, and the claim can be duly submitted to the German courts, which have jurisdiction to hear the case in accordance with the

rules of “Brussels I” on cross-border civil and commercial litigation since the respondent is a German-registered entity, and then issues a decision in favour of X. X decides to make avail of the freedom of movement of judicial decisions within the EU and the easier recognition and enforcement procedure provided by “Brussels I” and attempts to enforce against not only what Y holds in Germany but any other of Y’s assets located in the European Union – e.g. in Italy and France.

In the meantime the CIETAC tribunal hands down an arbitral award which grants relief to Y’s claim in full. Y has to enforce against the assets of X, which are located in Belgium, and duly attempts to do so by submitting the CIETAC award before a Belgian court. At one and the same time the Italian and French courts have to deal with X’s application to enforce against Y’s assets there, while the Belgian court entertains Y’s application for recognition and enforcement of the arbitral award against X in Belgium.

If it were not for the arbitration element (the arbitration clause/agreement), these circumstances might have comprised two opposite claims lodged before two different courts, but stemming from one and the same contract, with one and the same parties and cause of action. Certainly then the situation would have qualified within the ambit of the *lis alibi pendens* principle (old Article 27, new 29) of “Brussels I” and the simple resolution would be that the second seised court should stay the procedure and, granted the first one has jurisdiction, then terminate the case so that it may be heard in its entirety in the court first in time.

However, the arbitration clause in the contract brings a radical change to the treatment of the factual scenario – the putative arbitration agreement should negate the effect of the Regulation and Brussels I, especially its recognition and enforcement mechanism, in its current version shall not apply. The two mutually interrelated proceedings with one and the same scope (contractual claim for refund/damages) would run in parallel. Such a situation certainly does not contribute to the objective to put the conflict-of-laws rules of EU Member States in uniformity and is rather conducive for jurisdictional clashes within the European Union.

According to Recital 12 of the amended Brussels I, which shall be effective as of 2015, arbitration remains ousted from the scope of Regulation’s application. This is no surprise since EU law has been consistently avoiding the inclusion of arbitration in the scope of the 1968 Brussels Convention and later the Regulation. Such an approach may have been reasonable as of 1968, given that all the EU Member States were also signatories to the seminal 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Some thirty years later, the interrelation between the Regulation regime and arbitration has become tense with conflict. Against this background, the revision of Brussels I has been anticipated as to indicate whether the position regarding arbitration shall be altered, and it appears, at first glance, that Article 1(2)(d)’s ouster remains firmly the same.