Kluwer Arbitration Blog

The Recast Brussels Regulation and "Domestic" Arbitrations

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As has been discussed previously on this blog, the recast Brussels Regulation contains a number of important clarifications to the arbitration exception. Paragraph 3 of Recital 12 and Article 73(2) make it clear that the recast Regulation shall not affect the application of the New York Convention (the "Convention"). The recast Regulation should allow a court to enforce an arbitral award considered valid under the Convention when it is confronted with a conflicting Member State court judgment, though the Regulation is vague as to how the enforcing court is to assess priority between the award and the conflicting judgment. Perhaps unsurprisingly for a pan-European Regulation, there has been little focus on domestic awards, where enforcement is sought at the seat against a conflicting judgment of another Member State court.

Take for example a London-seated arbitration between two Brazilian parties in relation to a power plant in Brazil. An award is rendered. Meanwhile, in breach of the arbitration agreement one of the parties has gone to the Spanish Court. The Spanish Court decides that the arbitration agreement is null and void and issues a judgment on the merits. Because the award is London-seated and therefore not a "New York Convention award" under the Arbitration Act 1996, the "*precedence*" accorded to the Convention by paragraph 3 of Recital 12 has no relevance as far as the English court is concerned. The English court would have no scope under the Regulation to refuse enforcement of the Spanish court judgment. The judgment would be a Regulation judgment and therefore entitled to recognition in the English courts.

This problem is not new to the recast Regulation, but the addition of Recital 12 has highlighted the difficulties in reconciling parallel court proceedings and the enforcement of domestic awards. This post suggests that it may be possible to extend Recital 12 to domestic awards where they have sufficiently international characteristics, by bringing them within Article 1(1) of the Convention as non-domestic awards.

A "non-domestic award"

Article 1(1) provides that the Convention applies to two categories of arbitral awards: those made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ("foreign awards"); and those awards not considered as domestic awards in the State where their recognition and enforcement is sought ("non-domestic awards"). This second category of non-domestic awards may be recognised and enforced in the same State as the seat, under the Convention.

The question of whether an award is considered non-domestic is dependent upon the national law

of the enforcement state. The application of the Convention to non-domestic awards is discretionary, but may arise in three situations:

(i) an award is made in the enforcement State under the arbitration law of another State;
(ii) an award is made in the enforcement State under the arbitration law of that State but involving an international element (such as foreign parties); and
(iii) an award is made that is not governed by any arbitration law and is regarded as a-national.

The first category of award is rare, though it provided the basis for certain civil law countries to propose the inclusion of the concept of the non-domestic award in the Convention. Not only is the third type of award rare, it is also controversial whether the Convention can apply to such awards at all. The question of what constitutes a non-domestic award has therefore focused on the second category of awards, though this has received little judicial attention outside of the United States.

The issue has been considered by US courts because of the wording of the provision of the Federal Arbitration Act which implements the Convention. This excludes from its scope arbitration agreements arising out of a relationship which is entirely between citizens of the United States, unless that relationship had a reasonable connection with one or more foreign states. In *Bergesen v Müller* 710 F.2d 928 (2d Cir. 1983), the US Court of Appeals for the Second Circuit enforced an award made in New York under New York law between a Norwegian and a Swiss party in accordance with the Convention by classifying it as a non-domestic award under Article 1(1) of the Convention. The Court found that "non-domestic" awards meant awards which are subject to the Convention not because they are made abroad, but because they are made within the legal framework of another country, for example "*pronounced in accordance with a foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction*".

It is possible to see how this reasoning could be applied to bring domestic arbitral awards in Member States within the scope of the Convention and Recital 12 of the recast Regulation, provided that they are sufficiently "international" in nature.

National legislation

Much will depend on whether the law of the relevant Member State can be interpreted to identify domestic and non-domestic awards for the purposes of the Convention. It appears that the majority of national laws adopt a strictly territorial approach, treating any awards made on national territory as domestic, though some exceptions exist. Article 1504 of the French Code of Civil Procedure provides that an arbitration seated in France will be considered "international" when international trade interests are at stake. It is possible to see how a "non-domestic" argument could be made in such circumstances.

The position in England is less clear. Looking again at the London award involving Brazilian parties, Part III of the Arbitration Act would not apply to the award because Section 100(1) defines a "New York Convention award" purely in terms of the first part of Article 1(1) of the Convention, i.e. a foreign award. The London award would be enforced like any other arbitral award with its seat in England, under Section 66.

Could the London award nevertheless be classified as a non-domestic award for the purposes of the Convention and ultimately the recast Regulation? The framework for identifying such a non-domestic award arguably exists within the Act. Section 85(2) defines a "domestic arbitration

agreement" as an arbitration agreement which provides for a UK seat and to which at least one of the parties is a UK party. An arbitration agreement with a seat in the England between two Brazilian parties would not, therefore, be a "domestic arbitration agreement".

To use the language of *Bergesen v Müller*, the arbitration agreement, and by implication the award, would be "*made within the legal framework of another country*", involving parties domiciled outside the enforcing jurisdiction. Section 85(2) evidences Parliament's recognition of the difference between English-seated arbitrations which have an international element and those which are truly domestic.

It is, of course, the case that Section 85 was not brought into effect because of fears that a distinction between domestic and international arbitration could lead to an infringement of EC law on grounds of discrimination and a restriction on the freedom to provide services. This therefore presents difficulties for any argument that the Convention should be extended to cover "non-domestic" awards within England and Wales. However, the use of the domestic/international distinction to extend the application of the Convention should not produce these results, as it broadens the categories of parties who may avail themselves of Recital 12. A corollary of such non-domestic awards falling within the scope of the Convention may be that only the grounds set out in Article V could be used to refuse enforcement, though the practical difference from the grounds used to refuse enforcement under section 66 should not be overstated. The court's power to set aside the award should still be available by virtue of Article V1(e) of the Convention, though whether the grounds for set aside would themselves be limited to the grounds for refusal of enforcement set out in Article V is an open question. Despite these issues, it is nevertheless possible to see how the recast Regulation's recognition of the competence of Member State courts to decide matters of enforcement "in accordance with" the Convention could be interpreted liberally by a pro-enforcement English court in future.

Conclusion

The issue of whether an award is non-domestic for the purposes of the Convention has hitherto been a relatively obscure issue, seldom having practical importance. However, the addition of Recital 12 of the recast Regulation has highlighted the difficulties in reconciling parallel Member-State court proceedings and the enforcement of domestic awards. This difficulty could be limited if domestic awards which are sufficiently international in nature are able to be categorised as non-domestic awards for the purpose of the Convention, thus enabling Member State courts to rely on Recital 12 of the Regulation. This will ultimately depend on whether the law of the relevant Member State can be interpreted to identify domestic and non-domestic awards, though the potential for such an approach appears to exist in France and the UK.

The views expressed above are those of the author.

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