How Can We Tackle the Problem of Non-Binding Judgments as to the Validity of an International Arbitration Agreement within the Context of EU Law?

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The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 was superseded by Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The latter was subsequently repealed by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments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) ("the recast Regulation").

The recast Regulation contains a new set of rules relating to the recognition and enforcement of judgments in civil and commercial matters within the Member States' territory. Arbitration has always been excluded, not only from the scope of the Brussels Convention, but also from the scope of both Regulations. However, the so-called 'arbitration exception' and, especially, the question of whether or not a Member State's court judgment on the validity of an arbitration agreement is binding on the rest of the courts of the Member States has, for all time, been the subject of a tortuous and lengthy saga.[fn] For a complete overview of the episodes in the ongoing saga of the arbitration exception, Julio-César Betancourt, 'State Liability for Breach of Article II.3 of the 1958 New York Convention' (2017) 33 Arbitration International 215-227.[/fn]

In line with the previous legislation, Article 1(2)(d) of the recast Regulation makes clear that it 'shall not apply to … arbitration', and Recital 12, paragraph 2, of the said Regulation stipulates, *inter alia*, 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 this Regulation', meaning that these kinds of judgments are not inherently binding or, put differently, do not invariably attain *res iudicata* effect as between Member States.

This does not mean that the relevant judgment cannot be given effect in the Member States in accordance with the rules that are intended to regulate the effects of a foreign judgment in their respective jurisdiction, but rather that the recast Regulation cannot be invoked with a view of obtaining its recognition and enforcement. In other words, judgments that do not fall within the ambit of the recast Regulation (i.e., non-regulation judgments) might well be recognised and enforced in

another Member State under a different set of rules, but certainly not under such a Regulation.

Recital 12, paragraph 2, of the recast Regulation managed to solve one of conflicts that arose under the previous Regulation vis-à-vis the New York Convention 1958. In *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)*, the English Court of Appeal held that the United Kingdom's obligation under the New York Convention to give effect to arbitration agreements did not exempt an English court from its duty to enforce a decision of a court of a fellow Member State and co-signatory of the New York Convention (i.e. Spain) that there was no arbitration clause.

In that case, it would seem to be clear that the validity of the agreement to arbitrate should have been judged on the basis of English law (the law applicable to the arbitration agreement), and yet the Spanish court — curiously — decided that the agreement in question was not valid pursuant to Spanish law. As a result, the party against whom court proceedings were wrongly initiated in breach of such an agreement, was unable to counteract the effects of the Spanish judgment, which, for better or for worse, was considered to be binding on the Court of Appeal.

The recast Regulation is no doubt to be welcomed by the international arbitration community. Among other things, it reverses the English Court of Appeal's decision in *The Wadi Sudr*, which, unquestionably, led to an undesirable result. From now on, it can be said that, as a matter of EU law, the Member States' courts will not be prevented (in principle) from asserting their own view as to whether a given arbitration agreement is valid, irrespective of any previous judgments to the contrary, and 'regardless of whether the court decided on this as a principal issue or as an incidental question'.[fn] Recital 12, paragraph 2, of the recast Brussels Regulation.[/fn]

At first glance, Recital 12, paragraph 2, of the recast Regulation may appear to be a rather promising solution. On a closer examination, however, this solution might not be as promising as it seems, mainly because the question of whether an arbitration agreement is null and void, inoperative or incapable of being performed ("the validity issue") could be litigated — and relitigated — before the courts of, practically, various Member States. Thus, this recital, if interpreted literally, would flagrantly run against the principle of legal certainty, which is said to be one of the general principles of EU law.

Recital 12, paragraphs 1 and 2, of the recast Regulation somehow implies that, under EU law, the national courts of the Member States have been granted jurisdictional power to examine and make a non-binding determination as to the validity issue. But what if the arbitration agreement contains a choice-of-court agreement in favour of a court a Member State? Or more exactly, what if the arbitration agreement itself sets out that the courts of a given Member State are to have exclusive jurisdiction so as to consider, once and for all, the validity issue?

This question can be answered by looking at Recital 12, paragraph 3, in conjunction with Article 73(2) of the recast Regulation. Recital 12, paragraph 3, posits that the New York Convention takes precedence over such a Regulation, thereby inferring that the former is hierarchically superior to the latter. Article 73(2) of the recast Regulation states that it 'shall not affect the application of the … New York Convention'. The Convention, which has been ratified by 159 countries, including all EU Member States, provides that Contracting States are bound to recognise and enforce arbitration agreements.

In *Giuseppe Manfredi v Regione Puglia*, the Court of Justice of the European Union held, among other things, that recitals 'cannot be relied upon to interpret [a Regulation] … in a manner clearly contrary to its wording'. Therefore, it can be argued that Recital 12, paragraphs 1 and 2, of the recast Regulation should not be interpreted to mean that the parties to an arbitration agreement whose validity has been challenged before the court of a Member State have an inalienable right to secure a judgment on the matter from the court seized of the case in question.

Nor should it be interpreted to mean that the national courts of the Member States are not legally bound to recognise and enforce a judgment on the validity issue stemming from an arbitration agreement whereby the parties have agreed to refer this issue to a chosen court. Adrian Briggs, Professor of Private International Law at the University of Oxford, explains that it is 'perfectly possible to find a reason to recognize judgments … by focusing … on the conduct of the parties in relation to each other as giving rise to a mutual obligation, owed by each to the other, to abide by a judgment'.[fn] Adrian Briggs, 'The Principle of Comity in Private International Law' in *Collected Courses of The Hague Academy of International Law* (The Hague Academy of International Law 2012) 152.[/fn]

In view of the foregoing, it is submitted that a private — or exclusive jurisdiction — agreement to abide by the court's judgment of a given forum (e.g., the English courts) with the underlying purpose of finally disposing of the validity issue should be readily recognised and enforced by the courts whose jurisdiction it purports to exclude pursuant to Article II of the New York Convention. This is so regardless of whether the chosen court is located within or outside the EU. It is immaterial whether the non-chosen court was first seized.

It is evident that the non-chosen court does not (or should not) have the power to decide whether the exclusive jurisdiction agreement is valid, otherwise, it would be very easy to defeat the object of such an agreement. Nor does it have the power to entertain the matter if it is contended that the contract to arbitrate 'containing the agreement on jurisdiction is [null and void, inoperative or incapable of being performed], not least because the latter is juridically distinct from the [former]'.[fn] Cf Adrian Briggs, *The Conflict of Laws* (3rd edn, Oxford University Press 2013) 78.[/fn] This holds true even if the chosen court eventually decides that the arbitration agreement itself is not valid.

It remains to be seen, however, whether these types of agreements will withstand judicial scrutiny, as their validity has yet to be tested in the Member States' courts.