Kluwer Arbitration Blog

Some additional comments on the (now amended) Heidelberg Report: A reply to Professor Hess

Alexis Mourre (Castaldi Mourre & Partners) · Monday, March 22nd, 2010

I am grateful to Professor Hess for his comments on my 3 March 2010 blog. It greatly contributes to advancing the debate. However, it also perfectly illustrates the difficulties of a proposition – the total or partial deletion of the arbitration exception in Regulation 44/2001 – that has not been sufficiently thought through.

1. Professor Hess now introduces a very significant change in the Heidelberg proposal.

In his 14 February post on ConflictsofLaw.net, he had acknowledged that "the proposal of the Heidelberg Report to delete the arbitration exception entirely maybe goes too far".

Professor Hess now proposes for the first time an alternative to the Heidelberg proposal by drafting Article 1-2 (d) of the Regulation as follows "The Regulation shall not apply to… (d) Arbitration, save supporting measures and declaratory relief proceedings as provided for under Articles 22(6), Article 27A and Article 31".

In other words, the arbitration exception would not de deleted, as initially proposed by the Heidelberg Report, but maintained, save for ancillary proceedings (proposed new Article 22(6)), for the proposed new declaratory action (new Article 27A), as well as for provisional and conservatory measures (Article 31).

The question which immediately arises is therefore: what about court decisions which do not fall within the three limited exceptions to the exception? Will a court decision on the validity of an arbitration agreement or of an award still be excluded from the scope of the Regulation?

Normally, one would tend to answer positively to that question. If the arbitration exception is maintained (although with limited exceptions), it is hard to see why a judgment annulling an award should be recognized under the Regulation. *Putrabali* would thus survive to the new Regulation.

And what about a judgment on the validity of the arbitration agreement? Here, a distinction would have to be made.

In case of a judgment rendered at the seat of the arbitration in the context of the proposed new declaratory action, one would have to admit, under the amended Hess proposal, that it should be recognized under the Regulation.

If, on the contrary, the judgment is not rendered at the seat (or rendered at the seat but not in the context of a declaratory action), what would the situation be?

Then, *March Rich* is likely to survive.

If the main scope of the action giving rise to the judgment is the validity of the arbitration agreement, the judgment would thus presumably fall outside the scope of the Regulation.

But the situation would be more difficult in the case of an interim judgment on the validity of the arbitration agreement rendered by a court seized on the merits. There, as it is known, the Court of Appeals of Paris answered by excluding the application of the Regulation in Fincantieri (Paris, 15 June 2006, *Legal Department du Ministère de la Justice de la République d'Irak v/ Sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio,* Rev. Arb. 2007.90, note Bollée), while the English Court of Appeals admitted that the Regulation is applicable in Endesa (*National Navigation Co c. Endesa Generacion SA*, [2009] EWCA Civ 1397). Which of those two solutions should prevail?

Professor Hess, however, seems to follow an entirely different line of reasoning. He in fact rejects my proposal for a safeguard clause inspired from Article IX of the Geneva Convention (new Article 34A). Let me recall that my proposed clause would read as follows:

"A judgment shall also not be recognized:

(a) if it has been rendered in disregard of a valid arbitration agreement that is valid under the law of the country of recognition;
(b) as regards judgments rendered on the validity of an award, if (i) it has not been rendered by the courts of the country where the arbitration has its seat, or (ii) in case of annulment of the award, if it was not made on one of the grounds set out in Article V(1)(a) to (d) of the New York Convention".

Such proposal was made on the assumption that the arbitration exception would be entirely deleted, with the consequence that a judgment rendered in a Member State deciding on the validity of an award would fall within the scope of the Regulation and would have to be recognized (possibly with no formalities or requirement of exequatur under the new regime).

It would however become unnecessary in case the arbitration exception is maintained with limited exceptions, as suggested by Professor Hess. In such case, a judgment deciding on the validity of an arbitral award should in fact fall outside the scope of the Regulation and have to be recognized under the general private international rules of the country of recognition.

Professor Hess, however, does not reject my proposal on the basis that it becomes unnecessary under the limited arbitration exception that he suggests.

In order to justify his rejection of such a provision, Professor Hess states that it would "completely runs counter the objective of the ongoing reform of Brussels I which shall reduce the grounds of non-recognition and replace exequatur proceedings by the principle of mutual trust".

One has therefore to understand that, under Professor Hess proposed limited arbitration exception, a judgment rendered in a Member State on the validity of an arbitral award would have to be recognized under the principle of "mutual trust".

Why it should be so is unclear. But if this assumption is correct, and although Professor Hess declares that he "[does] not want to discuss the issue in more detail", the question deserves much more attention.

For example: under the New York Convention, awards may be annulled at the seat, and courts in other countries may only refuse recognition on the limited grounds provided in Article V. Let us now imagine a Member State court in a country other than the seat of the arbitration which would annul a foreign award. This is by no means an unimaginable situation. It has occurred in India and elsewhere (See recently: *Venture Global Engineering v. Satyam Computer Services Ltd, Supreme Court of India*, 10 January 2008). Under Professor Hess' suggestion (if I understood him well), such a decision would have to be automatically recognized under the Regulation in all other Member States. I trust that Professor Hess will accept that this would be plainly incompatible with the New York Convention.

Second example: a court in a EU Member State where the seat of the arbitration is located and which is also a member of the Geneva Convention of 1961 annuls an award for reasons not contemplated by Article V (1) (a) to (d) of the New York Convention. Recognition of said decision is sought in another Member State which is also a party to the Geneva Convention. Based on the principle of "mutual trust", automatic recognition would prevent the enforcement of the arbitral award, in breach of Article IX of said Convention when applicable.

It is thus evident that, if the arbitration exception is to be totally or partially deleted in a way that would include judgments on the validity of an arbitral award in the scope of the Regulation, exceptions would need to be framed in order to make the Regulation compatible with the New York and Geneva Convention and to take into account the specificities of arbitration.

2. Let us now turn to the other *punctus doli* of the Hess/Heidelberg proposal: the automatic *lis pendens* provision of Article 27 and the proposed declaratory action.

I have expressed the legitimate concern that the proposed new Article 27A will not be compatible with the negative effect of Kompetenz-Kompetenz, as it is applied for example in France.

I have accordingly proposed to vary the proposed new Article 27A of the Regulation as follows:

"A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to the existence and scope of the arbitration agreement (i) if a court of a Member State that is designated as the place of the arbitration is seized for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement, or (ii) if a judge at the seat of the arbitration has been seized to put the arbitration in motion or has been seized of a difficulty relating to the constitution of the arbitral tribunal, or (iii) if an arbitral tribunal, sitting in or outside the European Union, has been seized of said question".

Professor Hess maintains that "French procedural law explicitly provides for declaratory relief in the context of arbitration (if the *juge d'appui* finds the clause is manifestly void)" and adds that "it seems to me possible that a French *juge d'appui* who is seized by a party under Article 22 (6) JR will stay his proceedings and send the parties to arbitration". Professor Hess adds that "If the arbitral tribunal finds that the clause is effective, it may give an interim award. The French *juge d'appui* can endorse the award (by a declaratory judgment). This judgment will be recognized in all other EU-Member States and the prevalence of the arbitration proceedings will be assured".

Such statements are a bit confusing. As explained in my blog, proceedings before the *juge d'appui* are my no means comparable to declaratory proceedings. The *juge d'appui* does not take any decision on the validity of the arbitration agreement. He just puts the arbitration in motion (for example by appointing an arbitrator) unless the arbitration agreement is manifestly null and void. If the judge is seized on the merits, he will decline jurisdiction (not stay his proceedings) and refer the parties back to arbitration unless the clause is manifestly null or inoperative. There is no possible "stay" of the proceedings before the *juge d'appui*. Either the arbitration agreement is manifestly null or inoperative, and he will not put the arbitration into motion, or it is not, and he will send the parties to submit their jurisdictional objections to the arbitral tribunal.

Whatever Professor Hess meant in his analysis of the situation before the French *juge d'appui*, he seems to be in agreement that, in presence of an action in the merits before a Member State court where it is argued that the arbitration agreement is null and void, or even manifestly null and void, a judge in another Member State where the arbitration has its seat could nevertheless put the arbitration in motion by for example appointing an arbitrator. In such a scenario, the arbitration could proceed with no need for the judge to "endorse the award by a declaratory judgment" along the lines suggested by Professor Hess.

This is welcomed and – if this understanding is correct – Professor Hess should agree that Article 27A should be amended as suggested above.

3. I also have pointed out that the proposed declaratory action will not prevent situations of *lis pendens* between an action in the merits in breach of an arbitration agreement and an action to enforce an award in a country other than the seat, thus *de facto* obliging the parties to return to the old requirement of double exequatur that he New York Convention has suppressed.

To that effect, I have proposed a new Article 27B drafted as follows: "Article 27 shall not apply to the court of a Member State requested to enforce an arbitration award".

Professor Hess did not comment this proposed new article. I hope he is also in agreement with this proposal.

4. Finally, I would like to make some comments on Eco Swiss and the public policy defense to enforcement, as this issue seems to be at the root of our disagreements.

Professor Hess maintains that "the objective of the NYC is certainly to provide for a uniform regime on the recognition of arbitral clauses and awards". With due respect, I disagree. The scope of the NYC is to provide for a minimum threshold of recognition, not to unify the regime of recognition of arbitral clauses and awards.

Professor Hess then wonders "whether the EU-Member States are still free to interpret and apply the public policy exception of Article V NYC individually". Professor Hess' answer to that query is that: "the public policy clause of Article V (1) (c) of the New York Convention must be interpreted coherently within the EU" and that "eventually, the courts of the Member States must refer questions on the interpretation of mandatory EU law to the ECJ (Article 267 TFEU)".

This calls for two observations.

First: as a general matter, I of course agree that, within the EU, courts should as much as possible apply EU mandatory laws in a coherent and uniform manner.

But, with due respect, this is not the issue which is debated with respect to the application of the public policy exception in the context of courts review of arbitral awards.

The true issue is that of procedural autonomy, i.e. whether Members States can be more or less intrusive in their review of arbitral awards. As I have shown in a recent study (note to *SNF v Cytec*, Cass. 4 June 2008, Clunet 2008, 1107), most jurisdictions in the EU would set aside an award only in case of a *manifest* or a *flagrant* breach of public policy (like in the *Thalès* case, a decision which is criticized by some, but which is rightly approved by most, including by such authors as Professor Schlosser, see: *Articles 81 and 82 EC Treaty and Arbitration: a German perspective*, Cahiers de l'arbitrage, 2009-1, p. 22,).

This is not the place to discuss whether this is appropriate and compatible with EU law. My view is that Eco Swiss permits Member States to restrict their review of awards. Eco Swiss, in deciding that courts must quash an award based on EU public policy if they would quash it based on their domestic public policy, sets a rule of equivalence according to which EU mandatory rules should not be treated differently than EU public policy. It thus permits courts to exercise limited review (or no review at all) of the compliance of an award to both domestic and EU mandatory rules.

Second: It is hard to understand why the need for a coherent and uniform enforcement of EU mandatory laws by courts within the EU is at all relevant in the context of a debate on the revision of the Regulation and the possible suppression of the arbitration exception.

The Heidelberg proposals (in their original version or as they are now amended by Professor Hess) provide no answer to that question because the scope of the Regulation is procedural and does not address issues of substance. Under the Regulation as it could to be amended by the suppression of the exequatur (an evolution that Professor Hess seem to welcome), a judgment having disregarded EU mandatory laws would have to be recognized exactly like a judgment having made a correct application of the same.

Likewise, the Regulation does not address referrals under Article 267 TFEU.

Those issues may be interesting in the context of a discussion on a new instrument providing for a uniform regional regime on arbitration, but they are entirely irrelevant to the revision of the Regulation.

This entry was posted on Monday, March 22nd, 2010 at 6:04 pm and is filed under Arbitration Agreements, Arbitration Awards, Commercial Arbitration, Domestic Courts, Enforcement, Europe, European Law, Jurisdiction, kompetenz-kompetenz, Lis Pendens, National Arbitration Laws, New York Convention, Public Policy, Seat of the arbitration, Set aside an international arbitral award
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