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The proposal for reviewing the Brussels Regulation and the new Regulation No. 1215/2012 after the West Tankers decision: a new step back for arbitration?

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One of the more debated issues in the process of the implementation and review of Regulation No. 44/2001 ("Brussels Regulation") was the general exclusion of arbitration from the matters covered by the Brussels Regulation.

The debate about the opportunity to mitigate such exclusion arises from the subsequent difficulty in determining which courts of Member States have jurisdiction over court proceedings related to an arbitration agreement or procedure, such as proceedings for the annulment or challenge of arbitrators' appointments, or regarding the existence, validity or effectiveness of an arbitration clause. Moreover, since the Brussels Regulation's provisions about *lis pendens* and related actions do not apply to matters related to arbitration, this entails the risk that parallel court and/or arbitration proceedings on the same matter are commenced in different Member States, leading to conflicting decisions. More specifically, in the current EU judicial system there is no rule preventing arbitral tribunals and/or courts of different Member States from simultaneously ruling on proceedings regarding the validity, enforceability, effectiveness or interpretation of the same arbitration agreement.

Furthermore, Member States are not obliged to recognize or enforce decisions made by other Member States related to arbitration agreements or procedures; thus, it is not uncommon for a court of a Member State to recognise the validity of an arbitration clause declared null and void by a court of another Member State, or to deny the recognition and enforcement of a judgment issued in another Member State on the validity of an arbitration clause.

By way of an example, in the *Sovarex SA v. Romero Alvarez SA* case, the English High Court was requested to dismiss or stay enforcement proceedings of an arbitration award, commenced pursuant to Article 66 of the Arbitration Act 1996, on the grounds that court proceedings commenced prior to the arbitration were still pending in Spain, for a declaration that the contract containing the arbitration agreement was in fact never concluded. In the present case, the English court held that (i) the question of the existence of a concluded contract or the lack thereof had not yet been determined by the Spanish court, and (ii) the English court was the court of the seat of arbitration, therefore England was the natural forum for the dispute. Accordingly, there was no basis for staying or dismissing the award's enforcement proceedings, since it was not governed by the

Brussels Convention of 1968 (now replaced by the Brussels Regulation), thus the *lis pendens* provisions set out therein, obliging a court of a Member State to stay proceedings where proceedings involving the same cause of action and between the same parties have been previously brought in a different Member State, did not apply.

In the *Legal Department du Ministère de la Justice de la République d'Iraq v. Fincantieri Cantieri Navali Italiani, Société Finmeccanica et Société Armamenti e Aerospazio* case, the Genoa Court of Appeal found that it had jurisdiction to rule on the dispute that arose between three Italian Companies and the Ministry of Defence of the Republic of Iraq, in spite of the fact that the relevant contracts contained arbitration clauses, by holding that the arbitration clauses were invalid in accordance with the New York Convention. When enforcement of the decision was sought in France, the Republic of Iraq challenged the enforcement order made by the Court of Appeal of Paris, arguing that (i) the Brussels Convention did not apply to the decision made by the Genoa Court of Appeal, since arbitration fell outside its scope, and (ii) given the non-applicability of the Brussels Convention, the Genoa Court of Appeal did not have jurisdiction over the dispute pursuant to the bilateral convention in force between Italy and France. The Court of Appeal of Paris then reversed the enforcement order and dismissed the request for enforcement, holding that the Brussels Convention did not apply to the decision made by the Genoa Court of Appeal and such Court did not have jurisdiction over the merit of the dispute, therefore the enforcement order had to be overturned. Again, this resulted from the exclusion of arbitration from the Brussels Convention, which (like the current Brussels Regulation) expressly prevented the courts of a Member State from denying recognition or enforcement of a decision on the grounds of lack of jurisdiction over the Member State of origin.

Such kinds of situations are quite common in the European judicial scenario, since until the anticipated introduction of common rules and regulations governing arbitration (which is still a very distant goal, due to the wide cultural differences still existing between Member States in their aptitude for arbitration), each Member State solves the relevant disputes applying, alternatively, its own national laws or the New York Convention of 1958, which, most of the time, results in an unsatisfactory solution.

The situation described above was exacerbated after the decision issued by the European Court of Justice in the *West Tankers* case, where the ECJ prohibited the so-called "anti-suit injunctions" that English Courts used to issue to prevent a party from commencing court proceedings in different Member States whenever the other litigant contested the court's jurisdiction on the basis of an (English) arbitration clause. In the *West Tankers* decision (following the pronouncement issued in the *Turner v. Grovit* case, where the ECJ had already stated the incompatibility of the "anti-suit injunctions" with the system of mutual trust between the courts of Member States established by the 1968 Brussels Convention), the ECJ pronounced that it is incompatible with the Brussels Regulation for a court of a Member State to make an order preventing a litigant from commencing or continuing court proceedings in another Member State, allegedly in breach of an arbitration agreement. More specifically, the ECJ ruled that even if proceedings aimed at obtaining anti-suit injunctions do not properly fall within the scope of the Brussels Regulation, they nevertheless prevent a court of another Member State from exercising the jurisdiction conferred on it by the same Brussels Regulation, thus undermining its effectiveness.

As a consequence of the *West Tankers* decision and the abolition of anti-suit injunctions, the EU judicial system risks further favouring parallel court and arbitration proceedings as well as conflicting decisions issued in different Member States.

In order to prevent this situation, the *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* of December 2010 (the "Proposal") included a specific rule on the relationship between arbitration and court proceedings, obliging a court of a Member State hearing a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and (i) an arbitration tribunal has been convened to hear the dispute under the arbitration agreement, or (ii) court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

More specifically, Article n. 29.4 of the Proposal expressly stated that "*Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. […].*

Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction".

Such a choice was aimed, according to recital (20) of the Proposal, at improving the effectiveness of arbitration agreements "*in order to give full effect to the will of the parties*" and at "*avoiding parallel proceedings and abusive litigation tactics*", in particular, where the agreed or designated seat of an arbitration is in a Member State.

Unluckily for advocates of arbitration, the provision contained in Article 29.4 of the Proposal did not meet the approval of the European Parliament, which in its Draft Report of 28 June 2011 on the Proposal deleted the entire provision of Article 29.4. This was consistent with the guidelines already laid down in its resolution of 7 September 2010, whereby the Parliament had strongly opposed the (even partial) abolition of the exclusion of arbitration from the scope of the Brussels Regulation, clarifying that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, must be excluded from the scope of the new Regulation.

As a result, the current Whereas clause (12) of Regulation No. 1215/2012, that shall apply from 10 January 2015, replacing the Brussels Regulation, still provides that "*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*

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, regardless of whether the court decided on this as a principal issue or as an incidental question".

As anyone can see, such a solution leaves many issues open; one of them is that, with reference to a dispute connected to an arbitration agreement, three different decisions could potentially be issued, each of them being governed by different recognition and enforcement rules: (i) the arbitral

award, which shall circulate in accordance with the rules laid down in the New York Convention of 1958; (ii) the decision issued on the merits by a court of a Member State, on the basis of the acknowledged nullity, unenforceability or ineffectiveness of the arbitration clause, which shall circulate in accordance with the more favourable rules laid down in the Brussels Regulation (and later in Regulation No. 1215/2012); (iii) the decision issued by a court of a Member State upon the validity/unenforceability of the arbitration agreement, which shall not profit from the Brussels Regulation rules and circulate in accordance with the rules of the national laws of the Member State in which enforcement is sought, in a scenario entailing the risk of undermining the effectiveness of decisions in the EU judicial common area.

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