Kluwer Arbitration Blog

Evolution of the EU Arbitration Law: From Conflict of Laws Rules to Substantive Requirements

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The term "EU arbitration law" may take some getting used to. After all, there is no EU arbitration act that would be comparable to, for instance, the English Arbitration Act 1996 or Chapter 12 of the Swiss Private International Law Act. Regulation (EC) No 593/2008 on the law applicable to contractual obligations ("Rome I Regulation"), as per its Article 1(2)(e), explicitly does not apply to arbitration agreements. Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia Regulation") coordinates the jurisdiction of Member States' courts and regulates the recognition and enforcement of their judgments. But it famously excludes arbitration, within the meaning of its Article 1(2)(d), from its scope of application.

Still, provisions at the core of any arbitration law—namely rules on how courts deal with arbitration agreements and arbitral awards—also exist at the EU level. So far, this may have been overlooked because, in a lean conflict of laws approach, the Brussels Ia Regulation refers the task of coordinating state court and arbitral jurisdiction primarily to the Member States' domestic (arbitration) laws. Yet to protect the Brussels Ia regime, the Court of Justice of the EU ("CJEU") also defines substantive requirements that domestic arbitration laws must comply with in this context—what may be called rules of an EU arbitration law.

This is the background against which the CJEU case of *Prestige* (20 June 2022, C-700/20, ECLI:EU:C:2022:488, *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain*) must be read. Although much criticised, *Prestige* is relatively (commercial) arbitration-friendly, as we shall see in the second and third sections.

The Way EU Domestic Courts Deal with Arbitration Agreements

The Brussels Ia Regulation does not explicitly regulate how to deal with arbitration agreements, a task that is left primarily to the domestic laws of the Member States, together with the New York Convention. Indeed, according to Article 73(2) Brussels Ia Regulation, this "Regulation shall not affect the application of the 1958 New York Convention".

As a starting point, therefore, each Member State decides for itself how to deal with an arbitration agreement. In *West Tankers*, the CJEU specifically prevented other Member States from interfering

in that process, even if only indirectly, e.g., by issuing an anti-suit injunction. From an arbitration perspective, it is remarkable that the CJEU uses EU law, in particular the principle of mutual trust between Member States in their respective legal orders and judiciary, to give supremacy to a particular domestic arbitration law within the Brussels Ia area, and not necessarily that of the seat of the arbitration.

While the Member States' *competence* to decide on how to deal with arbitration agreements is thus protected, little seems to *coordinate* the ways they deal with them.

No coordination takes place if a Member State *decides in favour of arbitration*, assisting, e.g., in the appointment of arbitrators, or declining to exercise its own (state court) jurisdiction. No one else in the Brussels Ia area is bound by such a decision or needs to decide accordingly—as the first and second paragraphs of Recital 12 Brussels Ia Regulation highlight.

On the other hand, coordination effectively does take place—and this must be considered an anomaly within the Brussels Ia regime, given the exclusion of arbitration in Article 1(2)(d)—if a Member State *decides against arbitration*, i.e., finds a purported arbitration agreement to be null and void, inoperative, or incapable of being performed, affirms its own (state court) jurisdiction, and decides on the merits. Namely, in this case, the resulting judgment must be recognised and enforced within the Brussels Ia area, as the third paragraph of Recital 12 clarifies. Indirectly, therefore, the way the respective domestic arbitration law deals (negatively) with the purported arbitration agreement thereby gains binding force throughout the Brussels Ia area, which coordinates how all the other relevant courts deal with this specific arbitration agreement.

The Way EU Domestic Courts Deal with Arbitral Awards

Article 73(2) and the fourth paragraph of Recital 12 Brussels Ia Regulation also suggest that the way Member States deal with arbitral awards is governed exclusively by their domestic (arbitration) laws. Yet this is not the case in either scenario where the award potentially conflicts with a judgment from the Brussels Ia area.

If a Member State decides on the merits of a dispute falling within the Brussels Ia Regulation, the resulting judgment is recognised throughout the Brussels Ia area without further ado. An arbitral award issued subsequently cannot prevent the enforcement of such judgment as the Brussels Ia Regulation authorises no exception.

But what if the arbitral award is issued first? In principle, the (later) Member State judgment must still be enforced, although Article 45 Brussels Ia Regulation may now allow otherwise.

According to Article 45(1)(c) Brussels Ia Regulation, the recognition of a judgment from within the Brussels Ia area shall be refused "if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed". An arbitral award is *not* such a "judgment given between the same parties in the Member State addressed", as awards are not the judgments of states. Still, in *Prestige*, the CJEU accepts that an award, *once confirmed or recognised* by a Member State, has the potential of blocking the recognition of a subsequent judgment from another Member State. This relativises the principle discussed above that a Member State's finding that an arbitration agreement is null and void, inoperative, or incapable of being performed, if followed by a decision on the merits, binds all other Member States.

Prestige is insofar (commercial) arbitration-friendly, even though the CJEU sets certain boundaries. Namely, a Member State that has recognised an arbitral award, and that wishes to rely on this recognition to refuse the enforcement of a later judgment from another Member State, must verify whether it would itself have been allowed, but for the arbitration exception, to render the same decision on the merits as the arbitral tribunal, and that "without infringing the provisions and the fundamental objectives of [the Brussels Ia Regulation], in particular as regards the relative effect of an arbitration clause included in an insurance contract and the rules on lis pendens contained in" Article 31 (*Prestige*, § 73).

In summary, an arbitral award once recognised in a Member State can prevail over a judgment from another Member State, but only if (i) the arbitral proceedings were initiated prior to the court proceedings (or else *lis pendens* rules would have been violated) and (ii) the award was issued prior to the judgment (or else the judgment would be *res judicata*). EU jurisdiction rules thus interfere with domestic arbitration law to a limited extent only, provided certain substantive requirements, set by what we have termed "EU arbitration law", are met.

Arbitration in the EU is No Longer "International"

The Brussels Ia Regulation thus integrates the Member States' court jurisdiction to a large extent, but the EU area of justice is not (yet) a legal order in its own right as regards civil jurisdiction. Consequently, as we shall briefly summarise in the remainder of this contribution, when coming into contact with the EU area of justice, arbitration enjoys greater consideration than it would within a (domestic) legal order, but less than it would in a purely international setting.

Most legal orders are likely to resolve conflicts between their own court judgments and arbitral awards by giving priority to the judgment, whether rendered earlier or later—as Sebastian Breder has demonstrated for English, French, and German law. This is because a court judgment will only be rendered if the arbitration exception fails—and then there is no basis for recognising an award later.

However, following *Prestige*, the interplay of Article 73(2) and Recital 12 Brussels Ia Regulation does not lead to a similar situation within the Brussels Ia area. Rather, an arbitral award, if recognised, may prevail over a later judgment from another Member State—provided the *Prestige* criteria are met.

On the other hand, the Member States are closer to one another, and owe one another, and their courts greater consideration, than states not bound by a special arrangement such as the Brussels Ia Regulation. Namely, as a consequence of *Prestige*, the principle of priority, which underlies Article 45(1)(d) Brussels Ia Regulation, and which is the typical way of dealing with conflicting decisions in a purely international setting, does not conclusively govern the relationship of Member State judgments and arbitral awards. If the *Prestige* criteria are not met, a later judgment from another Member State must be given priority over an award, even if the latter has already been recognised internally.

In any event, the key takeaway from *Prestige* may be that the CJEU maps out a way for arbitration to integrate itself into the EU area of justice, earning the same consideration as the courts of other Member States—even though the legislator excluded arbitration from the Brussels Ia Regulation.

The above is an abbreviated version of an article published in German in the SchiedsVZ | German Arbitration Journal, Vol. 22, No. 3 (2024), which is also included on Kluwer Arbitration. See here for more information on and other contributions to the Journal.

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