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Reform of the Brussels Regulation — Latest Developments and the “Arbitration Exception”

This article continues our series of in-depth analyses of the new Brussels Regulation. It focuses on the interplay between arbitration proceedings and court proceedings in the context of the Brussels regime and is a must-read for anyone interested in the cross-border enforcement of litigation and arbitration.

To access the first article in the series, Reform of the Brussels Regulation, please [click here](#).

Introduction

On 6 December 2012, the Council of the European Union (Justice Ministers) endorsed the proposed reform of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation). The vote concluded nearly four years of consultations on amending the legislation.

Our previous article on the reform of the Brussels Regulation provided a background to the legislation and examined the main proposed amendments.¹ This article, which builds on that introductory text, discusses recent developments with respect to reforming the Brussels Regulation and considers one of the key provisions of the legislation in more depth, namely the arbitration exception.

Executive Summary

- The Brussels Regulation allows EU courts to determine which courts should have jurisdiction and how judgments should be recognised and enforced. Attempts have been made to reform the Brussels Regulation and those attempts came to fruition in December 2012, with the revised regulation coming into force in 2014/5.
- One of the liveliest debates in relation to the Brussels Regulation concerned the nature of its “arbitration exception”. According to Article 1.2(d) of the Brussels Regulation, arbitration is explicitly excluded from the scope of the

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legislation; but (in broad terms) that exception was watered down by a series of court decisions (particularly in relation to court proceedings connected with arbitration).

- Reforming the “arbitration exception” has given rise to concern, particularly amongst the arbitration community. However, the changes are largely to be welcomed as generally supportive of arbitration in general and the primacy of the New York Convention in particular, although certain issues remain unaddressed.

Brussels Regulation — Recent Developments

The Brussels Regulation governs jurisdiction and the recognition and enforcement of judgments in European Union (EU) Member States. It provides a harmonised approach to determining which EU Member State court should have jurisdiction over a dispute and how judgments from courts in one EU Member State should be recognised and enforced in other EU Member States.

The reform of the Brussels Regulation commenced formally in April 2009 when the European Commission published its report and green paper setting out proposed amendments to the legislation and inviting broader consultations on the operation of the Brussels Regulation. Following discussions with interested parties, which included legal practitioners and the European Parliament Committee on Legal Affairs (LAC), on 14 December 2010, the European Commission published its draft amendments to the Brussels Regulation, which provided for, inter alia:

- The abolition of *exequatur* (the intermediate procedure for the recognition and enforcement of judgments)
- Extension of the jurisdiction rules in the Brussels Regulation to disputes involving defendants who are not domiciled in an EU Member State
- Enhancement of effectiveness of choice of court agreements
- Improvement of the interface between the Brussels Regulation and arbitration
- Better coordination of parallel proceedings
- Clarification on the circulation of provisional and protective measures in the EU

The European Commission’s legislative proposal invited another round of consultations, which resulted in further draft amendments to the Brussels Regulation. Eventually, on 20 November 2012, the European Parliament approved revisions to the Brussels Regulation at first reading. Similarly, the Council of the European Union (Justice Ministers) voted to support the proposed reform without any amendments on 6 December 2012. The revised version of the Brussels Regulation was published in the “*Official Journal of the European Union*” on 20 December 2012. It came into force 20 days later and will apply starting on 10 January 2015 (Articles 75 and 76 will apply starting on 10 January 2014) in accordance with Article 81 of the amended Brussels Regulation.²

Arbitration Exception — An Overview

The reform of the Brussels Regulation was accompanied by a broad consultation process and one of the provisions most widely debated was the so-called “arbitration exception”.

According to Article 1.2(d) of the Brussels Regulation, arbitration is explicitly excluded from the scope of the legislation. The European Court of Justice

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(the ECJ) has defined the scope of the arbitration exception. In *Marc Rich & Co. AG v. Societa Italiana Impianti PA*, the ECJ held that the arbitration exception extended “to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation”.³ Further, in *Van Uden Maritime BV, trading as Van Uden Africa Lin v. Kommanditgesellschaft in Firma Deco Line and Another*, the ECJ clarified that court proceedings concerned arbitration if they served to protect the right to resolve the dispute through arbitration.⁴

However, the ECJ’s more recent rulings have been viewed as an encroachment on the arbitration exception. In *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA v. West Tankers Inc., (West Tankers)* the ECJ held that it was incompatible with the Brussels Regulation for “a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement”.⁵ In that case, the English court had issued an anti-suit injunction preventing insurers from pursuing proceedings in the Italian court in breach of a London arbitration clause. However, the ECJ decided that the anti-suit injunction breached the Brussels Regulation as it prevented the Italian court from ruling on its jurisdiction, regardless of the arbitration exception. The ECJ went further, stating, “a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application”.⁶ As such, broadly speaking, the ECJ held that court proceedings and judgments related to arbitration fell within the scope of the Brussels Regulation and thus outside the arbitration exception.⁷

The ECJ’s judgment in *West Tankers* has widened the opportunity for parallel proceedings, whereby one party would bring an action on the merits challenging the validity of the arbitration agreement while the other party would continue with arbitration. Any resulting court judgment would be subject to the recognition and enforcement rules under the Brussels Regulation. Thus, an EU Member State court would be required to recognise another EU Member State court’s judgment that invalidated an arbitration agreement, even if it considered the arbitration agreement valid.

Arbitration Exception — The Debate

The proposed amendments to the Brussels Regulation addressed the issues of parallel proceedings and conflicting court and arbitral decisions.

In its initial report on the Brussels Regulation, dated 21 April 2009, the European Commission reinforced the arbitration exception, emphasising the satisfactory operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (the New York Convention). However, the report also listed various problems arising out of the interface between the Brussels Regulation and arbitration, namely:

- Parallel court and arbitral proceedings where an arbitration agreement is held invalid in one EU Member State and valid in another
- Incompatibility between the Brussels Regulation and some procedural devices under national law (e.g., anti-suit injunctions)
- Lack of uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitral proceedings

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- Uncertainty surrounding the recognition and enforcement of court judgments in disregard of an arbitration clause and judgments on the validity of an arbitration clause or setting aside an arbitral award
- The recognition and enforcement of arbitral awards under the New York Convention being considered less efficient than the recognition and enforcement of court judgments⁸

In addressing the above concerns while accommodating the ECJ's ruling in *West Tankers*, the European Commission proposed, among other recommendations, a partial deletion of the arbitration exception, whereby court proceedings in support of arbitration would fall within the scope of the Brussels Regulation.⁹

This proposal met, however, with criticism from arbitration practitioners and the LAC, who opposed any encroachment on the arbitration exception as challenging the operation of the New York Convention. In its working document on the European Commission's proposal, the LAC also addressed the ECJ's ruling in *West Tankers*, recommending including in the amended Brussels Regulation a recital to clarify that "judgments brought in breach of arbitration clauses or judgments holding that arbitration clauses are invalid fall outside of the scope of the regulation" and would not be enforceable in other EU Member States.¹⁰

In addressing the criticism voiced by interested parties, the European Commission's proposal published on 14 December 2010 preserved the arbitration exception "save in the limited case provided for therein" (proposed Recital 11) and allowed for a stay of court proceedings if the court of the seat or an arbitral tribunal has been seised to determine arbitral jurisdiction (proposed Article 29.4).¹¹

However, certain stakeholders continued to insist on retaining the arbitration exception in its entirety. On 28 June 2011, the LAC published its draft report on the European Commission's text, in which it reiterated "the whole matter of arbitration should be excluded from the scope of this Regulation"¹² and recommended removing the above-mentioned draft Article 29.4. In justifying its position, the LAC maintained that recognition and enforcement of arbitral awards were satisfactorily addressed by the New York Convention.¹³ Similarly, the Council of the European Union, which adopted a general approach on the European Commission's proposal on 7-8 June 2012, reinforced the arbitration exception and suggested a new recital to clarify the scope of the exception, arguably making it absolute. The recommendations proposed by the Council of the European Union were eventually included in the final approved version of the revised Brussels Regulation.¹⁴

Arbitration Exception in the Amended Brussels Regulation

The amended Brussels Regulation provides welcome clarifications on the application of the legislation to arbitration proceedings. It preserves the arbitration exception pursuant to Article 1.2(d), as in the previous version of the legislation. This is also reiterated in a new Recital 12. Further, Recital 12 defines the scope of the arbitration exception. The new provision states that:

- EU Member State courts have the right to refer parties to arbitration, stay or dismiss proceedings, or examine the validity of an arbitration agreement.
- An EU Member State court ruling on the validity of an arbitration agreement is not subject to the rules of recognition and enforcement of the Brussels Regulation, regardless of whether arbitration is a principal or incidental question.

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- EU Member State courts may recognise and enforce arbitral awards under the New York Convention, which takes precedence over the Brussels Regulation, even if the arbitral award conflicts with another EU Member State court judgment (for example, if the court ruled that the arbitration agreement was invalid).
- The Brussels Regulation does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, arbitrators' powers, the conduct of arbitration, or the annulment, review, appeal, recognition or enforcement of an arbitral award.¹⁵

The amended Brussels Regulation addresses some of the main concerns arising out of the ECJ's ruling in *West Tankers*. Whilst a party may still commence court proceedings on the validity of an arbitration agreement, the court seised of the dispute has the right to refer the parties to arbitration. However, an EU Member State court is not required to recognise another EU Member State court's judgment on the validity of an arbitration agreement. Even in the case of inconsistent decisions, where an EU Member State court is presented with a valid arbitral award under the New York Convention and a conflicting judgment by another EU Member State court that is enforceable under the Brussels Regulation, the New York Convention (i.e., the enforcement of the arbitral award) takes precedence over the Brussels Regulation (i.e., the enforcement of the court judgment).

Although the Brussels Regulation has clarified a number of questions related to the interface between the legislation and arbitration, a few issues remain outstanding. The Brussels Regulation does not address a situation where a party needs to enforce an arbitral award in an EU Member State whose court held the arbitration agreement invalid. Moreover, given the precedence of the New York Convention over the Brussels Regulation in enforcing arbitral awards, there is a scope for parallel court and arbitral proceedings until the arbitral tribunal renders an enforceable award. Similarly, there is a risk of repeated court proceedings where a party dissatisfied with a judgment on the validity of an arbitration agreement rendered by the court first seised (a judgment falling outside the scope of the Brussels Regulation and therefore not binding on other EU Member States), commences similar court proceedings in another EU Member State.

Overall, however, the amended Brussels Regulation has met with positive reception among arbitration practitioners by improving legal certainty regarding arbitration agreements and preventing abusive litigation tactics.

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Endnotes

- ¹ See "Reform of the Brussels Regulation: Developments in Questions of Jurisdiction and the Recognition and Enforcement of Judgments Across the European Union", for a more in-depth commentary on the proposed revisions of the Brussels Regulation.
- ² Regulation (EU) No 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) [2012] OJ L351/1.
- ³ Case C-190/89 *Marc Rich & Co. AG v. Societa Italiana Impianti PA* [1991] OJ C202/5.
- ⁴ Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Lin v. Kommanditgesellschaft in Firma Deco Line and Another* [1999] OJ C20/2. See also Jacob Grierson, 'Comment on *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)*' (2009) 26 J.Int'l Arb. 891, 893-94.
- ⁵ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, and Generali Assicurazioni Generali SpA v. West Tankers Inc.* [2009] OJ C82/4. The English Court of Appeal considered the ECJ's judgment in *National Navigation Co v. Endesa Generacion SA; The Wadi Sudr* [2009] EWCA Civ 1397.
- ⁶ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, and Generali Assicurazioni Generali SpA v. West Tankers Inc.* [2009] OJ C82/4.
- ⁷ For a general discussion of the impact of this case, see Philip Clifford and Oliver Browne, "Lost at Sea or a Storm in a Teacup? Anti-suit injunctions after *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v. West Tankers Inc.*", [2009] Int A. L. R. 19.
- ⁸ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 174 final, p. 9.
- ⁹ Commission, 'Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' COM (2009) 175 final, pp. 8-10.
- ¹⁰ European Parliament Committee on Legal Affairs, 'Working Document on Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', pp. 3-4. See also European Parliament Committee on Legal Affairs, 'Draft Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' 2009/2140(INI), pp. 6-7; European Parliament Committee on Legal Affairs, 'Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' A7-0219/2010, p. 8.
- ¹¹ Commission, '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' COM (2010) 748 final, pp. 4, 9.
- ¹² Committee on Legal Affairs of the European Parliament, 'Draft Report on 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' 2010/0383(COD), p. 6.
- ¹³ *Ibid.*, pp. 9, 21, 48.
- ¹⁴ Council of the European Union, 'Addendum to Note' 10609/12 ADD 1, pp. 3, 61.
- ¹⁵ Regulation (EU) No 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) [2012] OJ L351/1.

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