The Arbitration Exclusion reconsidered in the Brussels I Regulation Reform

by Maria Karampelia

On 6 December 2012, the EU Council and European Parliament adopted EU Regulation 1215/2012—often referred to as “Brussels I Regulation Recast”—on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The primary objective of adopting the Regulation was to facilitate the circulation of judgments and to further enhance access to justice within the EU.

The Brussels I Regulation will apply to legal proceedings instituted on or after 10 January 2015, according to article 66 of the Regulation. The new Regulation introduces some key changes aiming to make the recognition and enforcement of judgments given by courts in Member States more effective and easier; however, contrary to the arbitration community’s expectations, the Regulation has not fully clarified the contentious interface between legislation and arbitration.

In the Brussels I Regulation, international arbitration has been specifically excluded from the regulation’s material scope. International arbitration was similarly excluded from article 1(2)(d) of the EU’s Regulation 44/2001. The main argument for excluding international arbitration from these regulations is that the EU Council was trying to preserve the smooth operation of the 1958 New York Convention by preventing potential arbitral decisions from conflicting with court decisions.

The arbitration exception of the Brussels I Regulation, though explicit, was in practice deteriorated by a series of court decisions that interpreted the arbitration exclusion narrowly and expanded the subject matter scope of Regulation 44/2001 to comprise issues ancillary to arbitration, widening the opportunity for parallel proceedings, leading to extended disputes and outlawing the use of anti-suit injunctions as a weapon against foreign court proceedings in breach of an agreement to arbitrate.

In particular, in the heavily commented West Tankers case, the European Court of Justice ruled that “because of the subject matter of the dispute, i.e. the nature of the rights to be protected in proceedings such as a claim of damages, those proceedings come within the scope of the Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.” (Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers Inc., Case C-185/07, (Feb. 10, 2009).) Broadly speaking, that means that according to the ECJ, court proceedings related to arbitration fall within the scope of the Brussels I Regulation and thus outside the arbitration exception.

As a consequence, issuing an anti-suit injunction to prevent those proceedings would be inconsistent with the Regulation, as this would prevent the court from exercising the power to rule on its own jurisdiction. This in practice could frustrate the arbitration
process severely, especially in cases where a party initiates proceedings in a Member State characterized by a slow or complicated judicial system—an approach followed by lawyers as a time-earning tool. Also, such court proceedings parallel to the arbitral proceedings could ultimately lead to two conflicting decisions on the same substance.

Upon the announcement of the upcoming Reform of the Brussels Regulation, arbitration stakeholders were expecting the address of such issues and the abolition of the opportunity for parallel proceedings. As was apparent in its initial report dated 21 April 2009, the European Commission identified the main problems the application of Brussels I caused to arbitration and proposed the partial deletion of its exception, in a way that would accommodate the West Tankers ruling; that is, by including court proceedings supportive to arbitration in the new Regulation’s material scope. The parties opposed to this proposal expressed concerns about risks imposed to the longstanding satisfactory operation of the New York Convention and asked for a clarification of the arbitration exclusion’s scope in the new recitals.

As recommended by the Council of the European Union, the amended Brussels Regulation includes a recital on arbitration (recital 12 in the preamble), which seems more elaborate and thus requires some analysis. Recital 12 repeats the arbitration exemption and defines its scope through some clarifications. It clearly 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. However, the rulings on the validity of an arbitration agreement are not subject to the rules of recognition and enforcement of the Regulation—although the same does not apply to the substance of the dispute. Moreover, the recital grants precedence to the New York Convention over the Regulation and allows the recognition and enforcement of arbitral awards by EU Member State courts according to the former, even if the arbitral award conflicts with a judgment of another EU Member State court. Finally, the proceedings ancillary to arbitration, such as the establishment of an arbitral tribunal, the conduct of arbitration or the annulment, review, appeal, recognition or enforcement of an arbitral award, do not fall within the Regulation’s scope.

The main question arising from the wording of recital 12 is whether it provides a sufficient legal basis for interpretation of the arbitration exemption in a way that would allow the reintroduction of anti-suit injunctions in the tool case of lawyers in the EU context. The answer is apparently negative since the requirement of mutual trust remains intact. Thus, a Member State court has no authorization to grant an anti-suit injunction in relation to proceedings brought in another Member State in breach of an arbitration agreement.

Despite the failure to reverse the West Tankers effect, the inclusion of the new recital improved the protection of arbitral proceedings from abusive litigation tactics, commonly known as “torpedo actions”. Upon the application of the recast regulation, parallel proceedings may still be brought in foreign courts, but they will
not prevent arbitral proceedings from commencing or continuing with support from the courts of the seat.

In conclusion, the clarifications of the Brussels I Regulation Recast are welcome but they do not solve any issue that might arise. For example, it does not provide for a solution when a party seeks to enforce an arbitral award in an EU Member State where a national court has held the arbitration agreement invalid. Similarly, a party dissatisfied with the judgment on the validity of an arbitration agreement could initiate proceedings in another EU Member State, since the latter’s court is not bound by the first decision as it falls outside the scope of the Brussels Regulation.

Ultimately, it has been said that the EU legislators opted more or less for the status quo, since the absence of a clear wording still permits parallel proceedings and abusive litigation tactics that challenge international arbitration. Whether the new Regulation will have an impact on arbitration and any form of anti-suit injunction to protect arbitration will be permitted in the EU will probably take years of court practice to clarify.