Brussels I Review – Interface with Arbitration

The Brussels I Regulation's interface with arbitration vies with choice of court agreements as the topic within the Commission's review having the greatest potential impact on the negotiation and efficient implementation of commercial transactions.

According to the Commission:

> *Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*
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> *In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .*
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> *Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.*
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> *Next, a deletion of the exception might allow the recognition of judgments*

deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award . This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).

The Commission seeks responses to the following questions:

Question 7:

Which action do you consider appropriate at Community level:

• To strengthen the effectiveness of arbitration agreements;

- *To ensure a good coordination between judicial and arbitration proceedings;*
- *To enhance the effectiveness of arbitration awards?*

The Commission observes, correctly, that "arbitration is a matter of great importance to international commerce" and that "[t]he 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners". Any solution to the problems described in the Report and the Green Paper must, therefore, be without prejudice to the functioning of the New York Convention in the Member States. Further, Art. 71 of the Brussels I Regulation (which, inexplicably, does not presently concern itself with obligations to decline jurisdiction) should be amended to make clear that the Regulation shall not prevent a court from declining jurisdiction, or from recognising or enforcing a judgment or award, where it is required to do so by the New York Convention (or, equally, the Hague Choice of Court Convention).

That said, it is also important that the treatment of arbitration in the Regulation should not give more favourable treatment, or greater protection, to arbitration agreements or to arbitral processes and awards than that given to choice of court agreements or to the judicial determination of disputes in, and the recognition and enforcement of judgments from, Member State courts. Within the EC's "area of justice", private methods of dispute resolution should not be favoured over judicial determination. This proposition is supported, for example, not only by the need for equal and fair access to justice for all at reasonable cost, but also by the important position that national courts hold in the Member States' constitutional orders and the need to protect the vital role those courts play in developing and declaring civil and commercial law. Arbitration tribunals, given their self-regulatory and confidential character, are not well suited to performing the latter role. One (perhaps the only) positive consequence of the ECJ's decision in the West Tankers case is that it removed the anomaly whereby an anti-suit injunction could be sought to restrain proceedings in another Member State brought contrary to an agreement for arbitration with its seat in a Member State, but not an exclusive jurisdiction agreement designating the courts of a Member State.

Against this background, a strong case can be made for removal of the arbitration exception in Art. 1(2)(d) of the Regulation as the first step in the process of reform. As the Study of Professors Hess, Schlosser and Pfeiffer (Study

JLS/C4/2005/03, paras. 106-136) affirms, however, that change alone will not be sufficient to ensure the effective co-ordination of judicial and arbitration proceedings, including regulation of jurisdiction with respect to ancillary court proceedings and the inter-relationship between judgments and arbitral awards, and will indeed create fresh problems.

Accordingly, in addition to the adjustment of Art. 71 to confirm the overriding effect of the New York Convention (above), further adjustments to the Regulation will be necessary. The proposals in the Study, emphasising the key role of the courts of "place of the arbitration" (which must be understood as referring to the seat of the arbitration and not the venue for any hearing) seem as good a starting point for discussion as any. Further work will, however, be required on the detail of the proposals, including the proposed definition of "place of the arbitration", with input from practitioners specialising in arbitration as well as international arbitration bodies such as the ICC and LCIA, and (if possible) UNCITRAL as the custodian of the New York Convention. In particular, it will be necessary to ensure that the existing allocation of competence between national courts and arbitral tribunals (e.g. as to determination of questions of the tribunal's jurisdiction) is not upset. Thus, recognition that the courts of the "place of arbitration" have jurisdiction under the Regulation, whether exclusive or not, to determine certain matters should be expressed to be without prejudice to rules in that place concerning the relationship between courts and arbitral tribunals. Further, in defining the "place of arbitration" in cases where the parties have not made an express choice of seat from the outset, care must be taken not to open up fresh opportunities for tactical litigation to undermine arbitration proceedings by designating as competent the courts of a place that is unlikely to have any close connection to the arbitration.

For the reasons given above, if, as a consequence of these discussions, additional protection is given to arbitration agreements over and above that recognised in the New York Convention (e.g. by giving exclusive jurisdiction to the courts of the "place of the arbitration" to determine the validity of an arbitration agreement), equivalent protection should also be given to choice of court agreements.

Accordingly, the answer to be given to Question 7 could be that the arbitration exception in Art. 1(2)(d) ought to be deleted and appropriate adjustments made to the Regulation to ensure the effective co-ordination of judicial and arbitration proceedings. Arbitration agreements, proceedings and awards should not,

however, be given more favourable treatment than choice of court agreements, judicial proceedings and judgments.

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