

Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted Arbitration/Litigation Interface: The European Debate on SSRN.

Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of the Recast Brussels Regulation (the “Recast”), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.

Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential interpretations of the Recast’s explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.

Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast’s regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital

12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.