

## **BRUSSELS I REGULATION (RECAST) AND ARBITRATION**

### **Rimantas Daujotas**

PhD Scholar, Queen Mary University  
Senior Associate at Motieka & Audzevičius PLP  
Gyneju st. 4, Vilnius, Lietuva  
[www.rdaujotas.com](http://www.rdaujotas.com)  
Email: [rimantasdaujotas@gmail.com](mailto:rimantasdaujotas@gmail.com)

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Ladies & Gentlemen,

It's a pleasure to see so many participants and such an esteemed panel here in Vilnius today. My topic today is Brussels I Regulation and Arbitration.

Based on time limitations, I want to focus on three important aspects to cover this topic. First, I will give few examples on how the Brussels I Regulation worked in practice. I will then discuss the new Recast of the Regulation and will see how the problems concerning arbitration exception were fixed, or were they actually fixed? and finally I will provide a short overview of the Gazprom case.

When the judicial cooperation on jurisdiction and recognition and enforcement of judgments was established in the European Community, there was a clear intention that the Brussels Convention should only cover court proceedings, excluding arbitration. This exclusion was reaffirmed in the subsequent reforms and modernisation, including the Brussels I Regulation and the recent Brussels I Recast in 2015.

Arbitration is excluded because there are international treaties on arbitration, which may conflict with the European jurisdiction regime. In particular, the New York Convention on Recognition and Enforcement of Arbitral Awards, which is a very successful international framework that applies to all Member States of the Brussels I regime.

Thus excluding arbitration from the Brussels I regime aims to avoid potential conflicts and to allow the Brussels I regime to perform alongside the New York Convention.

Now, although arbitration is a private dispute resolution method, separate from court jurisdiction, however, arbitration can never work without the support and supervision of the court.

Court's assistance is required to enforce arbitral awards, to appoint or remove arbitrators, to incorporate arbitral awards into court judgments, to refer the parties to arbitration, to issue anti-suit injunctions and other.

Therefore, it is hard to draw a clear-cut line between arbitration and court proceedings. That is why arbitration or arbitration-related issues frequently come before courts and that is why we frequently see a rather complex relationship between arbitration and the Brussels I Regulation.

I will now mention only a few examples of those complexities.

### ***Marc Rich v Societa Italiano Impianti***

The first important case that casted doubt on the arbitration exclusion of the Brussels Convention was the *Marc Rich* case. In this case, a Swiss company and an Italian company concluded a contract and agreed to submit their disputes to arbitration in London.

After disputes arose, Impianti first commenced litigation in Italy and Marc Rich later on commenced arbitration proceedings in London pursuant to the arbitration agreement.

Impianti refused to participate in the London arbitration or to appoint an arbitrator according to their agreement. Thus Marc Rich sought the assistance from the English court to appoint the second arbitrator and serve summons on Impianti.

Impianti, however, argued that before the English court could appoint an arbitrator and serve summons, the English court must first assess the existence and the validity of the arbitration agreement, which is within the scope of the Brussels Convention.

As Impianti first brought the dispute in Italy, where the validity of the arbitration agreement was examined by the Italian court, Impianti argued that the *lis pendens* doctrine of the Brussels Convention should apply and the English court, as the second seized court, should stay jurisdiction.

In this case, the European Court of Justice confirmed the broad interpretation of the arbitration exception of the Brussels Convention. The Court provided that the Brussels Convention excludes arbitration 'in its entirety', including court proceedings in which the subject matter is arbitration.

Therefore, the European Court of Justice explained that since the court proceedings in English court are regarding appointing an arbitrator, the subject matter of which is arbitration, it should be excluded from the scope of the Brussels Convention, regardless of whether the validity of the arbitration agreement is raised as a preliminary issue. Thus the English courts had jurisdiction.

## **Allianz SpA v West Tankers**

Another and rather conflicting and controversial ruling on the relationship of arbitration and the Brussels I Regulation was delivered by the European Court of Justice in *West Tankers* case.

In this case, the claimant applied for an anti-suit injunction in an English court restraining the defendant from suing in Italy in an alleged breach of an arbitration agreement which required the parties to submit disputes to arbitration in London.

The European Court of Justice, however, eventually ruled that such an anti-suit injunction was in conflict with the Brussels Regulation.

While there was an express carve-out for arbitration in the Regulation, the Court considered that this could not be extended so far as to undermine the Regulation's purpose, namely the unification of jurisdictional conflict rules between member states.

## **The Recast of Regulation**

Therefore, only these few examples, amongst others, evidence that no systematic and consistent guidance was provided by the European Court of Justice in addressing the relationship between arbitration and the Brussels I Regulation.

So, in order to address this inconsistency and any other problems of the Regulation, the work on the Recast of Regulation began in late 2012 and came into effect in January 2015. The approach taken was to retain the exclusion of arbitration with virtually no changes to the enacting provisions of the Recast itself.

The main relevant change, as far as arbitration is concerned, was the insertion of the new Recital 12, which contains four paragraphs clarifying the Regulation's relationship with arbitration. The second is the insertion of a new Article 73.2, which expressly provides for the supremacy of the New York Convention over the Brussels Regulation.

Now let's take a look at the new Recital 12, Paragraph 1

### **Recital 12, paragraph 1**

*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*

The first sentence of Paragraph 1 merely restates the arbitration exclusion without adding any wider context.

However, the second sentence resembles Article II.3 of the New York Convention, which requires the court of a contracting state to refer the parties to arbitration, unless the court finds the arbitration agreement to be null and void, inoperative or incapable of being performed.

The problem with this wording is that it gives both the court and the arbitral tribunal the right to rule on its own jurisdiction, without granting priority to one of the tribunals. Therefore, such a provision cannot resolve parallel proceedings between member state courts and arbitral tribunals.

In addition, Paragraph 1 does not solve the problem of parallel proceedings between the courts. For example, if proceedings in Italian court were commenced first, or a decision reached on jurisdiction, another European Court could still issue its own decision on whether the arbitration agreement is binding and would not be bound by the findings of the Italian court.

Now let's see Paragraph 2

### **Recital 12, Paragraph 2**

*A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.*

Paragraph 2 of the Recital provides that a ruling by a Member State court on whether the arbitration agreement is null and void will be exempt from the rules of recognition and enforcement contained in the Brussels Regulation irrespective of whether the court decided the point as a principal issue or as an incidental question.

Accordingly, a member state court won't be bound by a ruling by another member state court on the validity of arbitration agreement and can decide the point for itself anew.

For example: a party starts torpedo proceedings on the merits in Italy, claiming the arbitration agreement is void. The Italian claim does not stop the other party from requesting the courts at the seat of the arbitration to refer the parties to arbitration.

So, even if the Italian court holds the arbitration agreement invalid, the court at the arbitration seat is not bound by that decision, nor is it required to stop its proceedings until the Italian court has reached a decision and could proceed to rule on its own on the validity of the arbitration agreement.

Therefore, here again we see a risk of parallel court proceedings on the validity of arbitration agreements. This increases the risk of conflicting court rulings.

However, on the other hand, maybe this is preferable to the alternative position of a declaration by one member state court on the status of an arbitration agreement being automatically binding within the whole EU.

Now let's take a look at the Paragraph 3

### **Recital 12, Paragraph 3**

*On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.*

The first sentence of this paragraph provides that when a court renders a judgment on the merits after holding an arbitration agreement invalid or inapplicable, its judgment on the merits will be enforceable under the Regulation.

The second sentence attempts to address the conflict of obligations that arises when a court has on the one hand the duty to enforce a judgment under the Regulation and, on the other hand, the duty to enforce an arbitral award or agreement in the same dispute under the New York Convention.

Thus a court faced with a conflicting judgment and arbitral award would be considered bound to recognise and enforce both the judgment under the Brussels I regime and the arbitral award under the New York Convention.

For example, the Spanish court has handed down judgment in civil litigation proceedings in Spain following or including a declaration that an arbitration agreement between the parties was null and void.

The Austrian court may be bound to recognise that judgment pursuant to the Brussels Regulation even though the Austrian court may have made a separate declaration that the arbitration agreement between the parties was valid in accordance with Paragraph 1 of the Recital 12.

So although it may not arise too often in practice, in such circumstances the Austrian court may be unsure of its obligations under the Regulation.

The court would not be bound to recognise the judgment in the presence of an enforceable New York Convention arbitral award, but if such an award does not exist, it would be bound by the recognition and enforcement articles of the Brussels Regulation.

and finally, we have Paragraph 4

#### **Recital 12, Paragraph 4**

*This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.*

Paragraph 4 of Recital 12 states that ancillary proceedings relating to arbitration are not covered by the new Regulation, and actions or judgments concerning the annulment, review, appeal, recognition or enforcement of arbitral awards do not fall within the Brussels Regulation. Therefore, these judgments cannot be enforced under the Regulation.

For example: an action for recognition and enforcement of an arbitral award is brought before an Austrian court. The Austrian court is not required to enforce a previous judgment of a French court on the same issue, nor is it required to suspend its proceedings until the French court has ruled on its jurisdiction in that matter. Therefore, the arbitral award could be declared enforceable in Austria and unenforceable in France.

That said, it should be noted that Advocate General in his opinion in the *Gazprom* case cites this paragraph in support of the contention that antisuit injunctions in support of arbitration will once again be permitted under the Brussels I Recast.

and this brings me to the *Gazprom* case, which is of course a very important case when one talks about the Brussels I Regulation and Arbitration in Lithuania.

#### **The *Gazprom* case**

The *Gazprom* case initially concerned litigation in Lithuanian courts between Gazprom and the Ministry of Energy of the Republic of Lithuania regarding recognition and enforcement of the Stockholm (SCC) arbitral award in Lithuania.

In the award, the Stockholm tribunal decided that the initiation of the Lithuanian court proceedings by the Ministry was in breach of the arbitration agreement and ordered it to withdraw part of its claims in the national courts, which fell under the arbitration agreement.

Although initially the Lithuanian Court of Appeal had refused enforcement of the award, the case was heard by the Supreme Court of Lithuania, which in turn referred to the European Court of Justice for a preliminary ruling.

The Supreme Court was unsure whether it should refuse to enforce the Stockholm award, which it believed may have been inconsistent with EU law. In particular, the Supreme Court held that the arbitral award in question had anti-suit injunction features, where the award allegedly provided that Lithuanian courts did not have a right to hear the relevant civil cases.

The Supreme Court stated that according to European Court of Justice's case law in *West Tankers case*, the prohibition of the member state to commence or continue proceedings in another Member State's court on the basis of the breach of an arbitration agreement was contrary to the provisions of the Brussels I Regulation.

In the Supreme court's view, similar conclusions should be reached, when the decision regarding anti-suit injunction was made by the arbitral tribunal. Otherwise, the arbitral award with anti-suit injunction would prevail over the court's decision.

Thus an important issue which arisen in the context of both *West tankers* and *Gazprom* cases was the relationship between an anti-suit injunction and the arbitration procedure. As it was the case in *Gazprom* dispute, anti-suit injunction was issued not by a national court but by an arbitral tribunal.

#### *Advocate General's opinion*

Turning first to the Advocate General's opinion, he considered that there was nothing in the Brussels I Regulation which required the court to refuse to recognise the tribunal's anti-suit award.

In reaching this view he deployed two, separate, lines of reasoning. First, he stated that, although the case fell to be decided under the Brussels I Regulation, Recital 12 of the Recast was still relevant. In his view, Recital 12 of the Recast made it clear that, contrary to the decision in *West Tankers*, European Court could grant an anti-suit injunction against court proceedings elsewhere in the European Union in support of arbitration. That being the case, there was also nothing in the tribunal's award which offended the Brussels I Regulation.

The Advocate General's second line of reasoning was more conventional. He said that, in any event, the matters in dispute were simply untouched by the Brussels I Regulation and should be left to national arbitration law to decide. Arbitral tribunals not being bound by the Brussels I Regulation, and, likewise, recognition and enforcement of an award is simply is not subject to it.

#### *Judgment of the CJEU*

In its judgment the European Court of Justice followed the Advocate General's second line of reasoning and held that there was nothing in the Brussels I Regulation that precluded an European Court from giving effect to an anti-suit award made by an arbitral tribunal.

In Court's opinion, this should be left to be determined by the national arbitration law applicable in the state of enforcement (including the New York Convention).

Thus it can be rightly concluded that the European Court of Justice's judgment in *Gazprom* case is a positive one for European seated arbitrations. The immediate result is to confirm that the Brussels I Regulation does not tie European Court's hands in respect of the effect to be given to an anti-suit award issued by a tribunal seated elsewhere in the European Union.

### **Conclusion**

In conclusion, however, it should be mentioned that the *Gazprom* judgment did not solve all issues. The Court suggested that where competition with a court in another Member State is at issue, the Brussels I Regulation might take the upper hand, as it did in *West Tankers*.

We also saw that the Brussels I Recast itself does not provide a satisfactory answer to reconciling the conflict between jurisdiction and arbitration. In particular, the parties are allowed to challenge an arbitration agreement in any Member State. Therefore, subject to the national law, parallel proceedings may exist not only between courts but also between courts and arbitral tribunals.

An early judgment declaring an arbitration agreement valid may not prevent subsequent proceedings on the same issue or on the merits of the dispute in another Member State. Whether that is a positive change? As always, it depends on which side you are sitting in the dispute.

Thank you.