Arbitration and the Revision of Brussels I Regulation

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- Arbitration and the Revision of the Brussels I Regulation (*44/2001/EC*)
- "the matrix of civil judicial cooperation in the European Union"
- The Arbitration Exclusion
- The Problem Presented by West Tankers
- The Policy Options
- The Proposals for the New Regulation

The Purpose of the Regulation

- Determine the appropriate court with jurisdiction to determine international proceedings within the EU and provides mandatory rules for the recognition and
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- Facilitate free movement and enforcement of the judgments of courts of other member states within the European Union.

The Arbitration Exclusion

- Brussels 1, Article 1.2.(d)

- "This Regulation shall not apply to... arbitration."

The Review and Evaluation

21 April 2009 the European Commission report to the European Parliament, the Council and the European Economic and Social Committee that

21 April 2009 the Commission adopted a Green Paper on the review of the Regulation.

7 September 2010 the European Parliament resolution

14 December 2010, European Commission Proposal for a new Regulation

Identified as Need for Reform

to abolish remaining intermediary procedures for the recognition and enforcement of judgments, principally exequatur, the desire to have a general improvement of access to justice for European citizens and companies in international disputes;

to enhance of the effectiveness of choice of court agreements;

to improve in the rules to prevent parallel proceedings in the EU; and

to improve the relation between court and arbitral proceedings

Court and Arbitration Interface

Ancilliary proceedings [Marc Rich – excluded]
Provisional Measures
re procedure [Van Uden – excluded]
re subject of dispute [Van Uden – included]
Anti suit injunctions [West Tankers- excluded]
Declaratory relief
Parallel Proceedings
Challenges to Jurisdiction
Recognition and Enforcement

Scope of the Arbitration Exclusion

"The scope of the exception from the Regulation of matters relating to arbitration, which has been a matter of debate over the years, has in my view now been settled by the decisions of the European Court of Justice in *Marc Rich and Co. AG v Società Italiana Impianti PA (The 'Atlantic Emperor')* (C-190/89) [1991] E.C.R. 1-3855 and *Allianz S.p.A. v West Tankers Inc (The 'Front Comor')* (C-185/07) [2009] 3 W.L.R. 696."

per Lord Justice Moore-Bick in

National Navigation Co. v Endesa Genearacion SA [2009] EWCA Civ 1397

Marc Rich

"26. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention."

Marc Rich and Co. AG v Società Italiana Impianti PA (The 'Atlantic Emperor') (C-190/89) [1991] E.C.R. 1-3855

West Tankers

Where a party to an arbitration agreement introduced court proceedings on the merits even if the invalidity of the arbitration clause was raised as a preliminary question, such proceedings fall within the scope of Regulation Brussels I.

Allianz S.p.A. v West Tankers Inc (The 'Front Comor') (C-185/07) [2009] 3 W.L.R.696

The Regulation after West Tankers

"The *West Tankers* decision thus revealed a real risk for abusive litigation tactics under the Regulation. The fact that a bad faith claimant can escape from an arbitration agreement by bringing an action on the merits in a "friendly" jurisdiction jeopardizes the effectiveness of arbitration in the European Union.

The current situation may encourage parties to arbitrate in countries outside the EU which provide more legal certainty for arbitral proceedings, thereby undermining the attractiveness of arbitration within the European Union."

Commission Staff Working Paper, Impact Assessment

Importance of Arbitration

most popular seats London and Paris, followed by Geneva, Stockholm and New York

2009, European arbitration centres administered 4,453 international arbitration cases with a total value of over € 50 billion

total value of the arbitration industry in EU estimated at €4 billion

increasing competition from emerging arbitration centres in Asia notably Singapore

Singapore International Arbitration Centre increased its case-load by over 300% over the past 9 years and currently handling the fifth largest number of cases worldwide

Commission Staff Working Paper, Impact Assessment

Policy Options – The Green Paper

To strengthen the effectiveness of arbitration agreements?

To ensure a good coordination between judicial and arbitration proceedings?

To enhance the effectiveness of arbitration awards?

Evolved Policy Options

1. Maintain the *status quo* or maintaining the exclusion of arbitration from the scope of the Regulation

2. Expand the exclusion of arbitration from the scope of the Regulation

3. Develop EU rules to enhance effectiveness of arbitration agreements

3.B Develop EU rules to enhance effectiveness of arbitration agreements combined with improved system of recognition and enforcement

Proposed Regulation
New Recital 11

This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.

Proposed Regulation
New Recital 19

The effectiveness of choice of court agreements should be improved in order to give full effect to the will of the parties and avoid abusive litigation tactics. This Regulation should therefore grant priority to the court designated in the agreement to decide on its jurisdiction, regardless of whether it is first or second seised.

Proposed Regulation
New Recital 20

The effectiveness of arbitration agreements should also be improved in order to give full effect to the will of the parties. This should be the case, in particular, where the agreed or designated seat of an arbitration is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. The seat of the arbitration should refer to the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution or by any other authority directly or indirectly chosen by the parties.

Proposed Regulation
New Article 1.2(d)

2. This Regulation shall not apply to: ...

(d) arbitration , save as provided for in Articles 29, paragraph 4 and 33, paragraph 3

Proposed Regulation
New Article 29.4

Article 29. 4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement....

Proposed Regulation
New Article 29.4

Article 29. 4...

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction...

Proposed Regulation
New Article 33.3

3. ...

an arbitral tribunal is deemed to be seised

when a party has nominated an arbitrator or

when a party has requested the support of an institution, authority or a court for the tribunal's constitution.

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