Arbitration and the Brussels Regulation I Recast, Anti-Suit Injunctions and now… Brexit

Abstract.-

In accordance with article 1.2.d of Regulation 1215/2012, known as the Brussels Regulation 1 Recast, the Regulation shall not apply to arbitration. Nevertheless, the interference between arbitration and ordinary jurisdiction is undeniable as there are matters such as interim measures or even the nullity of the arbitration clause that can be heard by both arbitrators and courts. A successive number of the Court of Justice of the European Union judgments, sometimes clear and other times not as much, created the case law on which lawyers have based their cases and which commentators have used to construe the legal framework. Recital 12 of the Regulation could have shed light on the matter but commentators do not concur on some basic issues. This article intends to clarify the current status of the matter.

1. Introduction.-

One of the most sensitive aspects of arbitration, whose essential feature, let us not forget, is the veto on intervention by the courts, is precisely that of their inevitable participation in certain cases. Leaving aside this "supporting" role of the courts of which our Arbitration Act speaks and which is more or less limited, there is a field which has long been worrying the global arbitration community and, to a greater extent, those who practice arbitration in Europe, which is whether or not it is affected by the European Community procedural rules.

2. Background.-

Without the Community rules on civil and commercial procedural matters, perhaps the most relevant, referring both to competition as well as recognition and enforcement, is Regulation 1215/2012, known as Brussels I Recast or Brussels I bis. Conscious of the relevance of international issues to matters relating, firstly, to the determination of which court is competent and, secondly, facilitating the recognition and enforcement of judgments, in 1968 the European legislator began down a path setting out a series of guidelines to determine jurisdiction in cases that affect citizens resident in the European Union. It also established channels to facilitate the recognition and enforcement in Member States of judgments issued in another Member State. This path began with the Brussels Convention in 1968 and had another important milestone in Regulation 444/2001 being enacted on the same topics, but serving to clarify some points and taking a step towards procedural harmonisation, with its last milestone –to date– being the enactment of Regulation 1215/2012.

Focusing on arbitration, we must point out from the outset, and this has been maintained in subsequent amendments, that the Convention in its first article very strongly established that arbitration was excluded from its scope. The European legislator made it clear that the New York Convention of 1958 was a suitable mechanism for the enforcement of arbitration awards and therefore left this matter outside the scope of the Convention. This may seem to greatly simplify the issue, and even make the analysis of possible implications unnecessary: if arbitration is excluded, we close the Convention, put it in a drawer and pay attention to the rest of the rules that do apply to arbitration. But the question is not that simple because, arbitration being a mechanism for dispute resolution, encounters and even collisions with the ordinary courts are inevitable. Consider, for example, the adoption of interim measures in arbitration or the jurisdictional challenges as typical cases in which such an encounter occurs and whether to exclude the application of the Convention and subsequent regulations is not so clear.

The difficulty of the matter has become apparent throughout the successive judgements of the Court of Justice of the European Union (CJEU). The question started in a more or less peaceful way: in the classic *Marc Rich*[1] case of 1991, the Court seemed to dwell on the view that arbitration had not lost anything in the Brussels Convention. It was a case involving the appointment of an arbitrator by the English courts in a case in which the validity of the arbitration agreement was questioned, and the Court stated that any measure that was related to arbitration was outside the scope of application of the Convention. However, when the Court ruled on the effects of interim measures laid down in an arbitration in 1998 (*Van Uden*[2] case), it considered that they were not actually part of an arbitration process, but rather were supportive measures and, consequently, they would fall within the Convention if the rights that they intended to safeguard through the interim measures did fall within the Convention´s scope of protection. The standard seems to be that the interim measures procedure is not an arbitration procedure per se, but rather a kind of parallel proceeding so that if the rights protected in those measures do fall within the scope of the Convention, then it shall apply.

[1] Judgment of the Court of Justice of 25 July 1991 in the case of March Rich & Co. AG v. Societa Italiana Impianti P.A.

[2] Judgment of the Court of Justice of 17 November 1998 in Van Uden v. Kommanditgesellschaft in Signature Deco-Line

3.- Anti-suit injunctions.-

One of the issues causing the biggest headache in this area is the validity of that known in Anglo-Saxon law as "*anti-suit injunctions*". These measures, which have no counterpart in continental law, consist of the judge who is hearing a dispute informing the defendant that his jurisdiction is best-placed to hear the dispute and suggest that they do not initiate a further proceeding before another court or, if they had already initiated it, that they withdraw it. Failure to do so would place them in contempt of court and may carry pecuniary penalties[3].

Although these measures are applicable in a wide range of cases, when focusing ourselves on arbitration it is clear that it can affect a number of cases because it is a suitable measure to stop or prevent the start of an arbitration or, conversely, judicial proceedings, by someone who considers there to be a valid arbitration agreement. But we must not lose sight of the fact that, within the European Union, the possibility that a court of one state might interfere or restrict the jurisdiction of a court of another state is contrary to the principle of mutual trust which must prevail amongst courts of Member States, whilst at the same time fully affecting the regulation of *lis pendens* and connectedness contained in the Convention. In view of the circumstances, it seems that the European Court of Justice was focusing on the anti-suit injunctions and was not going to miss the opportunity to establish doctrine on the matter when the occasion arose. The well-known *Turner*[4] case found itself in this scenario in 2004 and the Court concluded that if the anti-suit injunctions were used to restrict proceedings in other Member States, this would be affecting the use of *lis pendens* in the Convention and the principle of mutual trust. But the arbitration was not affected by the regime, which was good news for the sector since resorting to this was even recommended, and even more so in the United Kingdom where valid anti-suit injunctions could be issued.

Along the way, the national courts echoed this doctrine and, for example, our Supreme Court[5] declared that Regulation 44/2001 –Brussels I– was not applicable to the incidental control of an arbitration agreement since arbitration was a matter excluded thereof.

But this reassurance went awry when the Court extended the incompatibility with the Brussels Regulation of the anti-suit injunctions in the *West Tankers*[6] ruling, which went on to say –to reiterate– that anti-suit injunctions are incompatible with the Regulation, that questions relating to the validity of an arbitration agreement herd by a court of a Member State do indeed fall within the scope of the Convention, and that the court having jurisdiction to settle the question of the validity of the arbitration agreement shall be the court before which the action on the merits of the case is presented[7]. This meant that the international arbitration community was virtually unanimous, and that anti-suit injunctions could henceforth not be recognised or enforced outside the United Kingdom, while calling for a legislative solution to the risk that a party would seek to avoid the arbitration to which it had submitted through the initiation of proceedings before the ordinary jurisdiction, which has been termed a "torpedo action".

Speaking of the effects of the anti-suit injunctions of the Anglo-Saxon systems, the relevance of the discussion of their admission or not in accordance with the Regulation could be called into question as it only affects the United Kingdom and Ireland within the Community framework. But the importance of the English jurisdiction in arbitration should not escape anybody given, on the one hand, the degree of maturity and security that makes it a forum of choice for multiple international investors and, on the other, its relevance, when not a monopoly, in certain sectors such as finance, maritime or insurance, a good number of international arbitrations take place in England. Logically, the fact that the use of anti-suit injunctions may or may not be used has an extraordinary relevance in this field of international arbitration. In fact, the high influx of arbitration in English territory has been favoured to a large extent by the existence of these anti-suit injunctions, because in a jurisdiction as favourable to arbitration as the English, such measures were considered as something positive in order to avoid delays or even actions of procedural bad faith.

The final episode of this process constituted the judgement of the *Gazprom*[8] case, which reiterated –if there remained any doubts– the conclusions reached in *West Tankers*, but addressed an issue new to date, which was the case in which the anti-suit injunction would have been handed down by an arbitration and not a jurisdictional tribunal[9].

[3] Elvira Benayás, M.J., "Is there any possibility, however small, of saving our own? The antisuit injunction and the Brussels Convention on the subject of the STJCE of 27 April 2004m C-159/02", Electronic Journal of International Studies

[4] Judgment of the Court of Justice of 27 April 2004, Turner v. Grovit

[5] Judgment of the Supreme Court of 17 May 2007

[6] Judgment of the European Court of Justice of 10 February 2009

[7] Marcuello, Salto, Juan Ignacio, "The West Tankers Judgment and its derived jurisprudence. The inckusion of arbitration in the area of freedom, security and justice" RJUAM nº 24, 2011 II

[8] Judgment of the European Court of Justice, Gazprom c. Lithuania, 13 May 2015

[9] Judgment of the European Court of Justice cit. Ap 33 and 34:
"33 An injunction issued by a court of a Member State requiring a party to an arbitration procedure not to pursue proceedings before a court of another Member State does not observe the general principle

Regarding the first aspect, the Court reiterates that the adoption of anti-suit injunctions by Member States´ courts in support of arbitration is excluded from the Brussels Regulation I because it does not authorise the control of a Member State´s jurisdiction by another Member State´s court, and would otherwise be contrary to the principle of mutual trust.

As regards the second aspect, the Court maintains that, where the injunction comes from an arbitration body, there can be no conflict of jurisdiction between courts of Member States, the principle of mutual trust does not operate and Regulation 44/2001 –Brussels I–, is not applicable. The case concerned the dispute between Gazprom and the Lithuanian Ministry of Energy in connection with the joint venture Lietuvos Dujoa AB, whereby the Ministry lodged an arbitration claim before a Lithuanian court, although in the shareholders´ agreement with Gazprom there existed submission to arbitration. Subsequently, Gazprom filed an arbitration claim before the Institute of Arbitration of the Stockholm Chamber of Commerce requesting that the Ministry withdraw its claims before the ordinary jurisdiction. Logically, the Court of Arbitration issued a ruling by which the Ministry was ordered to withdraw or limit some of the pending lawsuits in local Lithuanian courts. These courts refused to implement this anti-proceedings measure, which led to the appeal before the Supreme Court of Lithuania which raised the matter to the European Court which ruled in the sense already commented of leaving the issue outside the scope of the Regulation.

that follows from the case law of the Court of Justice, according to which every court before which a lawsuit is made determines, by virtue of the applicable legislation, whether it has jurisdiction to settle the dispute before it. In this regard, it should be recalled that, apart from a few limited exceptions, Regulation 44/2001 does not authorise the review of the jurisdiction of a court of a Member by a court of another Member State. This jurisdiction is directly determined by the regulations laid down in said Regulation, including those relating to its scope. Consequently, a court of another Member State is no case better placed to rule on the jurisdiction of a court of another Member State (see Allianz and Generali Assicurazioni Generali, C.185/07, EU:C:2009:69, paragraph 29).

34 In particular, the Court of Justice has held that an obstacle, by means of an injunction of this kind, to the exercise by a court of a Member State of the powers conferred on it by the aforementioned Regulation is contrary to the mutual trust that Member States grant to other legal systems and judicial institutions and may prevent the applicant, that considers an arbitration clause to be void, ineffective or unenforceable, from accessing the State court before which they have come (see, to this effect, Allianz and Generali Assicurazioni Generai, C-185/07, EU: C: 2009: 69, paragraphs 30 and 31)."

During this time the new Brussels Regulation I Recast – Regulation 1215/2012 had entered into force, but the same is applicable only to the actions exercised as of 10 January 2015, and the controversial issue of the conclusions of Advocate General Melchior Wathelet, favouring the validity of anti-process measures in support of arbitration –which was ignored by the Court– and the possibility of a court of State accepting an anti-proceedings measure issued by an arbitration tribunal – which was accepted by the European Court.

4.- Brussels Regulation I Recast.-

On 12 December 2012, Regulation 1215 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters, also known as "Brussels Regulation I bis" or "Brussels Regulation I Recast" was enacted and is of application as of 10 January 2015. This regulation continues to maintain the express exclusion of arbitration within its scope of application, but introduces the modification of dedicating its Recital 12 entirely to arbitration. The content of this recital has led some commentators to consider that, to a certain extent by the imperative tone in which the Recital is drafted and to some extent by their desire, that a further analysis of the question of the inclusion of arbitration within the scope of the Regulation should be carried out and, consequently, the jurisprudence of cases such as West Tankers and Gazprom should be reinterpreted. On this side we would find Advocate General Wathelet, who considers that the Recital makes it clear that any court in one Member State may issue an anti-proceedings measure before any further proceedings in another Member State. That statement was made in his conclusions in the Gazprom case already mentioned and, although it is true that the Court´s judgement did not take into account that part of his argumentation, it is also true that such a judgment occurred at the time when although Regulation 1215 was already in force, Regulation 44/2001 was applicable to the substance of the case.

On the other hand, other authors consider that there is nothing new under the sun and that a recital can simply provide interpretative guidelines but not regulatory ones and much less those contrary to the principles of the regulation in which it is inserted10.

As a matter of fact, whilst a new ruling of the ECJ is handed down in a different sense, it can be said that the

[10] Gómez Jené, M. "Comments on Regulation (EU) nº 1215/2012… " pg. 71 onwards

current state of the matter is summarised in that there is no guarantee that an anti-suit injunction handed down by an Anglo-Saxon court will be followed in a court of another Member State, but that if that measure comes from an arbitration body it will be enforceable through the New York Convention.

5.- The possible effects of Brexit on this situation.-

In the analysis of this issue, the fact that the United Kingdom has decided to leave the European Union and that, in a timeframe still to be determined, Community regulations will consequently not apply to judgments handed down by courts in this State, should not be overlooked. At this early stage it would be premature to attempt to make a conclusive analysis of the final situation which will depend on the agreements reached on the matter. However, it could be pointed out that if the provisions of the Brussels I Recast Regulation were not applicable to the United Kingdom, its anti-suit injunctions would not be affected by the regulation discussed here. Also, the rulings would be enforceable within the framework of applicable international treaties and would be of the same nature as any other court judgment emanating from a British court11.

6.- Conclusion.-

According to the content of the successive Brussels Regulations and the ECJ case law, the courts of another Member State will not have to enforce anti-proceedings measures issued by a court in another Member State and will have jurisdiction to rule incidentally on the validity of an arbitration agreement. Whether or not we agree, this is the current state of the issue. As practical jurists, once we have analysed all the elements, and without prejudice to the fact that we could give our subjective opinion in any sense, the fact is that we must stick to this situation and act in accordance with the conduct that can give us greater practical security. Today it does not make sense to apply for an anti-suit injunctions before an Anglo-Saxon court in an international arbitration, therefore if the situation requires it, it would be advisable to file the lawsuit requesting such measures before the arbitration tribunal considered competent since the court of the Member State concerned will have no legal basis for ignoring it in accordance with the doctrine established in the Gazprom judgement.

This means that the arbitration decisions adopting the anti-proceedings measure must be enforced through the New York Convention, but another issue arises here to make the situation more difficult: if the CJEU says that anti-suit injunctions are contrary to the principle of mutual trust, could they be a breach of European public policy? The relevance that the CJEU affords to this principle cannot be avoided, since it is considered that it puts all Member States in a situation of equality and implies the presumption that all correctly apply the Regulation12. If we therefore consider that the principle of mutual trust is part of European public policy, and that anti-process measures are in breach thereof, then article V. 2. b of the New York Convention could authorise the refusal to enforce the award in these cases13. It could also be argued that an anti-suit injunction does not violate the principle of reciprocal trust, or that if it does, it would be mild and would not violate public order, given that the court that approves the measure does not inference in the jurisdiction of the other court. Rather, it acts in the private sphere of the litigants ordering them rather than the court to stop or not to initiate the proceedings, but all this remains in the realm of doctrinal digressions.

In any case, there remains a gap not resolved by Recital 12 nor by the jurisprudence of the CJEU of the possible co-existence of arbitration and judicial proceedings in the event that a judge decides, incidentally, to invalidate the arbitration agreement and decides to hear the case and, in turn, the arbitration tribunal under the kompetenz-kompetenz principle decides that the arbitration agreement is valid and also decides to hear the case, as it would arrive at the absurd notion that arbitration and jurisdiction would simultaneously be aware of the same issue.

It is clear that the question of the relationship between arbitration and jurisdiction within the European Union is far from being resolved and that an excellent opportunity has been missed with Recital 12 of Brussels Regulation

[11] De Miguel Asensio, Pedro Alberto. "Brexit and international litigants. Initial reflections. Law Journal 8791. 27 June 2016

[12] "it should be recalled that the principle of mutual trust between Member States is of fundamental importance in Union law as it allows the creation and maintenance of an area without internal frontiers", Opinion 2/13 of the Court of Justice of 18 December 2014, para. 191

[13] Ortolani, Pietro. "Los efectos de una orden anti-suit dictada por un órgano arbitral…" European Union Law No. 29, 30 September 2015

I Recast, which has not only failed to clarify the situation but has served to introduce new doubts by giving rise to contradictory interpretations.