CJEU Rules that Judgments on Awards Circumventing Brussels Regulation Cannot Form Basis for Non-recognition of Irreconcilable Judgments

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In a recent judgment in the case of *London Steam-Ship Owners' Mutual Insurance Association Limited v. Kingdom of Spain* (Case C-700/20, Judgment of 20 June 2022) (the ***Judgment***), the Court of Justice of the European Union (the ***CJEU***) issued a preliminary ruling holding that arbitration proceedings initiated in the United Kingdom and the resulting award could not block the recognition of a Spanish judgment requiring an insurer to compensate Spain for the environmental damage caused by the Prestige oil tanker (***Prestige***) off the coast of Spain.

The CJEU held that the proper interpretation of EU Regulation No 44/2001 on jurisdiction and the recognition and enforcement

of judgments in civil and commercial matters (the ***Brussels Regulation***) entails that, although a judgment entered by a court of a Member State in the terms of an arbitral award may, in principle, form the basis for the refusal to recognise a subsequent irreconcilable judgment of the courts of another Member State, a judgment should not be recognised where it would result in an outcome that the court of a Member State could not have reached without infringing the provisions and fundamental objectives of the Brussels Regulation. In short, the English courts were required to recognise the Spanish court's judgment and the insurer was liable to Spain for EUR 1 billion.

Background

In 2002, the sinking of the Prestige caused an oil spill and consequential environmental damage off the coast of Spain. The London Steam-Ship Owners' Mutual Association Limited was the insurer of the Prestige and its owners. The insurance contract between the insurer and the owners contained an arbitration clause providing for London-seated arbitration (the ***Arbitration Agreement***).

In 2010, Spain filed a direct claim against the insurer before Spanish courts which culminated in a 2016 judgment that held the insurer liable towards Spain (the ***2016 Judgment***).

Separately, in 2012, the insurer commenced arbitration proceedings in London seeking a declaration that the Arbitration Agreement required Spain to bring its claim in London-seated arbitration. In 2013, the arbitral tribunal held that the claim of Spain was contractual under English law, and that Spain had to abide by the Arbitration Agreement, and bring its claim in arbitration proceedings. An English court recognised this award shortly after (the ***2013 Judgment***) under Section 66 of the English Arbitration Act 1996, which provides that judgment may be entered in terms of the award.

Questions before the CJEU

In 2019, Spain brought recognition proceedings of the 2016 Judgment in the courts of the United Kingdom. The insurer objected to recognition on the basis that the 2013 and 2016 Judgments were irreconcilable, and the English High Court made a preliminary reference to the CJEU,[1] asking the following questions:[2]

1. Is a judgment entered by a court of a Member State in the terms of an arbitral award a "*judgment*" within the meaning of Article 34(3) of the Brussels Regulation[3] (which prevents the recognition in that Member State of a judgment given by a court in another Member State if those two judgments are irreconcilable)? The question arose because, under Article 1(2)(d), the Brussels Regulation does not apply to arbitration.
2. If Article 34(3) of the Brussels Regulation does not apply, would it be permissible to rely on Article 34(1) (which provides that a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought) to refuse the recognition of the 2016 Judgment on the grounds that this would violate the principle of *res judicata*[4] by reason of the 2013 Judgment?

The opinion of Advocate General Collins

In addressing the first question above, Advocate General Collins' opinion (the ***Opinion***)[5] proposed that the CJEU rule that a judgment entered in the terms of an arbitral award pursuant to Section 66(2) of the Arbitration Act 1996 is capable of constituting a relevant "*judgment*" within the meaning of Article 34(3) of the Brussels Regulation, notwithstanding that such a judgment falls outside the scope of the Brussels Regulation according to Article 1(2)(d).

With respect to the second question above, the Opinion stated that Articles 34(3)-(4) of the Brussels Regulation regulated the matter of *res judicata* exhaustively. *Res judicata* could therefore not be contained in the notion of public policy contemplated under Article 34(1).

The decision of the CJEU

As a preliminary point, the CJEU noted and accepted that the Brussels Regulation excludes arbitration from its scope in Article 1(2)(d) (the ***Arbitration Exclusion***).

Nevertheless, in answering the first question posed in the UK court's preliminary reference, the CJEU held that, despite the general Arbitration Exclusion, a judgment entered by a court of a Member State in the terms of an arbitral award may constitute a "*judgment*" within the meaning of Article 34(3). This means that such a judgment could in principle form the basis for a refusal to recognise a subsequent irreconcilable judgment.

However, the CJEU went on to provide an exception to the general rule by holding that this rule does not apply when the outcome of the first judgment could not have been reached by a national court of a Member State without infringing the "*provisions and fundamental objectives*" of the Brussels Regulation. The CJEU held that the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of the Brussels Regulation without infringing two "*fundamental rules*" of the Brussels Regulation:

1. The CJEU explained that a jurisdiction clause agreed between an insurer and an insured party (such as the Arbitration Agreement) could not be invoked against a victim of insured damage who, where permitted by national law, wished to bring an action directly against the insurer. The CJEU added that, as the circumstances

of the dispute in the main Spanish proceedings illustrated, "*to accept that* [a judgment such as the 2013 Judgment] *may prevent the recognition of a judgment given in another Member State following a direct action for damages brought by the injured party would be liable to deprive that party of effective compensation for the damage suffered*"; and

2. The English courts disregarded the earlier proceedings already pending in Spain, thereby infringing the rule of *lis pendens*[6] in Article 27(1) of the Brussels Regulation. In parallel proceedings (such as (i) the Spanish court proceedings and (ii) the English arbitration and related court proceedings), the priority principle favours the court first seized (i.e. the Spanish courts).

As such, the 2013 Judgment, although in principle a judgment for the purposes of the Brussels Regulation, could not form the basis for a refusal to recognise the 2016 Judgment under Article 34(3).

Turning to the second question, the CJEU held that the English court could not rely on Article 34(1) of the Brussels Regulation to refuse the recognition of the 2016 Judgment. The CJEU agreed with the Advocate General's Opinion that Articles 34(3)-(4) address the matter of *res judicata* exhaustively. The CJEU also recalled that public policy grounds to refuse recognition apply only in exceptional cases; not when, as in the present case, the issue is whether a foreign judgment is irreconcilable with a national judgment.

Comment

The effect of the Judgment should not be overstated. This is true not only in relation to the UK (which is no longer bound by the Brussels Regulation), but also in relation to other EU

Member States. It is important to note that the Judgment applies only in the context of domestic awards and cannot affect the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Having said that, the Judgment is still likely to have some implications in relation to the relationship between the courts and commercial arbitration within EU Member States.

Although the Judgment was rendered under the Brussels Regulation, which has been replaced by EU Regulation No 1215/2012 (the ***Brussels Recast Regulation***), the CJEU's reasoning will remain relevant to the interpretation of the recent regulation. The CJEU pointed out at the outset of its Judgment that, "*since* [the Brussels Recast Regulation] *repealed and replaced* [the Brussels Regulation] […], *the Court's interpretation of the provisions of one of those legal instruments also applies to those of the others, whenever those provisions may be regarded as equivalent*". The Judgment cannot be limited simply to the interpretation of the now replaced Brussels Regulation.

In terms of practical implications, one thing is clear: the decisive approach taken by the CJEU ensures that the provisions and fundamental objectives of the Brussels Regulation (and the Brussels Recast Regulation) cannot be circumvented through arbitration proceedings followed by a court judgment entered into in terms of the arbitral award.

The CJEU's approach suggests that national court judgments should trump judgments merely recognising an arbitral award at least in cases where to do otherwise would involve the right to an effective remedy being denied to an injured party.

This means that the provisions of the Brussels Regulation (and the Brussels Recast Regulation) cannot now be easily circumvented by issuing arbitration proceedings and then seeking a judgment in terms of the award. This will clearly make it more difficult to resist the recognition of national

court decisions which are irreconcilable and inconsistent with decisions issued in parallel arbitration proceedings.

[1] Under Article 267 of the Treaty on the Functioning of the European Union, a reference for a preliminary ruling allows the courts of EU Member States in disputes brought before them to refer questions to the CJEU about the interpretation of EU law. The CJEU does not decide the dispute itself. It is instead the national court that disposes of the case according to the decision of the CJEU, which is also binding on other national courts before which a similar issue is raised.

[2] This preliminary reference has been challenged in the Court of Appeal which held in May 2022 that the reference was made incorrectly. The appeal before the UK Supreme Court has been adjourned by request of the parties.

[3] Article 34(3) of the Brussels Regulation provides that a judgment shall not be recognised "if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought". Article 34(4) provides that a judgment shall not be recognised if "it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed".

[4] *Res judicata* is a general principle of law that provides that a cause of action may not be relitigated once it has been judged on the merits. In this case, there was a question as to whether the Spanish proceedings which culminated in the 2016 Judgment breached the principle of *res judicata* given that the arbitral award resulting in the 2013 Judgment already considered the merits of the claims relevant to the 2016 Judgment.

[5] Advocates General are called upon to present their views

on the cases before the CJEU, advising the CJEU on how it should decide them. The opinions of Advocates General are not binding and the CJEU does not have to follow them, but they are commonly regarded as influential.

[6] *Lis pendens* refers to a situation in which different legal proceedings relating to the same object and cause of action are brought between the same parties in the courts of different jurisdictions. Article 27 of the Brussels Regulation provides that (1) the courts other than that first seized of the proceedings shall stay their proceedings until such time as the jurisdiction of the court first seized is established, and (2) where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.
