



DISSERTATION

ARBITRATION AND EUROPEAN LAW

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“...Learn as if you were to live forever...”

Mahatma Gandhi

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TABLE OF ABBREVIATIONS

AG - Advocate General

AM. J. COMP. L - American Journal of Comparative Law

App. Cas - Law Reports Appeal Cases

Arb Int - Arbitration International

Art – Article

Brussels Convention - Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

Brussels I Recast - Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

Brussels I Regulation - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

CA - Court of Appeal

CML Rev - Common Market Law Review

COM – Commercial

CPC - Code de *procédure civile*.

ECJ - Court of Justice of the European Communities

ECR - European Court of Reports

EC Treaty - European Community Treaty establishing the European Community

EEC Treaty - Treaty establishing the European Economic Community

EU - European Union

EWHC - High Court of England and Wales

Ibid – Ibidem

Int. Arb. Law Rev - International Arbitration Law Review
L.G.D.J - *Librairie générale de droit et de jurisprudence*

MICH. J. INT'L. L. - Michigan Journal of International Law

New York Convention - New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

N. Ir. Legal Q - Northern *Ireland Legal Quarterly*

OJ - Official Journal

P - page

Para – paragraph

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

Tulane L. Rev - Tulane law Review

UKHL - United Kingdom House of Lords

UKSC - United Kingdom Supreme Court

UNCITRAL - United Nations Commission on International Trade Law

UNTS - United Nations Treaty Collection

Vol – Volume

W.L.R. - Weekly Law Reports

INTRODUCTION

Traditionally EU law and International Arbitration have long failed to intersect, each field aspiring to stay indifferent towards the other. Arbitration on one hand has been the leading dispute settlement recourse whilst EU law, though thriving and expanding over a wide variety of fields in view of Member State's harmonization has abstained from providing similar solutions for arbitration. Arbitral tribunals would rarely be the *fora* for the resolution of EU claims thus keeping arbitration outside the ambit of EU law.

However, the significance of European market integration and the importance of establishing a harmonized EU legal framework have prevailed, forcing the two bodies of law to enter initially in contact and increasingly in conflict. In 1958, the Treaty Establishing the European Economic Community, forerunner of today's Treaty of European Union¹ suggested that harmonization of Member State's private international law issues required a convention outside the Community law framework which took the form of a wholly separate convention, the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (hereinafter the "Brussels Convention")². That same year another Treaty of a different nature was signed- the United Nations Convention on the recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention")³, which became the cornerstone of International Commercial Arbitration. Both these Conventions followed their own distinct policy objectives supported by their respective set of principles established to ensure their effectiveness. While the Brussels Convention-and later Regulation-secured the free movement of judgments in civil and commercial matters, arbitration remained

¹ Treaty on European Union (TEU), 1992 O.J. C 191/1 (29, July 1992). However most matters initially treated by the Community Treaties are now covered by the Treaty for the Functioning of the European Union (TFEU), 2010 O.J. C 83 (Mar. 30, 2010).

² 1998 O.J. 1998 C27/1 (26 January, 1998).

³ 330 U.N.T.S. 38 (1959).

unregulated by EU law mainly because the already established system by the New York Convention was considered sufficient enough. The distance between EU law and international arbitration was palpable, reflecting two bodies of law failing largely to converge.

The initial EEC Treaty expressly contemplated that any harmonization in the private international law area would fall outside the EU scope and provided for separate agreements on international jurisdiction as well as the enforcement of foreign judgments among the Member States. Even when the 1992 Maastricht Treaty encompassed private international law, it relegated it to the third pillar on justice and home affairs, which operated in an inter-governmental level, rather than engulfing it in the first pillar. Only with the 1999 Treaty of Amsterdam⁴ was private international law finally integrated in the first pillar consecutively leading to the transformation of the 1968 Brussels Convention to the 44/2001 Council Regulation, a EU law instrument of direct applicability⁵.

I. THE OLD REGIME AND ITS RECURRENT PROBLEMS

The 1968 Brussels Convention although an instrument addressing core issues of international private law, contained an express exclusion of matters related to arbitration from the Community legal framework⁶. In other words, the Convention did not address the exercise of jurisdiction by arbitral tribunals or the recognition and enforcement of arbitral awards. This exclusion though, conveyed more than just the indication that it was impossible to deal with arbitration with an instrument addressing jurisdiction and recognition of court judgments, whilst the two areas of

⁴ Treaty of Amsterdam, 1997 O.J C 340/1 (Nov. 10, 1997), amending the Treaty Establishing the European Community, art. 65.

⁵ *George A. Bermann*, Navigating EU law and the Law of International Arbitration, *Arbitration International*, Kluwer Law International 2012, Volume 28, Issue 3, p.397-445.

⁶ Brussels Convention, *supra* n. 2, art. 1 (“The Convention shall not apply to: Arbitration”). A comparable provision is found in the Lugano Convention.

law where utterly heterogeneous: the convention was understood also to exclude questions related to judicial jurisdiction and the recognition or enforcement of judicial judgments such as the underlying claim or judgment related to arbitration-notwithstanding arbitration agreements, arbitral proceedings or arbitral awards. The Member States were of the opinion that the existing international conventions, in particular the New York Convention, provided a sufficient framework to ensure the proper and effective development for arbitration⁷. When in 2000, the Convention was transformed into secondary EU legislation taking the form of the Brussels I Regulation⁸, the drafters decided to keep in place the carve-out created for arbitration cases in the courts. The Court⁹ on the other hand was of the opinion that the exclusion of arbitration was due to the existence of “many international agreements”¹⁰ on arbitration by the time the Brussels Convention was adopted. According to some commentators this was a “clear and logical” justification¹¹, whilst others were of a different opinion¹². However this justification appears rather inaccurate since the New York Convention is more concerned with the recognition and enforcement of foreign awards and less with jurisdiction. The Brussels

⁷ *Jenard Report*, Official Journal C 59 (1979) 1m 13.

⁸ Council Regulation 44/2001, 2001 OJ L12/1, 16 Jan.2001, art 1(2).

⁹ *Marc Rich & Co. AG v. Società Italiana Impianti PA*, ECJ 25 July 1991, Case C-190/89, para. 17: “The report by the group of experts set up in connection with the drafting of the Convention (Official Journal 1979, C 59, p.1) explains that: “There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol, which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration”.

¹⁰ The *Jenard Report* confirmed that the “many international agreements” referred to the 1958 New York Convention and the 1961 European Convention on International Commercial Arbitration (the European Convention).

¹¹ *G. Droz*, *Pratique de la Convention de Bruxelles du 27 Septembre 1968*, in (1973) *Dalloz Paris* 12; *J. Kropholler*, *Europäisches Zivilprozessrecht, Recht und Wirtschaft* (Heidelberg, 2002), p. 98; *U Magnus and P. Mankowski* (eds), *Brussels I Regulation* (Sellier, 2007), p. 62.

¹² “Cette motivation, claire et logique, s’est relevée avec le temps insatisfaisante”. *J.P. Béraudo and M.J. Béraudo*, *Convention de Lugano du 16 Septembre 1988, Règlement n. 44/2001 du Conseil du 22 Décembre 2000* in *Juris-Classeur, Droit International*, VIII Fasc. 3000, p. 17.

Convention and Regulation cover both and in detail jurisdiction of national courts along with recognition and enforcement of judgments.

Professor Schlosser's Report¹³ stated that in spite of diverging views among Member States as to the scope of the exclusion, no decision was taken in order to either delete or amend in part at least the exclusion of "arbitration" because of the existence of this "justification": most of Member States, including the new ones, were party to the New York Convention, which though it only covers the enforcement and recognition of foreign awards, it provides no definition for arbitration, thus leaving unresolved emerging jurisdictional issues. In spite of these facts, much later, in April 2009, the Commission still argued that the exclusion of "arbitration" relied on the fact that, by then, all Member States were party to the New York Convention¹⁴.

However the question as to the extent of the exclusion of "arbitration" from the Regulation remained unanswered, dichotomizing mainly the United Kingdom and the original Member States. The view of the United Kingdom extended the exclusion to covering all disputes, which the parties had effectively agreed should be settled by arbitration, involving any secondary disputes connected with the agreed arbitration. On the other hand, the original Member States only regarded proceedings before national courts as part of "arbitration" if they referred to arbitration proceedings, whether concluded in progress or to be started¹⁵. Under the interpretation suggested by the United Kingdom, the judgment rendered by a national court in spite of a valid arbitration agreement would see its recognition and enforcement in another Member State refused on the grounds that the judgment would fall outside

¹³ P. Schlosser, "Report on the Convention on the Association of the Kingdom of Denmark and others to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice" OJ C59/71, p.92-93, para 61.

¹⁴ "Arbitration falls outside the scope of the Regulation. The rationale behind the exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention, to which all Member States are parties". Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 174 final (Brussels, 21 April 2009), para. 3.7.

¹⁵ Schlosser's Report, supra n. 13, para. 61.

the scope of the Brussels Convention¹⁶. The ECJ's response to the above-mentioned views reverberated through Europe, thus stimulating legislative reforms leading, yet again, to important changes.

A. The decisive criterion upon the arbitration exclusion and the danger it entailed: case law of the ECJ

The Marc Rich case

In the *Marc Rich* case, which has determined the scope of the arbitration exception in the Brussels Convention, the Court stressed that reference must be made solely to the subject matter of the dispute. Its interpretation went as far as to exclude arbitration as a whole including court proceedings ancillary to arbitration. In other words, the Court stressed that the appointment of an arbitrator by a national court, even if the existence or validity of an arbitration agreement is a preliminary issue must be interpreted so as to exclude the dispute from the scope of the Convention¹⁷. In the *Marc Rich* the ECJ made the distinction between the main issue and the preliminary issue of the proceedings. Only the main issue influences the fact that the proceedings fall within the scope of the Convention. The relevant criterion is thus the nature of the main claim. Only the subject matter of the main claim and not the objections raised to that claim is decisive, irrespective whether the proceedings fall under the arbitration exception. Appointment of arbitrators was the main issue in

¹⁶ *Ibid.*, para 62.

¹⁷ The ECJ held that: "...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. Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even of the existence or validity of an arbitration agreement is a preliminary issue."

Marc Rich, which is certainly ancillary to the conduct of the arbitration and therefore covered by the arbitration exclusion¹⁸.

The Van Uden case

This case concerned the dispute between Van Uden Maritime BV (Van Uden) established in the Netherlands and Kommanditgesellschaft in Firma Deco Line and Another (Deco Line) from Germany. The issue here was whether a Dutch court had jurisdiction to make an interlocutory order for a provisional payment against Deco Line while the subject matter of the dispute was discussed by an arbitral tribunal in the Netherlands. The ECJ expressed the opinion that whether a specific matter falls within the ambit of the Convention, it must be determined from the substantive matter of the dispute. The court held that, by referring the dispute to arbitration, the parties have, in regards to the Convention excluded jurisdiction by national Courts. *Van Uden* argued that provisional measures, such as the Dutch interlocutory order are in fact ancillary to arbitration and should be excluded from the scope of the Convention. The ECJ recalled the remarks of the experts' report¹⁹, according to which the "Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time limit for making awards". However, the ECJ held that provisional measures are not in fact ancillary to arbitration, but parallel to it, seeking to be measures of support. They do not concern arbitration as such, but a wide variety of rights that they intend to protect. The Court argued that in order to determine whether a provisional measure

¹⁸ *J.P. Beraudo*, The Arbitration exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements, *Journal of International Arbitration* 18(1), 2001, p. 15; *H. Van Houtte*, Why not include arbitration in the Brussels Jurisdiction Regulation, *Arbitration International*, Vol. 21, No. 4, p. 513.

¹⁹ *Schlosser's Report*, supra n. 13, para. 61.

falls within the scope of the Convention, one should determine whether the right that the measure aims to protect also falls within the scope of the Convention. If it does so, then so does the provisional measure. The core of this decision is that it has resulted in a different approach as to measures which are prima facie ancillary to arbitration and those which are parallel to it likely to even fall within the scope of the Convention due to the nature of the right they serve to protect²⁰.

In other words, the ECJ confirmed that the decisive criterion in respect to fall within the scope of the Regulation is the subject matter lying in the heart of the proceedings.

i. The menace of Irreconcilable judgments due to the exclusion

This exclusion, however, entailed several conflicting consequences. To begin with, the lack of harmonized jurisdictional criteria relevant to arbitration proceedings created uncertainty as to which Member State courts will have jurisdiction over the different types of proceedings that may be brought before a domestic court in relation to a given arbitration agreement or arbitration proceedings. This involves proceedings related both to the granting of measures in support of arbitration, such as appointing or replacing arbitrators, as well as proceedings related to the validity of arbitration agreements and to the validity of arbitral awards. Additionally, the absence of an EU-wide *lis pendens* rule for arbitration-related court proceedings, allows for concurrent proceedings to be brought in different member States on these matters, likely to lead to conflicting court decisions.

The lack of a harmonized approach to the *Kompetenz-Kompetenz* doctrine, allows for concurrent proceedings before arbitrators and national courts on the validity of an arbitration agreement and on the merits of a given dispute submitted concurrently to an arbitral tribunal and to a court. The outcome can be an award that is irreconcilable with a judgment of a Member State court. The award will have

²⁰ J. J. Van Haersolte-Van Hof, The arbitration exception in the Brussels Convention: Further Comment, *Journal of International Arbitration* 2001, vol. 18, no. 1, p.28.

to be recognized pursuant to the New York Convention, while the judgment will circulate pursuant to the Regulation.

The third occurring problem brings up the question that if a court adjudicates a dispute because it has deemed an arbitration agreement invalid, can recognition and enforcement of that judgment be refused in another Member State on the ground that the arbitration agreement was valid and therefore excluded from the Convention? The Evrigenis Report²¹ states that the “verification of an incidental question of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope”. In other words, this passage supports the view, according to which the Convention applies “to recognition and enforcement of a judgment which disposes of a dispute within the scope of the Convention after giving a decision on the validity of an arbitration agreement. An alternative view was supported by Advocate-General Darmon in the *March-Rich* case, according to which a judgment on the merits given in breach of an arbitration agreement can be refused²². However, Advocate-General Léger in the *Van Uden* case²³ stated that if the initial Court has decided as to the scope of the Convention, there should be no room for the enforcing Court to review this decision and it should therefore abide by it.

The West Tankers case

The ECJ’s judgment on *West Tankers*²⁴ has been one of the most controversial ones and certainly one of the decisions that set in motion the wheels for the review of the Brussels I Regulation. In its article 27 the Brussels Regulation provides that “Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court

²¹ Evrigenis Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ C298, 24.11.86.

²² *Advocate-General Darmon* in *March-Rich*, see *J. Hill*, *The Law Relating to International Commercial Disputes*, p. 64

²³ *Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line*, Case 391/95, 1998.

²⁴ *Allianz SpA v. West Tankers Inc.*, Case C-185/07, [2009] E.C.R. 1-663.

first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established". Article 1(2)(d) of the Brussels Regulation provides that arbitration is excluded from its scope. The issue revolved around the question whether the Brussels I Regulation forbids a Court of a Member State to make an order to stay court proceedings before the courts of another EU Member State on the ground that such proceedings would infringe an arbitration agreement. The case concerned the collision of a vessel owned by West Tankers Inc. and chartered by Erg Petroli SpA with a jetty in the port of Syracuse in Italy. The charterparty was governed by English law and the contract contained a clause providing for arbitration in London. Erg received money from its insurers for damages related to the collision and began arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability. Erg's insurers then issued subrogation proceedings in Italy against West Tankers to recover the sums they had paid to Erg. In response, West Tankers started proceedings in the English High Court for an anti-suit injunction preventing insurers from pursuing the Italian proceedings in breach of the London arbitration clause. In March 2005, the High Court granted the injunction. Erg's insurers appealed to the House of Lords which in turn referred to the ECJ the question as to whether it was consistent with the Brussels Regulation for a court of a Member State to make an order to restrain a person from conducting proceedings in another Member State on the ground that such proceedings were in breach of an arbitration agreement. The ECJ, endorsing the much criticized Opinion of Advocate-General Kokott, held that anti-suit injunctions granted in view of giving effect to arbitration agreements are incompatible with the Brussels Regulation. Although arbitration is not within the scope of the Brussels I Regulation, the Court stated that anti-suit injunctions nevertheless have consequences, which undermine its effectiveness and the general principle that every court, which receives an appeal determines, under the rules applicable to it²⁵, whether it has jurisdiction under the Regulation²⁶. The judgment

²⁵ West Tankers, cited supra 20, para. 28, 29, 30 "... Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on

triggered a flood of diverse reactions²⁷ and its variety of implications have been debated extensively, especially in the United Kingdom which has a long practice of issuing anti-suit injunctions regarded as a valuable asset in the hands of a court exercising supervisory jurisdiction over an arbitration²⁸.

ii. *Lis alibi pendens*: The prior in tempore principle

The rationale of this judgment lies in the fact that the EU approach to jurisdiction uses the *lis pendens* rule²⁹. The *lis pendens* contains a formal criterion to avoid parallel proceedings: if another court is already seized of a matter, the second court seized must decline jurisdiction. The purpose of this jurisdictional criterion is to ensure predictable, certain and neutral litigation outcomes³⁰. In quest of “a clear and effective mechanism for resolving cases of *lis pendens*”³¹, this rule embodied in the

the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it ...

Further ... such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based ...”

²⁶ Case C-185/07 Allianz SpA v. West Tankers Inc. (2009) ECR I-663, annotated by A. Giannakoulis and H. Meidanis, 46 CML Rev. (2009), 1709-1724, para 29.

²⁷ See the online symposium hosted by conflictolaws.net (<conflictolaws.net/2009/west-tankers-online-symposium/>) as well as Hess, “Improving the interfaces between arbitration and European procedural law-the Heidelberg Report and the European Commission’s Green Paper on the reform of the Regulation Brussels I”, (2010) *Les Cahiers de l’arbitrage*, 17; Radicati di Brozolo, Arbitration and the draft revised Brussels I Regulation: Seeds of home country control and of harmonization?, *Journal of Private International Law* (2011), 423.

²⁸ Opinions of the Lords of Appeal for the judgment in *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA and others* (2007) UKHL 4(19), 21 February 2007.

²⁹ *Ralf Michaels*, Two Paradigms of Jurisdiction, 27 MICH. J. INT’L L. 1003, 1008 (2006).

³⁰ *Anna Gardella & Luca G. Radicati di Brozolo*, Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction, 51 AM J. COMP. L. 611, 615 (2003).

³¹ Considerando XV of the Regulation 44/2001

Brussels I Regulation³² operates on a “first-come, first-served” basis: In *Erich Gasser GmbH v. MISAT Srl*³³ the ECJ confirmed that *the lis pendens* rule of the Brussels I Regulation requires the court second seized to suspend proceedings until the court first seized has established or declined jurisdiction. This entails a certain degree of uncertainty regarding exclusive choice of court agreements. According to the *lis pendens* rule, a party can bring a claim in a non-chosen court and thereby freeze the proceedings in the chosen court. This means that parties to a choice of forum agreement cannot be sure that the chosen court will eventually decide the case³⁴. As a result, the existence and the validity of the arbitration agreement may be challenged before any EU Member State’s court which claims jurisdiction over the main proceedings under the Regulation.

iii. Abusive litigation strategies: The “Italian Torpedoes”

A special kind of forum shopping³⁵ is the “torpedo” litigation strategy, which originated in intellectual property actions, and has its spiritual home in Italy³⁶. This blatant tactical abuse encouraged a party in fault in patent infringement tactics to protect themselves by bringing proceedings before the Italian courts, renowned for their endemic delay³⁷ and thereby infringe any claims of the counterparty. In other

³² *H. Gaudemet-Tallon*, *Compétence et exécution des jugements en Europe*, 4th Ed. Paris, L.G.D.J 2010; *U. Magnus and P. Mankowski*, *Brussels I Regulation*, 2nd Ed. Sellier 2012.

³³ Case C-116/02, 2003 E.C.R. I-14693.

³⁴ *Lukasz Gorywoda*, *The New Design of the Brussels I Regulation: Choice of Court Agreements and Parallel Proceedings*, *The Columbia Journal of European Law Online*, <http://www.cjel.net>

³⁵ *The Atlantic Star* (1974), App. Cas. 436, 471 (Lord Simon of Glaisdale): “Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose that one in which he thinks his case can be most favourably presented; this should be a matter neither for surprise nor for indignation”. *A. Lowenfeld*, *Forum Shopping, Anti-suit injunctions, Negative Declarations and Related Tools of International Litigation*, 91 *Am. J. Int’l L.* 314 (1997); *J. Fawcett*, *Forum Shopping—Some questions answered*, 35 *N. Ir. Legal Q.* 141 (1984), p.141-146; *F. Juenger*, *Forum Shopping, Domestic and International*, 63 *Tulane L. Rev.* 553 (1988-1989), p. 560-570, 571-572.

³⁶ *M. Franzosi*, *Worldwide Patent Litigation and the Italian Torpedo*, (1997) 7 *E I P Rev* 382.

³⁷ The other Member State courts where this tactic finds fertile ground are the Belgium courts.

words, it invites a potential defendant to “race” to the court of a Member State renowned for its slow judicial proceedings and set in motion the *lis pendens* rule, thus obstructing the counterparty from seizing the chosen court. The direct consequence of this abusive strategy is that the chosen court has to stay the proceedings before it and wait until the court first seized determined its jurisdiction, thus leading to lengthy judicial proceedings and unscrupulous litigation tactics. Unfortunately the effectiveness of the “torpedo” is further enhanced by the fact that the ECJ³⁸ has stressed that neither a choice of court agreement, nor an arbitration agreement is capable of deactivating the “first in time, first in right” rule.

On 24 January 2012, London has won a major victory in the arbitration scene: In the ongoing West Tankers litigation, the Court of Appeal agreed that a declaratory arbitral award could be enforced as a judgment of the English Court, thus establishing the primacy of the declaratory award over any subsequent inconsistent judgment of the Italian Courts. However welcome though this decision may be, it still gives rise to the unavoidable question as to whether a judgment on the validity of an arbitral award is indeed excluded from the scope of the Regulation.

B. The practice of anti-suit injunctions: panacea or anathema?

Order and fairness between the States are achieved either by the doctrine of *forum non conveniens*, by which a court directly circumscribes its own jurisdiction, or by the granting of anti-suit injunctions, by which a court indirectly delimits the jurisdiction of other courts. It is the second of these two, which is of our concern.

One of the purposes of anti-suit injunctions is to stop parallel proceedings, that is, to stop parties from pursuing litigation involving the same parties and the same claims in two different jurisdictions simultaneously. It is a practice long asserted by the English courts that mainly contributes to the enforcement of arbitral agreements by enjoining the other party from commencing or continuing litigation in a foreign jurisdiction. The right of the English courts is based on the idea that English courts have the power to restrain a person who is subject to their jurisdiction from

³⁸ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, (2003) ECR I-14693, para. 41-54.

commencing proceedings in a foreign court. Although the principle of judicial protection should prevent bad faith jurisdictional challenges brought before a national court in breach of a valid arbitration agreement, regrettably it is common practice for the respondent in arbitration to derail and ‘torpedo’ the arbitration agreement. This is the “raison d’être” of anti-suit injunctions. In *Turner v. Grovit*³⁹, the ECJ confirmed that anti-suit injunctions are incompatible with the Brussels I Regulation, even where the party is acting in bad faith with a view to frustrating the existing proceedings, and that because they interfere with the jurisdiction of foreign courts. Such an interference undermines the principle of mutual cooperation which is the backbone of the EU jurisdictional system. The ECJ held that the effect of anti-suit injunctions amounts to stripping a court of the power to rule on its own jurisdiction. What should be noted though, is that anti-suit injunctions are in fact personal injunctions, addressed to a party and not the other court, therefore they do not affect per se the foreign court’s jurisdiction⁴⁰. However, the thorny issue remains unresolved: Since anti-suit injunctions are assessed to be a harassment to a EU Member State’s judicial system, how does a party who has agreed to resort to arbitration prevent the respondent to the agreement from engaging in delaying tactics by having recourse to satellite litigation?

C. The aftermath of the Heidelberg Report: The Commission’s Green Paper and proposal

In September 2007 the Report on the Application of Regulation Brussels I⁴¹ (hereinafter the Heidelberg Report) was published. The Heidelberg Report has been

³⁹ Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd, Changepoint SA, E.C.J. Judgment, 27 April 2004, Case C-159/02, E.C.R. I-3565.

⁴⁰ H. Seriki, Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin, *Journal of International Arbitration* 23(1), 2006, p. 25.

⁴¹ B. Hess, Th. Pfeiffer, and Prof. Dr. P. Schlosser, Report on the Application of Regulation Brussels I in the Member States (“Heidelberg Report”), Verlag C.H. Beck München, 2008; see also *Cahiers de l’arbitrage*, Recueil Vol. IV p.151, http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (sept. 2007).

prepared on the basis of 25 national reports, which reflected a general consensus in favor of the Arbitration Exception. In particular, the Heidelberg Report reflected the idea that the Regulation 44/2001 already ensured the “prevalence” of the New York Convention⁴², which was perceived to operate satisfactorily, and that a suppression of the Arbitration Exception would not enhance the effectiveness of arbitral agreements and arbitral awards in Europe. Still, the Heidelberg Report endorsed the idea of suppressing the exception.

The Report provided for a comprehensive analysis of the issues that arose due to the interface between arbitration and litigation and the problems deriving from it that could no longer be ignored. In order to address these problems, the Report evaluated among other proposals, the deletion of the arbitration exclusion from the Regulation.

Pursuant to article 73 of the Regulation, the Commission was to present to the European Parliament a Report on its application no later than five years after its entry into force. The Report was released in 2009 and its conclusions were based on the “Heidelberg Report”⁴³. It was accompanied by a Green Paper⁴⁴ the object of which was to examine the relationship between arbitration and judicial proceedings, an issue that had come under considerable scrutiny in *West Tankers*.

The document provided inter alia for a partial deletion of the arbitration exception in view of bringing arbitration-related proceedings within the scope of Brussels I. It also considered allocating exclusive jurisdiction or giving priority to the courts of the

⁴² Art. 71 (1) “This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments”.

⁴³ The Green Paper and the attached Report (COM (2009) 174) have been prepared following a study carried out on behalf of the Commission by an external contractor – the Institute for Private International Law, University of Heidelberg, by Professors Hess, Pfeiffer and Schlosser, the so-called “Heidelberg Report: B. Hess, Th. Pfeiffer & P. Schlosser, *The Brussels I Regulation-Application and Enforcement in the EU (Munich 2008) Arguments in support of the Heidelberg Report* can be found in B. Hess, *Improving the Interfaces between Arbitration and European Procedural Law-The Heidelberg Report and the EU Commission’s Green Paper on the Reform of the Regulation Brussels I*, 1 *Cahiers de l’arbitrage* 17 (2010).

⁴⁴ Green Paper on the review of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 21.04.2009 (COM (2009) 175 final), s. 7.

Member State of the seat of the arbitration⁴⁵ in relation to proceedings regarding the existence, validity and scope of arbitration agreements. It was also pondering the extension of the Regulation on provisional measures to arbitration, as well as the circulation of judgments on the validity of arbitration agreements and of judgments setting aside an award. Finally it considered providing for the refusal of enforcements of judgments irreconcilable with an award enforceable under the New York Convention. However the proposal underwent substantive criticism⁴⁶ since it entailed the regulation of several aspects of arbitration so far governed by national law. But most importantly it involved the repudiation of the *Kompetenz-Kompetenz* principle and would have precluded the enforcement of annulled awards.

The occurring problem though was that the arbitration community along with the European Parliament, wanted to keep the arbitration exclusion in the Brussels Regulation and there were far too many supporters of this view. The European Commission, which had been considering endorsing a partial deletion of the arbitration exclusion, in the face of this opposition, essentially changed its agenda. In 2010 the Commission presented its proposal⁴⁷ for the recast of Brussels I Regulation⁴⁷. By fear that the inclusion of arbitration within the Regulation would only prove to be a Trojan horse, jeopardizing the attractiveness of arbitrating in the EU, or even the effectiveness of arbitration agreements, this invasive approach has been abandoned and *in lieu* the Commission restrained itself to introducing only one new rule on

⁴⁵ The Green Paper suggests that the seat of the arbitration would be determined by reference to “*the agreement of the parties or the decision of the arbitral tribunal*”. In absence of agreement of the parties, however, a choice of laws rule would have to be introduced, by connecting the seat to “*the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement*”.

⁴⁶ Ph. Pinsolle, *The Proposed Reform of Regulation 44/2001: A poison pill for Arbitration in the European Union?* (2009), *Int. Arb. Law Rev.* 62.

⁴⁷ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14.12.2010 (COM(2010) 748 final). A further analysis of the rule on arbitration in the Commission’s original proposal and its implications for the New York Convention can be found in *Vesna Ladic*, *The Commission’s Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How ‘Much Ado about Nothing’ Can End Up in a ‘Comedy of Errors’ and in Anti-suit Injunctions Brussels-style*, (2012) 29 *Journal of International Arbitration*.

arbitration. The aim and scope of the Commission's proposal on arbitration was set out in Recital 20 in the draft revised Regulation, according to which "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 agreement is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and 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". Synopsizing the Commission's intent, one would have to say that it aspired to the introduction of "special rules aimed at avoiding parallel proceedings and abusive litigation tactics". This goal was achieved by the introduction of art. 29 (4), according to which, a court seized of a dispute would be obliged to stay proceedings if its jurisdiction was contested on the basis of an arbitration agreement and an arbitral tribunal has been seized of the case, or in cases where court proceedings relating to the arbitration agreement had been commenced in the Member State of the seat⁴⁸. Draft article 29(4) read: " 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 seized of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. 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 seized shall decline jurisdiction. This paragraph does not apply in disputes concerning matters referred to in sections 3, 4, and 5 of Chapter II".

Draft article 33(3) read: "For the purposes of this Section, an arbitral tribunal is deemed to be seized when a party has nominates an arbitrator or when a party has

⁴⁸ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14.12.2010 (COM(2010) 748 final) arts 29(4) and 33(3).

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

These two draft articles gave priority either to the arbitral tribunal in respect of the *Kompetenz-Kompetenz* principle or to the court of the seat of an arbitration agreement to decide as a main object or as an incidental question, upon the existence, validity or effects of the arbitration agreement when the court of another EU Member State had been seized. But most importantly, these two draft articles would have jointly ensured the avoidance of parallel proceedings initiated by two or more *fora* to the detriment of any arbitration agreement, dilatory tactics, diverging court judgments or irreconcilable court decisions and arbitral awards. Inter alia the Commission's Proposal sought to propel expediency and legal predictability but most importantly it favored the dominance of the parties' initial will: the choice of the seat of their arbitration should reflect their choice to submit to the jurisdiction of the court of the seat or defer any arising dispute regarding jurisdiction straight to the arbitral tribunal which pursuant to the *Kompetenz-Kompetenz* doctrine is in position of ruling upon it.

In other words, the new provision would achieve the same effect as an anti-suit injunction. Under the Commission's Proposal, this was the only matter pertaining to arbitration that would be part of the Brussels Regulation – everything else relating to arbitration would be governed by national law. This was a provision which was in line with article II (3) of the New York Convention and aimed to discourage parties from filing parallel proceedings simply to delay and harass, to infringe the proceedings and torpedo the other party, by enjoining the non-seat court from doing anything but staying the proceeding or declining jurisdiction. It is only rather unfortunate that by contrast with the abundance of these amendments proposed by the Commission, the New Regulation has not retained them and chose to adopt a more hesitant and skeptical approach.

II. THE NEW REGULATION 1215/2012 AND ITS RECURRENT PROBLEMS

After a barrage of commentary and discussions on 6 December 2012, the Council of the European Union endorsed the proposed reform of the 44/2001 Regulation, thus adopting the Brussels I recast 1215/2012 Regulation. The Council though it abandoned the provisions suggested in article 29(4), nevertheless decided to introduce significant changes regarding the amended version of the proposal whereas the arbitration exception was retained in article 1(2)(d), which stated that “The regulation shall not apply to arbitration”. The revised Regulation introduced an elaborate and explanatory recital in view of determining the scope of the arbitration exception and the relationship between the Regulation and the New York Convention. The Committee of Legal Affairs, which prepared the Report upon which the Parliament decided to adopt the New Regulation stated that “The Commission is of the view that the effectiveness of arbitration agreements should be improved in order to give full effect to the will of the parties. In particular, it should be the case where the agreed or designated seat of arbitration is in a Member State. It recommends special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. Regarding this point, the Committee adheres to the position taken by Parliament in its resolution on the Green Paper: arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration. All Member States are parties to the abovementioned conventions; therefore the exclusion of arbitration from the scope of the Regulation should be preserved. Recital 11 and following above clarify this.”⁴⁹

After the *West Tankers* decision the threat of torpedo actions became more of a predicament that a potential impediment to arbitration within the European Union. The hazardous affair of parties having recourse to parallel court proceedings gave

⁴⁹ The Committee on Legal Affairs of October 15, 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748—C7-0433/2010—2010/0383(COD)), p.140.

rise to the risk of inconsistency between an arbitral award and a court judgment. This would only lead to conflicting decisions where a Member State court would have to fulfill its obligations under the Brussels I Regulation and enforce a judgment of another Member State court, whereas an arbitral award would have to be enforced according to the provisions of the New York Convention.

During the years of debate regarding the revisions of the Brussels I Regulation, the EU institutions considered tackling the Italian torpedo phenomenon directly. However the feedback by the arbitration community was that the problem needed to be dealt indirectly, choosing to insert to the new Regulation as limited changes as possible.

A. A skeptical approach of the arbitration exception issue: the meaning of recital 12

Although in the Commission's Proposal the issue of arbitration was intended to be addressed both in the preamble and by the insertion of two substantive provisions on *lis pendens*, the approach of the 1215/2012 Regulation⁵⁰ has proved more skeptical. The arbitration exception is preserved pursuant to article 1(2)(d), but is also reiterated in the preamble and its recital 12, which further defines and delimits the scope of the arbitration exception. Recital 12 reads as follows:

"This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized 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.

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,

⁵⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) OJ L351/1.

regardless of whether the court decided on this as a principal issue or as an incidental question.

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 recognized 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.

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."

According to the first paragraph of recital 12, arbitration is unequivocally out of the scope of the Regulation, leaving Member State courts free to refer the parties to arbitration, to stay or dismiss the proceedings and to examine whether there is a valid arbitration agreement in place. In other words the Regulation does not wish to interfere with Member State's national law. The Regulation does not establish a uniform regime vis-à-vis arbitral matters, but instead entrusts national lawmakers to enact the appropriate legislation on arbitration whilst complying with the New York Convention. It has been argued that this first paragraph of recital 12 "allows for the courts of the seat to rule on the validity of an arbitration agreement, even if this issue has already been raised before another court"⁵¹. However it seems that others are of the opinion that paragraph 1 "simply excludes the application of the Regulation and leaves unaffected the governing national laws of Member States"

⁵¹ A. Estrup Ippolito, *M Adler-Nissen*, *West Tankers Revisited: Has the New Brussels I regulation Brought Anti-Suit injunction back into Procedural Armoury?*, *Arbitration* 2013, pp. 158 (168).

without granting preference to the court of the EU Member State of the seat of the arbitration in relation to the courts of other Member States⁵². On the other hand, one could suggest that, if a party initiates court proceedings in a Member State other than that of the seat, the other party may still request the courts of the seat to refer the parties to arbitration. Therefore, even though it is argued that the first paragraph does not appear to give priority to the court first seized with a question regarding the validity of an arbitration agreement, it is claimed that only the courts of the seat can impose the arbitral process.

The second paragraph of recital 12 envisages the scenario where a EU Member State court renders a decision concerning the validity of an arbitration agreement. Irrespective of whether the court decided upon the matter as a principal issue or as an incidental question, paragraph 11 of the recital expressly excludes this ruling from the scope of the Regulation. In other words, the Recital explicitly draws a line of distinction between a court ruling, which has an assessment of the effect of an arbitration clause as its subject matter, and a decision where this assessment forms only an incidental to the substance of the case consideration. Whether such a decision would have a binding effect on a court of another Member State would instead be decided by national principles of *res judicata and issue estoppel*⁵³. But the problem still is that the same arbitration agreement could be considered valid in one Member State and invalid in another. The fact that arbitration is altogether excluded from the Regulation impedes a party from opposing the recognition of a court ruling rendered on the validity of an arbitration agreement in a scenario where recognition would have been refused, on the grounds that the ruling is irreconcilable with a previous decision given in another Member State involving the same parties and the same cause of action. In other words, the outcome can still be haphazard and

⁵² *Guido Carducci*, The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration: With Notes on Parallel Arbitration, Court Proceedings and the EU Commission's Proposal, *Arbitration International* (LCIA 2013 Vol.29, Issue 3) p. 467-491.

⁵³ Not all Member States see eye to eye regarding the principles of *res judicata* and *issue estoppel*. See for example the UK Supreme Court's judgment in *Dallah Real Estate and Tourism Holding Company v Government of Pakistan* [2010] UKSC 46 and the related judgment of the Paris Court of Appeal in *Gouvernement du Pakistan—Ministère des Affaires Religieuses v Dallah Real Estate and Tourism Holding Company* (Case No.09/28533). See also the House of Lords' judgment in *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 other ships* [1985] 1 W.L.R. 490, HL.

inconclusive.

When read in conjunction, the first and second paragraphs of recital 12 seem to scrape off some of the effect of the “Italian torpedo” phenomenon. According to the first paragraph, one could go as far as interpret that the courts of the seat may rule on the validity of an arbitration agreement, even when the same issue has been raised before another court and the same parties have been involved. The second paragraph provides that, if the court of one Member State renders a decision on the matter, the ruling has no binding effect on other Member State courts “which are therefore free to make their own ruling”⁵⁴. One would argue that the beneficial effect of these new provisions is that while parallel court proceedings may still be brought in different courts of EU member States, such proceedings will not prevent arbitral proceedings from commencing or continuing. However, the suggestion that pursuant to paragraph II of recital 12, the court ruling in one Member State has no binding effect on other Member States’ courts seems to be indifferent to the *lis pendens* rule according to which there can be no other court ruling in a second Member State in an identical case between the same parties regarding the same arbitration agreement. In other words, a party to an arbitration agreement seeking to avoid it will generally try to obtain a court ruling declaring the arbitration agreement “null and void, inoperative or incapable of being performed”. If the other party subsequently seizes another court of a Member State for the same cause of action in order to obtain a court ruling declaring the validity of the arbitration agreement, then the court second seized, pursuant to the *lis pendens* principle will have to stay its proceedings until the court first seized rules decides upon its jurisdiction. In other words, there cannot be second court proceedings in another Member State other the one first seized for the same cause of action, involving the same parties and with regard to the same arbitration agreement.

The third paragraph of recital 12 explains that the rules of this Regulation would not interfere with the competence of Member State’s courts even though a preliminary decision on the validity of an arbitration agreement is in itself not within the ambit of the New Regulation, nevertheless the judgment on the merits of the matter

⁵⁴ A. Estrup Ippolito, *M Adler-Nissen*, supra n. 50, p. 168.

should still be recognized and enforced. Furthermore, this paragraph reminds that the New York Convention takes precedence over the Regulation, which does not intrude in areas where the rules on recognition and enforcement of arbitral awards according to the New York Convention apply. Article II (3) of the New York Convention provides that: “ the court of a contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”. Therefore, as long as the court of a contracting State deems the arbitration agreement valid under the applicable law, then it has no other choice but to refer the parties to arbitration.

However in the hypothetical example that one party in an arbitration agreement (the defendant) in his quest to declare the arbitration agreement null and void seizes the court of a Member State, which indeed renders a decision to his liking and declares the arbitration agreement null and void, inoperative or incapable of being performed, thus deciding to rule on the merits, then this decision would have to circulate pursuant to the rules laid down by the New Regulation. But if for instance the claimant in this very same example decides to initiate arbitration proceedings, where the arbitral tribunal enjoys the power to rule upon its own jurisdiction, according to the *Kompetenz-Kompetenz* doctrine and decides to render an arbitral award which is contrary to the previous court ruling, then it would have to be enforced in accordance with the rules laid down by the New York Convention. The problem here is unequivocal: Which one takes precedence? And although it has been suggested that at the end of the third paragraph, the new recital perhaps solves the problem of conflicting court judgments and arbitral awards ruling on the same substantive issue because it stipulates that the New York Convention takes precedence, is it possible that this interpretation goes a step too far? Although by virtue of article 71 of the New Regulation, the New York Convention prevails, this would only be the case when two colliding decisions are submitted before the same national authority. However, it could hardly be the case of a court ruling and an arbitral award pending before different Member State courts. The risk of incoherent

decisions and the uncertainty regarding the primacy of the New York Convention arises from the fact that though Member State courts are not bound to recognize and enforce judgments concerning the validity of an arbitration agreement *per se*, nevertheless they are bound to recognize and enforce judgments on the merits of a dispute found not to be part of a valid arbitration agreement. The Court of appeal of Paris denied that the judgment of an Italian court rendered exclusively on the validity of an arbitration agreement and ruling *a contrario* without engaging in any decision making as to the merits of the dispute could rely for its recognition and enforcement on the Brussels Convention⁵⁵.

The last paragraph of recital 12 exempts from the Regulation both actions and ancillary proceedings before the courts of EU Member States, any measures that relate to stages of the arbitral process (such as the establishment of an arbitral tribunal, the extent of arbitrators' powers, the conduct and any other aspect of the arbitration proceedings⁵⁶) as well as those that relate to their conclusion. In other words this last paragraph reiterates that the arbitration exception extends to court proceedings in support of the arbitral process.

The solutions brought by the New Regulation regarding the issue of contradictory and conflicting decisions circulating in the European Union do not seem adequate: the general idea is that, with reference to a dispute connected to an arbitration agreement, three different decisions could potentially be issued, each one of them in accordance with different recognition and enforcement rules: first, the arbitral award, which shall circulate according to the rules of the New York Convention; second, the decision issued on the merits by a court of a Member State, rendered on the acknowledged nullity, unenforceability or ineffectiveness of the arbitration agreement, which shall circulate following the rules of the New Brussels Regulation; and finally, the decision issued by a court of a Member State upon the validity or unenforceability of the arbitration agreement, which shall circulate according to the rules of the national laws of the Member State in which enforcement is sought,

⁵⁵ Cour d' appel de Paris 17 june 2006, Legal Department du Ministère de la Justice de la République d'Iraq v. Fincantieri Cantieri Navali Italiani, Società Finmeccanica et Società Armamenti e Aerospazio, Rev. Arb. 2007, p 87.

⁵⁶ Paragraph IV, supra n. 50.

where it encompasses the risk of undermining the effectiveness of decisions in the EU judicial system.

B. The future of anti-suit injunctions under the new regime

The new Recital 12 appears to abstain from addressing the problem that generated the debate in *West Tankers* and concomitantly gave rise to the revision process: court-ordered anti-suit injunctions. According to paragraph IV of Recital 12, “The Regulation should not apply to any actions 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 of enforcement of an arbitral award”. The unavoidable question here would be if anti-suit injunctions should be regarded as “ancillary proceedings”. An anti-suit injunction is aimed to protect an arbitration agreement and prevent a court to decide to the detriment of the parties’ will. Whilst nothing in this Regulation should prevent the courts of a Member State from examining the validity of an arbitration agreement, would it be safe to assume that court-ordered anti-suit injunctions may fall under the auspices of “ancillary proceedings”? If an anti-suit injunction is an “action or ancillary proceeding” relating to “the conduct of an arbitration procedure or any other aspects of such a procedure,” then it should be excluded from the scope of the New Regulation. This view undermines the one expressed by the ECJ in *West Tankers*, according to which an anti-suit injunction is incompatible with the Brussels Regulation since it “obstructs a Member State court in the exercise of the powers conferred on it by Regulation No 44/2001 and runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based”⁵⁷.

After the significant turbulence that the *West Tankers* has caused in the arbitration world, one would expect that a wording in the New Regulation concerning anti-suit

⁵⁷ Allianz SpA v. West Tankers Inc, supra n. 24, para. 30.

injunctions would be in order. It was highly anticipated that the matter of anti-suit injunctions would be addressed in the New Regulation. Therefore when it comes to anti-suit injunctions, one would expect that they would not be simply implied under the wording “ancillary proceedings”. Whereas Paragraph IV of Recital 12 considers “actions or ancillary proceedings” as any action relating to “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”, it does not encompass anti-suit injunctions. Would it be pertinent for anti-suit injunctions to fall within the phrasing “any other aspects of such a procedure”?

Furthermore, one could argue that given the *West Tankers* decision that echoed in the arbitration community, the permissibility of anti-suit injunctions would require an express inclusion and an unequivocal legal basis in the New Regulation. In *West Tankers*, the ECJ held that an anti-suit injunction “amounts to stripping a court of the power to rule on its own jurisdiction under Regulation No 44/2001.”⁵⁸ Since the Recitals in the Preamble of a EU Act are interpretative⁵⁹, how could these provisions derogate from the actual provisions of the Regulation in the absence of any legal binding effect⁶⁰? Thus it seems that the explicit exclusion of “actions or ancillary proceedings” from the Regulation does not provide for a clear legal basis for anti-suit injunctions.

Additionally, even to the most fervent supporters of the opinion that Recital 12 of the Recast Regulation allows for anti-suit injunctions, one must be reminded that anti-suit injunctions are mostly issued by common law courts, whereas the vast majority of court systems in the European Union are civil law systems which do not

⁵⁸ *Ibid.*, para. 28.

⁵⁹ See for example *Ordre des Barreaux Francophones et Germanophone v Conseil des ministres* (C-305/05) [2007] ECR I-5305 para.24, and *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* (C-481/99) [2001] ECR I-9945 para.39.

⁶⁰ See for example *Criminal proceedings against Gunnar Nilsson Per Olov Hagelgren and Solweig Arrborn* (C-162/97) [1998] ECR I-07477 para.54; *Deutsches Milch-Kontor v Hauptzollamt Hamburg-Jonas* (C-136/04) [2005] ECR I-10095 para.32; and *R. (on the application of International Air Transport Association and European Low Fares Airline Association) v Department for Transport* (C-344/04) [2006] ECR I-403 para.76.

particularly favor anti-suit injunctions, thus unlikely to grant them and even less adopt them.

Moreover, among the solutions to the problem of parallel proceedings and abusive litigation tactics that the EU legislator foresaw, was clearly not the reintroduction of anti-suit injunctions, but a partial deletion of the arbitration exception. It is more than evident that the Recast Regulation has not resolved the problem of parallel proceedings, which precipitates the risk of incoherent judgments, and therefore makes arbitration less enticing, because of increased costs, legal unpredictability and inconsistencies. Given this situation, alternative solutions to anti-suit injunctions need to be consulted as a way to prevent vexatious breaches of arbitration agreements by parties who seek to derail the arbitral process by commencing litigation as a dilatory tactic. Therefore the arbitral tribunal should consider issuing an order that would provoke the same effect as an anti-suit injunction. One way of resolving this would be by granting interim measures. The UNCITRAL Arbitration Rules accords the arbitral tribunal the power to grant interim measures in view of protecting the arbitral process. UNCITRAL Article 26 reads as follows:

- “1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
 - (a)** Maintain or restore the status quo pending determination of the dispute;
 - (b)** Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
 - (c)** Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d)** Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraphs 2 **(a)** to **(c)** shall satisfy the arbitral tribunal that:
 - (a)** Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is

likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 **(d)**, the requirements in paragraphs 3 **(a)** and **(b)** shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement".

Thus, an arbitral tribunal subject to the UNCITRAL Arbitration Rules could chose to grant an interim measure, providing the same effect as an anti-suit injunction by ordering a party to refrain from commencing or continuing litigation bringing the same issues that are to be determined in the arbitral process before a court of a Member State with the rationale that such litigation would likely cause either "current or imminent harm or prejudice to the arbitral process itself".

However one should note that ordering such a measure would be unlikely to have

the same effect as a court-ordered anti-suit injunction since any court measure always proves to be more efficient in imposing penalties on a recalcitrant party, whilst arbitral tribunals lack such coercive powers.

Another alternative to anti-suit injunctions worth to consider is seeking damages for the breach of a valid arbitration agreement, but it still is a very different alternative: seeking damages or even according them do not stop time-consuming court proceedings initiated in breach of a valid arbitration agreement, neither preclude litigation costs nor *res judicata*. In the *West Tankers* saga some light was recently shed as to a tribunal's power to impose damages⁶¹. According to its latest development *West Tankers* asked from the arbitral tribunal that the insurers grant them damages for breach of the arbitration agreement, and also an indemnity to cover any potential liability that might be found by the Italian court. The tribunal dismissed the claim on the ground that its jurisdiction to award damages for breach of the arbitration agreement was not in accordance either with the Brussels Regulation or the ECJ ruling. Pursuant the ECJ's reasoning in the 2009 *West Tankers* decision, the tribunal held that the insurers had a fundamental right under Article 5(3) of the Regulation to bring a suit in Italy, since that was where the harmful incident occurred. The ECJ had made it clear that the right of a party to have access to a national court with jurisdiction under the Brussels Regulation was a fundamental right in EU law and that denial of that right was contrary to the principle of "effective judicial protection." Consequently, the tribunal, refused to award damages against the other party for exercising a fundamental right. The tribunal stated that it had no jurisdiction to award damages in the event of a party merely seeking to rely upon a fundamental right. But was the arbitral tribunal deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law? Does the ECJ 's judgment actually preclude an arbitral tribunal from making decisions or rulings, which are inconsistent with the decisions or rulings of the court of another Member State the same way that national Member State courts are precluded under the terms of the Regulation? *West Tankers* appealed to the English Commercial Court and on 4 April 2012 the High Court held,

⁶¹ See *West Tankers Inc v. Allianz SpA & Anor* [2012] EWHC 854 (Comm), 4 April 2012.

in a decision handed down by Flaux J., that the majority of the arbitral tribunal was wrong; the arbitrators did have jurisdiction to award damages for breach of the arbitration clause. Flaux J.'s decision was based on the opinion of Advocate Generale Kokott, according to which a tribunal could issue a different decision from a court, hence the tribunal's jurisdiction could not be constrained by the Regulation. Flaux J. said that "arbitration falls outside the Regulation and an arbitral tribunal is not bound to give effect to the principle of effective judicial protection. It follows that the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity." Therefore the principles of mutual trust and effective judicial protection upon which the *West Tankers* decision relied should not apply to arbitration since they were based on the Regulation. This decision of the High Court also lends support to the view that a tribunal should also have authority to award damages, not only for breach of an arbitration agreement, but also for failure to comply with a tribunal's order to abstain from any action that could cause harm or prejudice to the arbitral process. Accordingly, an interim measure granted by a tribunal not to engage in any action in violation of the arbitration agreement could be much more efficient when accompanied by a potential award for damages. The question remains to be answered whether civil court systems will ever find a way to protect arbitration agreements even by remotely accepting some sort of an anti-suit injunction as a solution to the troubling reality of parallel proceedings and inconsistent judgments.

C. Assessing the impact of Brussels I Recast

The Recast Regulation is expected to enter to force on 10 January 2015 according to its article 66. And although its Recital 12 comprises a few clarifications, which are welcome, overall it lacks the bold approach of the Commission's 2010 Proposal. The New Regulation does not take the quantum leap regarding the *lis pendens* mechanism and avoids to explore further solutions as to the risk of parallel court proceedings or parallel court and arbitral proceedings, thus leaving the issue of

potential diverging decisions unresolved. One would have thought that the evolution of international arbitration on European ground would have contributed to build a better relationship between them but instead these two fields of law have grown more and more isolated with paramount and irreconcilable differences. For this very reason the Brussels I recast was long awaited in the light of bridging the gap. However the EU legislator has abstained from providing a sufficient legal basis for the interpretation of the arbitration exemption and opted for the status quo. The hypothetical reasons behind this skeptical approach differ: one would presume the recurring “justification” that the New York Convention and the Geneva Convention deal satisfactorily with arbitration, following the reasoning of the Committee on Legal Affairs. However this observation appears rather misplaced with regard to the *lis pendens* rule, since the provisions proposed by the Commission in 2010 did not stumble upon any identical operational mechanism either in the New York Convention or the Geneva Convention. Additionally, the debate before the Parliament was not whether arbitration was satisfactorily dealt with by the New York and Geneva Conventions, but whether there could be a more satisfactory regime to deal with proceedings initiated before both a court and an arbitral tribunal of two Member States and whether there was a need to address this situation with the establishment of a more uniform EU regime, such as the one proposed by the Commission or whether the diverging existing national legislations of each Member State sufficed. The New Regulation opted for the last option.

The reason is equally unlikely to be the idea that the *Kompetenz-Kompetenz* principle that encompasses the opportunity for the arbitral tribunal to rule on its own jurisdiction is sufficient enough to ensure the prevention of the risk of parallel proceedings since it tends to operate domestically with regards to the court of the same country as the seat of the arbitration. In the above mentioned case of the *Legal Department du Ministère de la Justice de la République d'Iraq*⁶², the Genoa Court of Appeal found that it had jurisdiction to rule on the dispute that arose between three Italian Companies and the Ministry of Defense of the Republic of Iraq, despite the existence of arbitration clauses in the relevant contracts, by considering

⁶² Cour d' appel de Paris 17 june 2006, supra n. 55.

that those clauses were invalid. When enforcement of the decision was sought in France, the Republic of Iraq challenged the enforcement order before the Court of appeal of Paris on the grounds that, first of all, the Brussels Convention should not apply to the decision rendered by the Genoa Court of Appeal, since arbitration was not within its scope, and second, given the exclusion of the Brussels Convention, the Genoa Court of Appeal did not have jurisdiction over the dispute according to the bilateral treaty signed between Italy and France. The Court of appeal of Paris decided to reverse the enforcement order and dismiss the request for enforcement, stating that the Brussels Convention did not apply to the decision of the Genoa Court of appeal and that accordingly, the court had jurisdiction to rule on the merits of the case. The rationale of this decision relied to the exemption of the arbitration from the Brussels Convention and to the negative effect of the *Kompetenz-Kompetenz* principle. The particularly arbitration-friendly French law⁶³ has interpreted *Kompetenz-Kompetenz* to not only have the positive effect of allowing arbitral tribunals to determine their own jurisdiction, but also the negative effect of precluding courts from determining that they have jurisdiction over these issues⁶⁴. This approach that has been codified by the French legislature in amendments to their Code of Civil Procedure, does not allow a French court to be seized until after the arbitral tribunal has had the opportunity to rule upon its jurisdiction⁶⁵. However, rather than enhancing the extension of the negative effect of *Kompetenz-Kompetenz* to a foreign court, an arbitration friendly legal system should rather aspire to oppose to the recognition and enforcement in its territory of a judgment rendered by a foreign court in breach of an arbitration agreement. Therefore, in order for a legal system to promote the negative effect of *Kompetenz-Kompetenz*, it should establish it as a public policy requirement adept to oppose to

⁶³ Article 1448 cpc applies to both domestic and international arbitration in France but the parties may opt-out of this provision in international arbitration.

⁶⁴ Ph.Fouchard, E. Gaillard, B. Goldman, International Commercial Arbitration, Kluwer Law International (1996), p.396, para. 651.

⁶⁵ Article 1709 cpc grants a significant freedom to the tribunal with regard to the determination of the rules governing the proceedings.

any attempt of recognition and enforcement of foreign judgments in breach of arbitration agreements.

CONCLUSION

Overall, the New Brussels Regulation, though it pretends to clarify a number of questions regarding the interrelation between litigation and arbitration, it leaves a lot of issues unresolved. But these rules, incomplete or recessed from the French system of conflict of jurisdictions, give a new life to the old question of whether the ordinary law must prevail on the harmonized law since the first mentioned is more favorable than the second to international judicial cooperation⁶⁶. On the other hand, this New Regulation, however inept it may appear in comparison with the 2010 Commission's Proposal, it has been received positively, notwithstanding the risk of repeated court and arbitration proceedings which is palpable since it has enhanced the effectiveness of choice of court proceedings. And even though it is too early to assess the effectiveness of this new hesitant approach, one could argue that it is at least a move in the right direction.

⁶⁶ *Jean_Paul Beraudo*, Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Journal du Droit International (Clunet)*, Juillet-Août-Septembre 2013, n° 3/201, doct. 6, p.741.

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