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# Arbitration in the EU

## *- Where are we heading?*

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Tiivistelmä/Referat – Abstract			
<p>Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation) has been considered the most important legal document in the area of civil procedure on EU level. Article 1(2)(d) of the Regulation excludes arbitration from the scope of application of the Brussels I Regulation. However, the ECJ interpreted the arbitration exclusion narrowly in Case C-185/07 <i>Allianz SpA &amp; Generali Assicurazioni Generali SpA v. West Tankers Inc.</i> (2009) ECR I-663. In practice, this preliminary ruling watered down the arbitration exclusion in the Regulation, and thereby caused an intensive debate on the influence of EU legislation on international arbitration.</p> <p>Case law of the ECJ has shown that the scope of application of the Regulation and the arbitration exclusion in it depends on the substantive subject matter of the dispute in question. If that subject matter falls within the scope of the Regulation, a court which has jurisdiction under the Regulation is entitled to examine whether the arbitration exception applies and, depending on its assessment of the validity of the arbitration agreement, to refer the case to the arbitral body or adjudicate the matter itself.</p> <p>The revised Regulation (EU) No 1215/2012 becomes applicable on matters issued as of 10 January 2015. The result of the revision is that the arbitration exclusion remains unchanged, however with an added recital (12) in the preamble. This has left the arbitration audience and legal scholars somewhat confused concerning the reasons for keeping the arbitration exclusion unaltered in the revised Regulation.</p> <p>This thesis examines the factors that have led to the current legal situation in the area of EU civil procedure, in particular concerning arbitration. It also provides an analysis of what the revision of the Regulation signifies in practice. Lastly, it contemplates what the standpoint of the CJEU potentially will be in future arbitration proceedings in the light of i.e. <i>West Tankers</i> and based on the revised Regulation.</p> <p>The revised Regulation introduces some key changes originally aiming to make the recognition and enforcement of judgments given by the Member States' courts easier and more effective. However, contrary to the arbitration community's expectations, the Regulation has not fully clarified the interface between the Regulation and arbitration. The added recital only provides assistance to some extent, and it seems that we stand before a revision that chose <i>status quo</i> instead of presenting any revolutionary renovations to the arbitration exclusion.</p>			
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## **List of Abbreviations**

Court	Court of Justice of the European Union (European Court of Justice)
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEC	Treaty Establishing the European Economic Community
EESC	European Economic and Social Committee
EU	European Union
OJ	Official Journal of the European Union
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law



*'Procedure is not pure form. It is the meeting point of conflicts, of policies, of ideas. It is the 'Cape Wrath' where Rapidity and Efficiency have to be combined with Justice; it is also the 'Cape of Good Hope' where Individual Liberty has to be combined with Equality of Opportunities. Procedure is, in fact, the faithful mirror of all the major exigencies, problems, and trials of our epoch – of the immense challenge of our time. Here, my fellow proceduralists, is our challenge. Here is our work.'*

Mauro Cappelletti<sup>1</sup>

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<sup>1</sup> In *'Social and Political Aspects of Civil Procedure'* 1970-71, p. 886.



# 1 INTRODUCTION

The concept of arbitration is originally a simple one. The reason for choosing arbitration instead of legal court proceedings could for instance be that arbitration makes possible the achieving of a different, ‘better’ right for the parties.<sup>2</sup> Disputing parties agree to submit their disagreement to a person whose expertise or judgment they trust. In short, arbitration is considered an effective way of obtaining a final and binding decision on a dispute without reference to a public court.<sup>3</sup> Although arbitration represents an old mechanism<sup>4</sup> of alternative dispute resolution outside public courts, arbitration proceedings comprise several inherent legal issues, which, if disputed, have to be submitted to the national courts for a final decision. Examples of these issues are disputes concerning the appointment of an arbitrator, requests for provisional measures, disputes regarding the enforcement of arbitral awards and the validity of arbitration agreements<sup>5</sup>. Thus, arbitration proceedings are never completely exempted from the influence of national courts. The language of the Brussels I Regulation, however, does not fully indicate in which cases the scope of the arbitration exception in Article 1(2)(d) covers these specific questions and when the Regulation becomes applicable in practice.

## 1.1 Background

The Brussels I Regulation<sup>6</sup> governs arbitration proceedings in the European Union (EU).<sup>7</sup> More specifically, they are governed through an exclusion clause stipulated in Article 2(1)(d) of the Regulation. The most famous preliminary ruling by the European

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<sup>2</sup> Lindskog 2012, p. 43.

<sup>3</sup> Blackaby *et al.* 2012, p. 2.

<sup>4</sup> Even though modern arbitration nowadays is mainly linked to commercial law, the practice originates from the Middle Ages. Koulu 2008, p. 498.

<sup>5</sup> On the term ‘arbitration agreement’, see Panico, R. C., Reform of the Brussels I-Regulation: the arbitrator’s jurisdiction, in Ferrari & Kröll 2012, p. 96-97.

<sup>6</sup> Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of January 16 2001. Hereinafter referred to as ‘the Regulation’.

<sup>7</sup> The Regulation is more specifically referred to as Brussels I Regulation to keep it separate from Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, the so called Brussels II regulation.

Court of Justice<sup>8</sup> is the *West Tankers* case<sup>9</sup> from 2009, in which the Court interpreted the arbitration exclusion in the Regulation narrowly. In practice, this watered down the arbitration exclusion. The Court's ruling in *West Tankers* contained among other things the remark that if the the nature of the subject matter in a dispute, i.e. the nature of the rights to be protected, comes within the scope of application of the Regulation, then a preliminary issue concerning the main dispute will also come within its scope of application. In other words, preliminary proceedings relating to arbitration might, according to the Court, fall within the scope of application of the Regulation (depending on the subject matter of the primary issue) and therefore outside the arbitration exclusion clause. Among some commentators critique against the Court for its influence on arbitration in the EU has been loud. A concrete consequence of *West Tankers* is that issuing an *anti-suit injunction*<sup>10</sup> to prevent parallel proceedings is deemed inconsistent with the Regulation, since actions like this may be used maliciously in order to limit a national court's right to decide on its own jurisdiction, and is therefore prohibited under the Regulation.

Anti-suit injunctions represent a type of procedural tactics, which have little, if any, effect outside common law countries.<sup>11</sup> At first sight, anti-suit injunctions interfering with arbitration do not raise the same criticism levelled at traditional anti-suit injunctions because they do not directly interfere with the jurisdiction of a national court. They may seem advantageous when they are pronounced to stay proceedings in favour of an arbitration clause. Arbitration injunctions can have two different

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<sup>8</sup> Hereinafter referred to as 'the Court' as meaning both the the Court of Justice of the European Union and its predecessor, the European Court of Justice.

<sup>9</sup> Case C-185/07 *Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers Inc.* (2009) ECR I-663.

<sup>10</sup> An anti-suit injunction is a prohibition that a court in one Member State issues with the intention to stop a person from bringing or maintaining action in a court in another Member State as a weapon against foreign court proceedings violating an arbitration agreement. See Introduction to the work Gaillard, Emmanuel (ed.). *Anti-Suit Injunctions in International Arbitration*. International Arbitration Institute, IAI Seminar Paris – November 21, 2003. Juris Publishing Inc. New York 2005. Gaillard 2005, p. 1-2; Arbitration-related anti-suit injunctions essentially come in two varieties: they are either directed at foreign court proceedings which have been commenced in breach of an arbitration agreement, or directed at defective arbitral proceedings which are ongoing. Neither case is specifically dealt with in the UNCITRAL Model Law on International Commercial Arbitration. For more, see Bachand, Frederic. *The UNCITRAL Model Law's Take on Anti-Suit Injunctions in Gaillard 2005*.

<sup>11</sup> Anti-suit injunctions tend to be issued only by common law courts; the vast majority of court systems in the EU are civil law systems, which tend to have strong negative views of anti-suit injunctions and would not be likely to grant them in any case. For more on anti-suit injunctions in this context, see e.g. Rainer 2010, p. 433-434, and Ambrose 2008, p. 416-424.

objectives: to restrain the implementation of arbitration proceedings or to prevent actions for enforcement of arbitral awards.<sup>12</sup> A so-called ‘torpedo action’ refers to a malicious attempt by a party to prevent the opposing party from bringing its claim before another national court or an arbitration tribunal, and is therefore considered an abusive form of litigation tactics, potentially harming international arbitration. The use of torpedo actions would essentially mean that a party might be prevented from bringing its claim before a national court if the opposing party files its law suit in another national court first, since the court first seised will gain jurisdiction forcing the court seised second to decline jurisdiction. Such tactics run counter to the principle of mutual trust, which serves as a foundation of the judicial cooperation in the EU and contradict its spirit.

Case law of the Court has shown that the scope of application of the Regulation and the arbitration exclusion in it depends on the substantive subject matter of the dispute in question. If that subject matter falls within the scope of the Regulation, a court which has jurisdiction under the Regulation is entitled to examine whether the arbitration exception applies and, depending on its assessment of the validity of the arbitration agreement, to refer the case to the arbitral body or adjudicate the matter itself.<sup>13</sup> One of the fundamental objectives of international arbitration is to ensure that (unless the parties agree otherwise) disputes will not be resolved in accordance with the procedures of one party's - and not the other party's - home jurisdiction, which may favour, explicitly or implicitly, one party over the other.<sup>14</sup> Court proceedings parallel to arbitration proceedings could lead to two conflicting decisions based on the same legal substance and subsequently creating a confusing situation.

When it was revealed that a revision of the Regulation was being prepared, arbitration stakeholders expected to receive a solution to questions like the abolishment of the

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<sup>12</sup> Lew, Julian D. M. Anti-Suit Injunctions Issued by National Courts. To Prevent Arbitration Proceedings. In Gaillard 2005, p. 26.

<sup>13</sup> See Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, Opinion of Advocate General Kokott, para. 44.

<sup>14</sup> Born 2009, p. 1001. See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article V(1)(b) of 10 June 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 (permitting the refusal to recognize and enforce an arbitral award where the parties are not on equal footing because the party against whom the award is invoked was not given proper notice of the proceedings or was otherwise unable to present a case).

possibility of parallel proceedings, which had been the purpose of issuing anti-suit injunctions. The European Commission identified the Regulation's main deficiencies in its report on the application of the Regulation.<sup>15</sup> The issues identified in the report involved among other matters the scope of application of the Regulation on arbitration proceedings.

The new Regulation will become applicable on matters issued as of 10 January 2015. The result of the revision is that the arbitration exclusion remains unchanged, however with an added recital in the preamble. This has left arbitration stakeholders and legal scholars somewhat confused concerning the reasons for keeping the arbitration exclusion unaltered in the revised Regulation.

## **1.2 Approach to the problem and research method**

The Regulation is considered the most important legal document in the area of civil procedure on EU level. It is also the sole piece of EU procedural legislation that explicitly mentions arbitration. The section in question excludes arbitration from the scope of application of the Regulation, in order to better comply with international legislation, especially the New York Convention. Regulation (EU) No 1215/2012<sup>16</sup> enters into application on 10 January 2015.<sup>17</sup> Naturally, it is difficult to provide any concrete answers regarding the future legal situation in advance. It is left to the Court to rule in the matter of the scope of application of the new Regulation and the effect of the new recitals concerning arbitration proceedings.

The purpose of this thesis is to provide an illustration of past and future case law by analysing legislation, preparatory work, articles, commentaries and, of course, central case law of the Court. Accordingly, the purpose of this work is also to clarify the scope of application of the Regulation in arbitration proceedings. It examines the reasons behind keeping the arbitration exclusion clause unaltered in the new Regulation; there is

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<sup>15</sup> 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.

<sup>16</sup> OJ L 351 of 12 December 2012, p. 1. Hereinafter referred to as 'the new Regulation'.

<sup>17</sup> COM (2013) 554 final, p.2.

no clear consensus among legal scholars and their interpretations of the future legal situation regarding the regulation of arbitration in the EU. The question also encompasses a dimension of complicated situations of conflicting legal principles and different objects of legal protection when interpreting the application of EU law in general, e.g. the principle of mutual trust between Member States and the competence of national courts to decide on their own jurisdiction in a specific case.

### 1.2.1 Subject and research question

The principal question of this thesis ‘*Where are we heading?*’ needs an answer because of the numerous question marks concerning *de lege ferenda* in this particular area of EU law. To answer this the subject of the research has been divided into three questions: 1) what are the factors that have led to the current legal situation in the area of EU civil procedure, in particular concerning arbitration, 2) what does the revision of the Regulation signify in practice, and 3) what will the standpoint of the Court potentially be in future arbitration proceedings in the light of i.e. *West Tankers* and based on the new Regulation.

To answer these questions a general review of the revision of the Regulation is provided, along with an analysis of central case law as well as hypothetical case law based on the new Regulation. The thesis ends with the author’s conclusive remarks.

This thesis is mainly based on the Regulation and its preparatory work, e.g. reports and opinions from various bodies and institutions of the EU. The case law of the Court, commentary on the revision, legal literature on international arbitration and civil procedure in the EU along with procedural principles and terminology are discussed and explained. International views on commercial arbitration and the role of the New York Conventions are also taken into account. This thesis also touches upon the role of the Court as a creator and interpreter of EU legislation and the debate around its influence on the legislative development in the EU.

As the new Regulation will become applicable only in 2015, it is impossible to provide

any watertight truths in the matter. This thesis presents a general picture of the development and brings forth different views on whether the revision answers its purpose, and what that purpose de facto is.

The subject of this thesis is relevant because of the fact that the Regulation specifically states that arbitration falls outside its scope of application. Nevertheless, the stance of the Court in *West Tankers*, which concerned the matter of a national court's jurisdiction and the use of anti-suit injunctions, was that the Regulation became applicable. The Court took the position that the principle of the free circulation of judgments has a stronger foothold in supranational relations in the EU than general principles of arbitration, and that the Regulation thus becomes applicable in certain circumstances. Arbitration practitioners have argued that this ruling weakens the arbitration exclusion in practice, prohibiting the use of anti-suit injunctions, and potentially contributes to the EU becoming an unfavourable centre for arbitration due to the lack of transparency and the risk of jeopardising the purposes of choosing arbitration as a dispute resolution method.<sup>18</sup>

### 1.2.2 Method

The complexity of the problems in this thesis essentially revolves around the arbitration exclusion in Article 1(2)(d) of the Regulation. The attitude towards the exclusion has been quite nuanced since the inclusion into the Brussels Convention<sup>19</sup>. There are different opinions regarding the content of a particular norm and its EU law context, and the question really is about whether the norm in question is linked to EU law or not and thus whether EU law becomes applicable at all.

This thesis is mainly based on legal dogmatics research. EU law constitutes *sui generis*<sup>20</sup>-law, as purposes and principles of EU law differ from what we are used to in

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<sup>18</sup> Parties agree to international arbitration with the objective of obtaining dispute resolution procedures that streamline the arbitral proceedings and allow a speedy, efficient, and expert result. See Born 2009, p. 1002 and Koulu 2008, p. 499.

<sup>19</sup> Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>20</sup> See e.g. case C-26/62 *Van Gend en Loos* (1963) ECR 1, p.12.



national law, and thus requires a scrutiny based on other methods of interpretation.<sup>21</sup> In a legal context, *sui generis* is a term of art used to identify a legal classification that exists independently of other categorisations because of its singularity or due to the specific creation of an entitlement or obligation. The disciplines of legal research can be divided into three wholes, viz. legal dogmatic, legal theory and general sciences of law.<sup>22</sup> The general sciences of law include e.g. legal theory and legal economics. A common direction has been the discipline of legal dogmatics, the research object of which is prevailing law. Legal dogmatics involves the stance regarding norms and the interpretation of norms.

Prevailing law has been given a definition by Alf Ross. According to Ross, the assertion in legal dogmatics that a rule is valid signifies a statement that the rule will be applied in future public authority decisions.<sup>23</sup> In line with the definition, legal dogmatics is to Ross an empirical science in this context. The object for legal dogmatics is the world of ‘*is*’, i.e. the valid norms and the traditional task is interpretation and systematising of the law.<sup>24</sup> The method in this work is mainly legal dogmatic, but it also holds a viewpoint on the world of ‘*ought*’, since it encompasses an analysis and hypothesis on future application of a certain norm in EU procedural law.<sup>25</sup> In other words, it is a matter of an examination *de lege ferenda*. More specifically this thesis examines European civil procedural law.

Koulu, for instance, examines the possible ‘europeanisation’ of procedural law research on a national level.<sup>26</sup> According to him, it is obvious that research in procedural law has changed due to fundamental conversions that have occurred in the societal and economic framework into which its research subject, conflict resolution (the process), is positioned. We have switched to talking about conflict management or conflict resolution that encompasses both traditional procedural law and the new framework.

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<sup>21</sup> Raitio 2013, p. 6.

<sup>22</sup> Hirvonen 2011, p. 21. See also Aarnio 1997, p. 36.

<sup>23</sup> Jyränki 1997, p. 76.

<sup>24</sup> Hirvonen 2011, p. 22.

<sup>25</sup> For an assessment on legal realism, see e.g. Koskeniemi, M. Introduction: Alf Ross and Life Beyond Realism. Koskeniemi 2003, pp. 654-659.

<sup>26</sup> Koulu 2012, p. 492.

Research like this is bound to be multidimensional and empirical.<sup>27</sup> According to Koulu, it is safe to say that modern procedural law is broader and more diverse, theoretical and international than traditional procedural law.<sup>28</sup> The europeanisation-thesis is confirmed by the EU's legislative power. However, Koulu believes that the influence of EU law occurs in an area that is too limited, since it covers only supranational court proceedings.<sup>29</sup>

Legal dogmatics also comprehends a demand for research on what additional material affects prevailing law. The research contains not only systematisation and interpretation of prevailing law, but also other material that affects the norm, e.g. preparatory work and case law.<sup>30</sup> When EU law is at hand, the interpretation emphasises the interaction between the Treaties, directed rights and case law.<sup>31</sup> The importance of fundamental and human rights is also stressed in the evaluation. As we know, the EU Charter of Fundamental Rights<sup>32</sup> is on the same level as the founding Treaties as of 2010, and therefore constitutes binding law in the application and exercise of EU law.

In this case, Article 1(2)(d) of the Regulation constitutes the examined norm in question. The semantic of the norm is however not quite clear. In other words, the content of the wording is not as clear as it *prima facie* would appear. Since this work quite extensively deals with EU law, certain legal principles of EU law become topical. Legal dogmatics also involves research concerning the positioning in issues of balance between legal principles. In EU law, legal principles are often disputed in relation to each other and questions of which interests are more important become relevant to solve a certain imbalance.

The point of departure of this thesis is EU civil procedural law, which is complicated in the sense that the task takes place on many different legal (and partially political) levels. In order to perform this analytical framework one needs to examine the subject through

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<sup>27</sup> *Ibid*, p. 494.

<sup>28</sup> *Ibid*, p. 495.

<sup>29</sup> *Ibid*, p. 496.

<sup>30</sup> Hirvonen 2011, p. 23.

<sup>31</sup> Raitio 2010, p. 5.

<sup>32</sup> Charter of Fundamental Rights of the European Union, OJ C 326 of 26 October 2012.

‘EU spectacles’, which demands a certain *connaissance* of methods and theories used in the research of EU norms and principles. Legal research always demands certain theoretical choices and ponderings before any analyse can be done.<sup>33</sup> Theories used in the research of EU law may be e.g. economic or constitutional. When it comes to the study of the EU Internal Market, many integration theories have gained foothold.<sup>34</sup> In this particular work I will not attempt to apply any EU theories, since it is not apt in this particular task.

Regarding principles of interpretation, EU law constitutes its own outsider system, and different principles are applied than those applied on national legislation. Analysing the case law of the Court is also challenging, since the deliberations of the judges are not public. When it comes to arbitration, the lack of predictability and confidentiality are particularly sensitive matters, because of the fact that the whole purpose of arbitration is to facilitate dispute resolution in trade relations and to render the dispute resolution process effective.

### **1.3 Scope and delimitation**

This thesis encompasses questions of procedural legislation on EU level, in this case, primarily the Regulation and its background, along with its revision. It does not include a description of international arbitration due to its extent and complexity. Nor does it include any deeper plummeting into the world of procedural tactics used in international arbitration.<sup>35</sup> However, the work provides a brief linkage to international conventions, since they affect the overall regulation of arbitration. The New York Convention for instance is directly entwined with the Regulation, and all Member States are members of the New York Convention.

This thesis mainly examines the scope of the arbitration exclusion in Article 1(2)(d) of the Regulation. The issue of the scope of the exclusion constituted only one part of the

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<sup>33</sup> Raitio 2013, p. 2.

<sup>34</sup> See e.g. Raitio 2003, p. 59-62.

<sup>35</sup> The complexity of anti-suit injunctions is illustrated in Baum, Axel H. Anti-Suit Injunctions Issued by National Courts. To Permit Arbitration Proceedings. In Gaillard 2005, p. 20.

overall revision of the Regulation, however, it is one of the most discussed objects of the amendment. There are some confusing factors regarding the new Regulation's preparatory work, e.g. the fact that the original plan to include arbitration into the scope of the new Regulation ended up being rejected, and the arbitration exclusion remained unaltered. This thesis thus concentrates on analysing the different standpoints in the preparatory documents and the result of the revision, especially the added recital (12) in the preamble.

Regarding case law, the Court's preliminary rulings constitute central objects of analyse in this work. Naturally, the case law is highly important because of the fact that it sets the pace of the future and constitutes binding law for all Member States to follow. The very reason for the ongoing debate is also the judgments given by the Court on the interpretation of the Regulation and the scope of Article 1(2)(d). The guidelines of the Court are rather clear, but the question is what effect recital 12 will have on arbitration proceedings in the future. This thesis analyses this question as well.

## **1.4 Structure**

The structure of this thesis is based on a chronological order of happenings. A very tight EU arbitration package is provided in the following Chapter 2 as well as an attempt to illustrate the happenings on the arbitration scene in the EU. After the information feature follows a presentation of case law of the Court concerning the interface between arbitration and the Brussels I Regulation in Chapter 3. In Chapter 4 a systematic run-through of the renewal process of the Regulation is presented, as well as an account and analyse of the preparatory work.

The thesis ends with a simulation of the most central Court judgments concerning the interface between the Regulation and arbitration is presented in Chapter 5. The same Chapter also encloses an analysis of the outcome and future prospects. The work is finalised in Chapter 6, which includes a brief summary and the author's analysis.

## 2 ARBITRATION IN THE EU IN A NUTSHELL

The Treaty on the Functioning of the European Union (TFEU) imposes a duty on the EU to develop judicial cooperation in civil matters having cross-border implications.<sup>36</sup> Such cooperation may be based on the adoption of measures for the approximation of the laws and regulations of the Member States. Thus, as one imperative of the TFEU, judicial cooperation in civil matters aims to tackle obstacles deriving from incompatibilities between the various legal and administrative systems by means of closer cooperation between the authorities of Member States.<sup>37</sup> The main pillar is thereby the principle of mutual recognition and the enforcement of judgments and of decisions resulting from extrajudicial cases, which is prescribed in Article 81(1) TFEU.<sup>38</sup>

The policy area of ‘judicial cooperation in civil matters’ applies to civil matters ‘having cross-border implications’. The objective is to facilitate access to justice and enhance legal security and predictability in litigation, which in some way has a link to at least two Member States. Some of the examples of more specific objectives listed in Article 81(2) TFEU do not expressly refer to cross-border situations<sup>39</sup>, but it is submitted that they should be read in the light of the first paragraph and its reference to cross-border implications.<sup>40</sup>

As an important milestone in enhancing the judicial cooperation in compliance with its duty set out by the TFEU, the Council of the EU adopted the Regulation.<sup>41</sup> The

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<sup>36</sup> Article 81(1) TFEU reads as follows: *The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*

<sup>37</sup> In the study of judicial cooperation in civil matters the emphasis is mainly on procedural rules, but according to commentators, it is situated at the crossroads of procedural law, private international law, and EU law. See Storskrubb 2008, p. 9-12.

<sup>38</sup> Rosas & Armati, p. 191.

It may be noted that this necessarily implies cooperation between courts and authorities that is founded on the principles of mutual recognition and mutual trust: certain acts of secondary law as well as the case law of the Court makes this explicit.

<sup>39</sup> For instance, sub-paragraph (e) simply mentions ‘effective access to justice’.

<sup>40</sup> Rosas & Armati, p. 191.

<sup>41</sup> Storskrubb 2008, p. 136.

Regulation lays down rules governing the jurisdiction in civil and commercial matters. It supersedes the Brussels Convention of 1968, which was applicable between the EU Member States before the Regulation entered into force. The Regulation specifically excludes arbitration from its scope, in order to give way to international agreements, such as the New York Convention.<sup>42</sup> Despite the positive effects achieved by clear common rules introduced by the Regulation, in some areas its application opened up possibilities for abuse contrary to the interests of justice and legal certainty.<sup>43</sup>

## 2.1 Brief overview of the Brussels I Regulation

As with the other parts of what is now the area of freedom, security and justice, judicial cooperation in civil matters started outside the Treaty framework in the form of conventions concluded between some or all of the Member States. One example of early action is the Brussels Convention<sup>44</sup>. The original EEC Treaty<sup>45</sup> enjoined the Member States to enter into negotiations with one another with a view to simplifying the formalities governing the reciprocal recognition and enforcement of judgments. Based on the provision in Article 220 of the EEC Treaty, the Member States negotiated the Brussels Convention. Consequently, it was considered to be linked to the scope of the Treaty and its purpose to facilitate the function of the common market, and thus give rise to an extensive body of case law from the Court.<sup>46</sup>

However, it became generally recognised that intergovernmental forms of cooperation were too slow and too fragmental to guarantee satisfactory results. Using the legal bases, which had been introduced by the Amsterdam and Nice Treaties, the Community legislator started to adopt regulations, in other words legislation directly applicable in

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<sup>42</sup> See *supra* note 16.

<sup>43</sup> The Committee on Legal Affairs of 15 October 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) 748—C7-0433/2010—2010/0383(COD)), p.140.

<sup>44</sup> Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. On the history and development of the Brussels Convention, see e.g. Fletcher 1982, p. 103-111.

<sup>45</sup> Treaty Establishing the European Economic Community of 25 March 1957.

<sup>46</sup> Rosas & Armati, p. 191.

See e.g. Case C-398/92 *Mund & Fester* (1994) ECR I-467, para. 11.

the Member States.<sup>47</sup>

The Regulation forms one of the sets of rules representing the Brussels Regime<sup>48</sup>. Its detailed rules assign jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgments. The Brussels Regime consists of three bodies of regulations: the Brussels Convention<sup>49</sup>, the Lugano Convention<sup>50</sup> and the Regulation. The scope of the Regulation is the same as for the Convention that it superseded.<sup>51</sup>

According to Article 293<sup>52</sup> of the Treaty establishing the European Community (TEC), the Member States are obliged to enter into negotiations as far as it is necessary, in order to ensure access to justice for its citizens and to enhance the principle of mutual trust and the recognition and enforcement of judicial decisions and arbitral awards. The Brussels Convention, and particularly the Court on the application of the Convention, has had a remarkable effect on the international procedural cooperation in the EU.

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<sup>47</sup> *Ibid.*

<sup>48</sup> The Brussels Regime refers to a set of rules regulating the question of jurisdiction in legal disputes of civil or commercial nature between parties resident in different Member States of the EU and the European Free Trade Association (EFTA).

<sup>49</sup> The Brussels Convention has now been reincarnated in the form of the Brussels I Regulation. Moreover, an equivalent regulation in the field of family law, the Brussels II Regulation (Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition of judgments in matrimonial matters and the matters of parental responsibility), has brought jurisdictional and mutual recognition issues in such matters as divorce proceedings and the custody of children into the realm of EU law and the jurisdiction of the Court. See e.g. Case C-435/06 *C* (2007) ECR I-10141; Case C-68/07 *Sundelind Lopez* (2007) ECR I-10403; Case C-195/08 PPU *Rinau* (2008) ECR I-5271 and Case C-403/09 PPU *Deticek* (2009) ECR I-12193. A similar path was followed by the Rome Conventions on the determination of applicable law in matters of contractual and non-contractual obligations: The Rome I and II Regulations were adopted in 2007 and 2008 (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), (2007) OJ L199/40; Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), (2008) OJ L177/6.

<sup>50</sup> Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Lugano Convention is nearly identical to the Brussels Convention. It was entered into between the Member States of the EU and the states belonging to the European Free Trade Association (EFTEA) in 1988.

<sup>51</sup> For further information on the substantive content and normative implications of the Regulation, see e.g. Storskrubb 2008 p. 136-152.

<sup>52</sup> Article 293 TEC: Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: 1) the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals, 2) the abolition of double taxation within the Community, 3) the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries, 4) the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

Nevertheless, some deficiencies were detected that needed attention. In December 1997 the Council appointed a working group to examine the Brussels and Lugano Conventions<sup>53</sup> Simultaneously, the Commission submitted a proposal for a Convention to replace the Brussels Convention on the basis of Article K.3(2) of the TEU.<sup>54</sup> In July 1999 a new Commission proposal was published.<sup>55</sup> The purpose was not to change the Convention in its entirety, but to make a few changes. After some additional proposals, the Regulation was passed and officially entered into force in 2002. Eight years later, the Commission again examined the practical function of the Regulation and contemplated necessary changes to the instrument.<sup>56</sup>

### 2.1.1 'Arbitration exclusion' in the Brussels I Regulation

The exclusion of arbitration from the scope of Regulation was not specifically discussed in the preparatory reports. The Jenard report<sup>57</sup> on the Brussels Convention, which contained the same wording in regard to the exclusion of arbitration, presented two reasons for the exclusion: the existence of many international agreements on arbitration and the preparation of a European Convention providing the uniform law on arbitration.<sup>58</sup> The Schlosser report<sup>59</sup> referred in its reasoning for the exclusion to the fact that all Member States have signed the 1958 New York Convention<sup>60</sup>. The Schlosser report also noted the difficulties where national courts take decisions on the subject matter of a dispute despite an arbitration agreement but does not decide between the two

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<sup>53</sup> Storskrubb 2008, p. 132.

<sup>54</sup> COM (1997) 609, p. 20.

<sup>55</sup> COM (1999) 348, p.1. This proposal was however protracted at this stage.

<sup>56</sup> COM (2010) 748 p. 3.

<sup>57</sup> Jenard, P., Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, 5 March 1979, OJ C 59.

<sup>58</sup> European Convention on International Commercial Arbitration of 21 April 1961.

<sup>59</sup> Schlosser, P, Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol of its Interpretation by the Court of Justice of 5 March 1979, OJ No C 59.

<sup>60</sup> The text of the New York Convention is available at:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (last visited 9 February 2014)



options.<sup>61</sup>

The scope of the arbitration exception has been controversial since the accession of the United Kingdom and Ireland to the Brussels Convention, and it has been a matter of dispute between common and civil law whether the arbitration exclusion should be interpreted broadly or narrowly. The Schlosser Report included a statement that

*‘[t]wo o divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes, which the parties had effectively agreed to be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of ‘arbitration’ if they refer to arbitration proceedings, whether concluded, in progress or to be started’.*<sup>62</sup>

The common law approach seems to be that the provision should apply to all disputes that the parties have agreed should be settled by arbitration, including any secondary disputes before a national court connected with the agreed arbitration, when the civil law approach is that the scope should depend on the substantive subject matter of the dispute.<sup>63</sup>

Admittedly, it is noteworthy that by challenging an arbitration agreement before a court, a party may effectively undercut the arbitration agreement and create a situation of inefficient parallel court proceedings, which may lead to clashing resolutions of the dispute. This effect has to some commentators appeared paradoxal, since a court’s right to examine the validity of an arbitration agreement will probably lead to additional costs and delays, and the whole purpose of having chosen arbitration as a dispute resolution mechanism in the first place.<sup>64</sup> It may also undermine the predictability of the dispute resolution and spur abusive litigation tactics.<sup>65</sup> However, this is a global phenomenon, and does not constitute and EU-specific issue.

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<sup>61</sup> Schlosser report OJ 1979, C 59, 71, para. 62.

<sup>62</sup> *Ibid*, p. 92

<sup>63</sup> *Ibid*, para. 61.

<sup>64</sup> See Koulu 2007, p. 295.

<sup>65</sup> The Commission’s Proposal COM (2010) 748, p. 4.

Due to the arbitration exclusion, the parties to supranational arbitration are referred to other rules of arbitration, the New York Convention for instance. Even though the arbitration exclusion seemingly leaves little room for interpretation, the Court has intervened and declared the Regulation applicable on arbitration proceedings in certain circumstances.<sup>66</sup> This in its turn has led to rather confused reactions among arbitration stakeholder, and the Court's rulings have received strong criticism. The need for a revision of the Regulation became perceptible after the Court's judgment in *West Tankers* in 2009, in which the Court did follow its own guidelines from earlier case law, but, due to the fear at the time of the EU becoming an unattractive centre for arbitration because of the influence of EU law, still caused commotion among commentators.

### 2.1.2 Arbitration case law

In this context three central judgments of the Court are examined, namely cases *Marc Rich*<sup>67</sup>, *Van Uden*<sup>68</sup> and *West Tankers*<sup>69</sup>. All three cases have carved the way for arbitration development in the EU. *Marc Rich* and *Van Uden* were issued under the Brussels Convention, while *West Tankers* followed several years later, under the Regulation.

The *rationale* behind the arbitration exclusion was explained in the Jenard Report by a group of experts set up in connection with the drafting of the Convention, which referred to the existence of many international agreements on arbitration.<sup>70</sup> In other words, it did not seem appropriate to include arbitration in the scope of the Brussels Convention (and, later, of the Regulation) because arbitration was already governed by international arbitration conventions. The justification underlying the arbitration exclusion was recalled by the Court when it was first asked to clarify the scope of the exception in *Marc Rich*, in which the Court specifically referred to the appointment of

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<sup>66</sup> Compare Dicey, para no. 15-003, in Collins 2002 p. 180.

<sup>67</sup> Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* (1991) ECR I-3855.

<sup>68</sup> Case C-391/95 *Van Uden v Deco-Line* (1998) ECR I-07091.

<sup>69</sup> Case 185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* (2009) ECR I-663.

<sup>70</sup> Jenard Report OJ 1979 No C/59 1, p. 13.

an arbitrator by a national court, which it qualified as part of the process of setting arbitration proceedings in motion, therefore concluding that such a measure was covered by the arbitration exclusion.<sup>71</sup>

In *Van Uden*, the Court ruled that a national court on the basis of Article 24 of the Convention (currently Article 31 of the Regulation) could order provisional measures in support of arbitration, since provisional measures do not concern arbitration as such, but the protection of a wide variety of rights, and consequently their place in the scope of the Convention is determined not by their own nature, but by the nature of the rights which they serve to protect.

In the 2009 *West Tankers* case, the Court decided on the one hand that proceedings which lead to the making of an anti-suit injunction in support of arbitration cannot come within the scope of the Regulation, but on the other hand it asserted that they may nevertheless have consequences which undermine the Regulation's effectiveness (in particular, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by the Regulation) and therefore stated their incompatibility with the Regulation.<sup>72</sup>

At this point a brief presentation of the cases is sufficient enough. The case law is presented more scrupulously below, in Chapters 3 and 5. Before that a presentation of the role of the Court and international arbitration conventions is provided in order to present a bigger picture of the general development.

## **2.2 The role of the Court as guardian of EU law**

This section includes a presentation of the central legislation that regulates the actions of the Court and the role of the Court when it comes to interpretation and legislative power. One of the most important features of the Court's case law is that its judgements constitute final decisions on the interpretation of EU law rules.<sup>73</sup> The Court is thus

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<sup>71</sup> Draetta & Santini 2009, p. 741-742.

<sup>72</sup> *Ibid*, p. 742.

<sup>73</sup> Trstenjak, V. The 'Instruments' for Implementing European Private Law – The Influence of the ECJ

responsible for weighing central principles against each other and rendering clarifying judgments concerning for instance objects of legal protection and the purpose of a certain norm.

The Court exercises jurisdiction in the EU. It strives to ensure that EU law is applied in a consistent way and that the organs of the EU do not exceed their jurisdiction. The Court has with its own interpretive actions been able to emphasise in particular the internal legal effects of EU law, especially through Article 267 TFEU and the system of preliminary rulings.<sup>74</sup> Simultaneously, it has increased its own influence in relation to the courts of the Member States.<sup>75</sup>

In performing both its role as the guardian and the vanguard of EU law, the Court has been directed as well as empowered by a provision which started as Article 164 EEC and now is Article 19(1) TEU – calling upon it to ‘*ensure that in the interpretation and application of the Treaties the law is observed*’.<sup>76</sup> This was to be a relatively constrained mandate to check the abuse of powers and to provide judicial protection to those wronged by the legislative or administrative excesses in the EU legal arena.<sup>77</sup>

Through its preliminary rulings, the Court has historically sought to establish legal EU principles to fortify the function of the common market, and to promote the advancement of a political union and EU citizenship.<sup>78</sup> The interpretation given in the rulings not only binds the referring court and the appellate court in the same proceeding but also carries a factual binding power on any other national court.<sup>79</sup> In the 1970’s the main reason for the Court’s judicial activism was to tear down import restrictions between the Member States and hence to stimulate free trade in the community.<sup>80</sup>

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Case Law on the Development and Formation of European Private Law, in Moccia 2013, p. 78.

<sup>74</sup> The Court gives rulings in accordance with Article 19(3) TFEU.

<sup>75</sup> See e.g. C-6/64 *Costa v ENEL* (1964) ECR 585 (primacy of EU law) or C-26/62 *Van Gend en Loos* (1963) ECR I (direct effect).

<sup>76</sup> A central task of the Court is giving preliminary rulings concerning the interpretation of EU law and the validity of statutes given by the EU organs by request of the national courts. See Raitio 2013, p. 169.

<sup>77</sup> Accetto, M. The Past and Possible Future of European Union Judicature, in Bělohávek & Rozehnalová 2011, p. 4.

<sup>78</sup> Raitio 2013, p. 31.

<sup>79</sup> See Case C-66/80 *International Chemical Corporation* (1981) ECR 1191, para. 13.

<sup>80</sup> See C-8/74 *Dassonville* (1974) ECR 837 and C-120/78 *Rewe-Central* (1979) ECR 649 (*Cassis de Dijon*).

The principle of judicial non-interference in international arbitral proceedings is a central pillar of contemporary international arbitration.<sup>81</sup> That said it is understandable why the application of the Regulation on arbitration proceedings can be aggravating to arbitration stakeholders counting on e.g. the precedence of international arbitration conventions. The principle is fundamentally important to the efficacy of the international arbitral process, ensuring that arbitration can proceed, pursuant to the agreement of the parties or under the direction of the tribunal, without the delays, second-guessings, and other problems associated with interlocutory judicial review of procedural decisions.<sup>82</sup>

### **2.3 International arbitration: the New York Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the so-called New York Convention, has been fundamental to all the developments of UNCITRAL in modern arbitration law.<sup>83</sup> Although the main purpose of the New York Convention is the enforcement of awards, it also deals with enforcement of arbitration agreements.

The New York Convention was entered into due to the recognition of the growing importance of international arbitration as a means of settling international commercial disputes. It provides common legislative standards for the enforcement of foreign and arbitral awards. The Convention's principal aim is that foreign arbitral awards are not discriminated against and it obliges convention member states to ensure that such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards.

The New York Convention is considered the driving force behind modern international arbitration<sup>84</sup>, and has been perceived as a bold innovation, perhaps due to its

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<sup>81</sup> Born 2009, p. 1033.

<sup>82</sup> Born 2009, p. 1000.

<sup>83</sup> UNCITRAL Model Law on International Commercial Arbitration. See Lew, Julian D. M. Anti-Suit Injunctions Issued by National Courts. To Prevent Arbitration Proceedings, in Gaillard 2005, p.

<sup>84</sup> Born 2009, p. 1000.

overwhelming success.<sup>85</sup> However, it has also been considered a logical follow-up to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Among the main ideas behind the New York Convention was 1) the elimination of the double *exequatur*, i.e. requiring an *exequatur* only in the country where enforcement of the award is sought, 2) to restrict the grounds for refusal of recognition and enforcement and 3) to switch the burden of proof of the existence of one or more of these grounds to the party against whom the enforcement was sought. As such, it appears that many of the ideas are similar to the ones later implemented in the European context for civil and commercial judgments in the Brussels Convention.<sup>86</sup>

One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure. This principle is acknowledged in the New York Convention and other major international arbitration conventions.<sup>87</sup> Arbitration statutes guarantee the principle in virtually all developed jurisdictions and it is included in and facilitated by the rules of most leading arbitral institutions. The principle of the parties' procedural autonomy is qualified only by the mandatory requirements of applicable national law and, under most developed arbitration statutes, even these requirements are ordinarily limited in scope.<sup>88</sup>

Article V(1)(d) of the New York Convention permits non-recognition of an arbitral award if '*[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*'<sup>89</sup>

Article V(1)(d) is important because it recognises the parties' autonomy to agree upon the arbitral proceedings, including proceedings different from those prescribed by the laws of the arbitral seat. I.e. where the parties have made such an agreement, Article V(1)(d) requires, in effect, that their agreement be followed, notwithstanding contrary

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<sup>85</sup> Storskrubb 2011, p. 686-687.

<sup>86</sup> *Ibid.*

<sup>87</sup> See e.g. Article V the New York Convention.

<sup>88</sup> Born 2009, p. 1004.

<sup>89</sup> Article V(1)(d) the New York Convention.

procedural rules in the seat of the arbitration.<sup>90</sup>

Essential to the arbitral process is the freedom of parties, and arbitrators, to proceed with their chosen dispute resolution mechanism to a final award, which only then may be subject to judicial review. The existence of interlocutory challenges or appeals from arbitrators' procedural decisions would have deeply damaging consequences for the arbitral process. To prevent these consequences, both the New York Convention and other international arbitration conventions and national arbitration statutes either expressly or implicitly adopt a principle of judicial non-interference in international arbitral proceedings. Although seldom remarked upon, this principle plays a central role in ensuring the efficacy of the arbitral process as a means of international dispute resolution.<sup>91</sup>

At the European level, there is no uniform application of the New York Convention, because each Member State interprets its rules independently.<sup>92</sup> On the one hand, this has created a strong competition among the different legal systems, which has fostered the progress of arbitration. On the other hand, such a situation gives rise to some inconsistencies in the functioning of the system, such as parallel proceedings with conflicting decisions, which undermine the certainty and the stability of commercial relations on the EU Internal Market.<sup>93</sup>

Based on the preparatory work of the Brussels Convention and the Regulation, the New York Convention should be applied on arbitration proceedings. Under Article II of the New York Convention, there is an obligation on all States that are party to that Convention to stay court proceedings in favour of arbitration.<sup>94</sup> This provision seems to suggest that if there is a valid arbitration clause, the courts should not be issuing injunctions to stop arbitration. The only qualification to this is that they should not interfere unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'. The fundamental rule therefore is that unless there is no arbitration

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<sup>90</sup> Born 2009, p. 1005.

<sup>91</sup> *Ibid*, p. 1033.

<sup>92</sup> Azzali & De Santis 2012, p. 74.

<sup>93</sup> *Ibid*.

<sup>94</sup> Article II(3) the New York Convention.

agreement, or the arbitration agreement is null and void, inoperative or incapable of being performed, national courts should not interfere with the arbitral process, a big subject in itself.

It has been questioned whether international arbitration is becoming a victim of its own success. International commercial arbitration has increased drastically over the last 40 years, and has thus become the primary method of settling trade disputes.<sup>95</sup> The New York Convention has also received some critique due to its large amount of members and the difficulties that follows when trying to maintain a unifying code that serves the interests and different legal systems of all 149 members states of the New York Convention.<sup>96</sup>

## **3 EXCLUDING ARBITRATION IN PRACTICE – THE BRUSSELS I REGULATION**

### **3.1 Introduction**

As noted above, the scope of the arbitration exclusion has been the subject of debate since the Brussels Convention came into force. The main issues disputed relate to ancillary proceedings, provisional measures and parallel proceedings. The Court has rendered three indicative decisions dealing with these issues. However, they did not succeed in delivering all the necessary answers as to the applicability of the Regulation and to the competence of national courts concerning arbitration or matters relating to arbitration.

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<sup>95</sup> Panico, R. C. Reform of the Brussels I-Regulation: the arbitrator's jurisdiction, in Ferrari & Kröll 2012, p. 83.

<sup>96</sup> The status of the New York Convention is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited 4 February 2014)



## 3.2 A look at significant case law of the Court

The interpretation of the arbitration exception has been on the Court's agenda in a handful of cases. The questions have mainly concerned the interface between arbitration and the Regulation. The Court has ever since the arbitration exclusion was first formulated upheld a consistent line of preliminary ruling in accordance with the principle of mutual trust in the EU.

### 3.2.1 *Marc Rich* – ancillary proceedings

One of the first cases where the Court issued a preliminary ruling in a matter relating to the interface between arbitration and court proceedings was in Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* (1991) ECR I-3855 ('*Marc Rich*'). The case dealt with ancillary proceedings to arbitration and the ruling was given based on the Brussels Convention. Ancillary proceedings are legal proceedings that do not constitute the primary dispute but which aid the judgment rendered in or the outcome of the main action.<sup>97</sup>

In 1989, the Court of Appeal of England and Wales referred three questions on the interpretation of certain provisions of the Brussels Convention to the Court for a preliminary ruling concerning the interpretation by the Court of the 1968 Brussels Convention.<sup>98</sup>

The questions were raised in proceedings between Marc Rich and Co. AH and Società Italiana Impianta PA (Marc Rich and Impianta). In the case, Marc Rich made an offer to purchase a quantity of Iranian crude oil on fob terms from Impianti. Impianti accepted the offer subject to certain further conditions. Marc Rich confirmed acceptance of those further conditions and sent a further message setting out the terms of the contract and including a clause on arbitration. Marc Rich, however, complained that the cargo was

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<sup>97</sup> See Illmer 2011, p. 649.

<sup>98</sup> Case C-190/89 *Marc Rich*, para. 1.

seriously contaminated, causing it to incur a loss in excess of USD 7 000 000.<sup>99</sup>

Impianti then summoned Marc Rich to appear before the Tribunale, which is the Regional Court in Genoa, Italy, in an action for a declaration that it was not liable to Marc Rich. Marc Rich, relying on the existence of the arbitration clause, then lodged submissions to the effect that the Italian court had no jurisdiction. Later on, Marc Rich commenced arbitration proceedings in London, in which Impianti refused to take part. Consequently, Marc Rich commenced proceedings before the High Court of Justice in London for the appointment of an arbitrator based on section 10(3) of the Arbitration Act 1950. As a result, the High Court granted leave to serve an originating summons on Impianti in Italy.<sup>100</sup>

Impianti requested that the order granting leave be set aside, contending that the real dispute between the parties was linked to the question whether or not the contract in question contained an arbitration clause. It considered that such a dispute fell within the scope of the Brussels Convention, and should therefore be resolved in Italy. Marc Rich, on the other hand, took the view that the dispute fell outside the scope of the Brussels Convention by virtue of Article 1 of the Convention. The High Court later held that the Brussels Convention was not applicable in the matter.<sup>101</sup>

The Court of Appeal then decided to stay proceedings and refer the following questions to the Court for a preliminary ruling: 1) Does the exception in Article 1(4) of the Convention extend to any litigation or judgments and, if so, to litigation or judgments where the initial existence of an arbitration agreement is in issue. 2) If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to Article 5(1) of the Convention and/or Article 17 of the Convention, and 3) if the buyers are otherwise able to establish jurisdiction in England than under para. 2 above, whether the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Conventions or, alternatively whether the Court should stay its proceedings under

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<sup>99</sup> *Ibid*, paras 2-4.

<sup>100</sup> *Ibid*, paras 5-6.

<sup>101</sup> *Ibid*, paras 7-8.

Article 22, of the Convention, on the grounds that the Italian court was first seised.<sup>102</sup>

In its judgment, the Court ruled that in order to determine whether a dispute falls within the scope of the Brussels Convention, reference must be made solely to the subject matter of the dispute.<sup>103</sup> 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.

In the case before the Court, it followed that the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Brussels Convention of a dispute concerning the appointment of an arbitrator.<sup>104</sup>

Impianti considered that the arbitration exclusion in Article 1(4) of the Brussels Convention does not apply to proceedings before national courts or to decisions given by them. It contended that ‘arbitration’ in the strict sense concerns proceedings before private individuals on whom the parties have conferred the authority to settle the dispute between them. Impianti bases that view essentially on the purpose of Article 220 of the Treaty, which, it argues, is to establish a complete system for the free movement of decisions determining a dispute. Consequently, it is legitimate to interpret Article 1(4) of the Convention in such a way as to avoid gaps in the legal system for ensuring the free movement of decisions terminating a dispute.<sup>105</sup>

Marc Rich and the governments supported a broad interpretation<sup>106</sup> of the concept of arbitration, which would completely exclude any disputes relating to the appointment of an arbitrator from the scope of the Brussels Convention.<sup>107</sup> With respect to the exclusion of arbitration from the scope of the Brussels Convention, the report by the group of

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<sup>102</sup> *Ibid*, para. 9.

<sup>103</sup> C-190/89 *Marc Rich*, para. 26.

<sup>104</sup> *Ibid*, p. 28.

<sup>105</sup> Bogdan 1996, p. 264.

<sup>106</sup> Magnus & Mankowski 2007, p. 63.

<sup>107</sup> C-190/89 *Marc Rich*, para. 14.

experts set up in connection with the drafting of the Convention<sup>108</sup> explained that there are already many international agreements on arbitration. Arbitration is referred to in Article 220 of the Treaty of Rome. This, and the fact that the New York Convention and other international arbitration conventions work sufficiently, is why it seemed preferable to exclude arbitration.

More particularly, it must be pointed out that the appointment of an arbitrator by a national court is a measure adopted by the Member State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in Article 1(4) of the Convention.<sup>109</sup>

In order to determine whether a dispute falls within the scope of the Brussels Convention, reference must be made *solely* to the *subject matter* of the dispute (author's emphasis).<sup>110</sup> If, by virtue of its subject matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Brussels 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.<sup>111</sup>

It would also be contrary to principle of legal certainty, which is one of the objectives pursued by the Convention for the applicability of the exclusion laid down in Article 1(4) of the Brussels Convention to vary according to the existence or otherwise of a preliminary issue, which the parties basically might raise at any time.<sup>112</sup>

It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.<sup>113</sup>

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<sup>108</sup> OJ 1979 C 59, p. 1

<sup>109</sup> Case C-190/89 *Marc Rich*, para. 19.

<sup>110</sup> Bogdan 1996, p. 286.

<sup>111</sup> Case C-190/89 *Marc Rich*, para. 26.

<sup>112</sup> *Ibid*, para. 27. Regarding the principle of direct effect, reference was made to case C-38/81 *Effer v Kantner* (1982) ECR 825, para. 6.

<sup>113</sup> Case C-190/89 *Marc Rich*, para. 28.

Consequently, the outcome in *Marc Rich* must be that Article 1(4) of the Brussels Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.<sup>114</sup> In other words, the interpretation of the exclusion in *Marc Rich* was broad.

### 3.2.2 *Van Uden* – interim measures

The judgment in Case C-391/95 *Van Uden v Deco-Line* (1998) ECR I-07091 (*Van Uden*) shed light on a certain area of the Brussels Convention. It was held by the Court that interim measures<sup>115</sup> ordered in support of arbitration proceedings could in some cases be covered by the Convention.<sup>116</sup>

In 1995, the Supreme Court of the Netherlands referred eight questions on the interpretation of Article 1(2)(d), Article 3, Article 5(1) and Article 24 of the Brussels Convention.

In 1993 *Van Uden* and *Deco-Line* concluded a ‘slot/space charter agreement’, under which *Van Uden* undertook to make available cargo space on board vessels operated by *Van Uden* to *Deco-Line*. In return, *Deco-Line* was to pay charter hire in accordance with the rates agreed between the parties.<sup>117</sup> *Van Uden* constituted arbitration proceedings in the Netherlands pursuant to the agreement, on the ground that *Deco-Line*

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<sup>114</sup> Bogdan 1996, p. 296.

<sup>115</sup> Interim measures have been defined by the Court as measures designed to safeguard rights the recognition of which is applied for in other proceedings in the court hearing the case on the merits and to preserve the status quo in both fact and law. In practice, such measures will enable the creditor to cover himself against the risk of not being paid by using two techniques: either the debtor is prevented from disposing of his assets or charges are registered on them so that if he does dispose of them they can be recovered from subsequent acquirers. In other urgent situations, purely precautionary measures will not always be enough. The court may therefore order certain interim measures having similar effects to the expected judgment on the merits. The final judgment may confirm or revoke these interim measures. For more, see [http://ec.europa.eu/civiljustice/interim\\_measures/interim\\_measures\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/interim_measures/interim_measures_gen_en.htm) (last visited 9 February 2014), and Illmer 2011, p. 650.

<sup>116</sup> See e.g. Petrochilos, G. C. Arbitration and interim measures: in the twilight of the Brussels Convention (2000), available at <http://www.i-law.com/ilaw/doc/view.htm?id=130220> (last visited 23 February 2014).

<sup>117</sup> C-391/95 *Van Uden*, para. 8.

had failed to pay certain invoices submitted to it by Van Uden.<sup>118</sup> Van Uden also applied to the District Court of Rotterdam for interim relief because Deco-Line was not displaying the necessary diligence in the appointment of arbitrators and that non-payment of its invoices was disturbing its cash flow. In its application, it sought an order against Deco-Line for payment to cover debts due under the agreement. In those proceedings, Deco-Line objected, first, that the Netherlands court had no jurisdiction to entertain the claims. Established in Germany, it could be sued only before the German courts. The President of District Court dismissed that objection on the ground that an order sought as interim relief must be regarded as a provisional measure within the meaning of Article 24 of the Brussels Convention.<sup>119</sup> Referring to Article 126(3) of the Code of Civil Procedure, he decided that, as court of the plaintiff's domicile, he had jurisdiction to entertain an application made by a plaintiff residing in the Netherlands against a defendant with no known domicile or recognised place of residence there. He further concluded that the case had the requisite minimum connection with Netherlands law. The President of the Rechtbank took the view that his jurisdiction was in no way affected by the fact that the parties had agreed to have their dispute determined by arbitration in the Netherlands since, under Article 1022(2) of the Code of Civil Procedure, an arbitration clause cannot preclude a party's right to seek interim relief.<sup>120</sup> By judgment of 21 June 1994, the President of the District Court therefore ordered Deco-Line to pay Van Uden a sum together with interest at the statutory rate.

On appeal by Deco-Line, the Regional Court of Appeal of The Hague nullified that order. In its view, the fact that the case had to have a sufficient connection with Netherlands law meant, in the context of the Convention, that it must be possible for the interim order applied for to be enforced in the Netherlands. The mere fact that Deco-Line could acquire assets there in the future was, it considered, insufficient for that purpose.<sup>121</sup>

A further appeal against that decision was brought before the Supreme Court of the

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<sup>118</sup> *Ibid*, para. 9.

<sup>119</sup> *Ibid*, paras 10-12.

<sup>120</sup> *Ibid*, para. 13-14.

<sup>121</sup> *Ibid*, para 16.

Netherlands, which stayed proceedings and requested a preliminary ruling by the Court on eight questions.<sup>122</sup> The questions raised related to the jurisdiction, under the Brussels Conventions, of a court hearing application for interim relief. The questions both dealt with whether such jurisdiction could be established based on Article 5(1) of the Brussels Convention and whether it could be established based on Article 24. In both cases, the national court's questions relate to the relevance of the fact that the dispute in question is subject to arbitration. The questions concerned whether the jurisdiction of the court hearing the application for interim relief is subject to the condition that the measure sought must take the effect or be capable of taking effect in the State of that court, in particular that it must be enforceable there, and whether it is necessary that such a condition should be met at the time when the application is made. Finally, the national court's questions relate to the relevance of the fact that the case relates to a claim for interim payment of a contractual consideration.<sup>123</sup>

The Court ruled that under Article 1(2)(d) of the Brussels Convention, arbitration is excluded from its scope. By that provision, the Contracting Parties to the Convention intended to exclude arbitration in its entirety<sup>124</sup>, including proceedings brought before national courts.<sup>125</sup>

The experts' report drawn up on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention<sup>126</sup> specifies that the Brussels Convention does not apply to judgments determining whether an arbitration agreement is valid or not. In case it is considered invalid, the Convention does not apply to judgments 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 Brussels Convention are proceedings ancillary to arbitration proceedings,

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<sup>122</sup> See C-391/95 *Van Uden*, para. 17.

<sup>123</sup> *Ibid*, para. 18.

<sup>124</sup> The original framers of the Brussels Convention intended to exclude arbitration matters entirely as there was many international agreements on arbitration to which the Contracting States were parties. At the time the hope was that there might be a separate European agreement for a uniform law of arbitration, which never gained foothold. Magnus & Mankowski 2007, p. 63.

<sup>125</sup> C-391/95 *Van Uden*, para 31. See Case C-190/89 *Marc Rich*, para 18.

<sup>126</sup> OJ 1979 C 59, p. 71, at p. 92-93.

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, if the subject matter of court proceedings are measures not ancillary but rather parallel to arbitration proceedings, the Brussels Convention remains applicable if the subject matter of the parallel proceedings falls within its the scope of application.

However, it must be noted in that regard that interim measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support.<sup>127</sup> They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Brussels Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.<sup>128</sup>

The Court therefore concluded that where the subject matter of an application for interim measures relates to a question falling within the scope *ratione materiae* of the Brussels Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.<sup>129</sup>

Court proceedings parallel and not ancillary to arbitration proceedings thus fall into the scope of the Brussels Convention even if a valid arbitration agreement exists which overthrows the jurisdiction of the Member States' courts for the main proceedings. The fact that a preliminary issue relates to the existence or validity of an arbitration agreement does not affect the exclusion from the scope of the Brussels Convention. The interim measures in the case served to protect arbitration proceedings, and thus the arbitration exclusion becomes applicable.

Thus, where the proceedings in a national court are principally for the purpose of

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<sup>127</sup> C-391/95 *Van Uden*, para. 33.

<sup>128</sup> See Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149, para 32.

<sup>129</sup> C-391/95 *Van Uden*, para. 34.



appointing or removing an arbitrator, fixing the place of the arbitration, enforcing or setting aside an arbitral award, or answering some point of law raised in an arbitration then those proceedings fall outside the Regulation. The less clear cases include e.g. proceedings where the validity of the arbitration is the principal issue, proceedings in which the arbitration agreement is used to challenge jurisdiction, injunctive proceedings to enforce an arbitration agreement, and declaratory proceedings as to the validity of the arbitration agreement. The English view seems to be that the scope of application of the arbitration exclusion should be wide in order to include all these cases would fall outside the scope of the Regulation.<sup>130</sup>

### 3.2.3 *West Tankers* – parallel proceedings

The deficiency of the interface between the Regulation and arbitration hit its peak in Case C-185/07 *Allianz SpA*, formerly *Riunione Adriatica di Sicurtà SpA* and *Generali Assicurazioni Generali SpA v West Tankers Inc* (2009) ECR I-663 (*West Tankers*). In the case the Court ruled that such countermeasures to parallel proceedings as anti-suit injunctions do not comply with provisions of the Regulation, thus, leaving, according to some commentators, no room for effective mechanisms to avoid parallel proceedings.<sup>131</sup>

In 2000, the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA (Erg), collided and caused damage in Syracuse, Italy, with a jetty owned by Erg. The charterparty was governed by English law and contained a clause providing for arbitration in London, United Kingdom. Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision.<sup>132</sup>

Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings against West Tankers before the Tribunale di

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<sup>130</sup> Magnus & Mankowski 2007, p. 64.

<sup>131</sup> On parallel proceedings and anti-suit injunctions, see e.g. Illmer 2011, p. 650-651.

<sup>132</sup> C-185/07 *West Tankers*, paras 9-10.

Siracusa, Italy, in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction because of the existence of the arbitration agreement.<sup>133</sup>

In parallel, West Tankers brought proceedings before the High Court of Justice of England and Wales, Queens Bench Division (the Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').<sup>134</sup>

The Commercial Court upheld West Tankers' claims and granted the anti-suit injunction sought against Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to the Regulation. The House of Lords first referred to the judgments in *Gasser*<sup>135</sup> and *Turner*<sup>136</sup>, which decided in substance that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State cannot be compatible with the system established by the Regulation, even where it is granted by the court having jurisdiction under that regulation. That is because the Regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States, which must trust each other to apply those rules correctly.<sup>137</sup>

However, in the view of the House of Lords, that principle cannot be extended to arbitration, which is completely excluded from the scope of the Regulation based on Article 1(2)(d). In that field, there is no set of uniform EC rules, which is a necessary

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<sup>133</sup> *Ibid*, para. 11.

<sup>134</sup> *Ibid*, para. 12.

<sup>135</sup> Case C-116/02 *Gasser* (2003) ECR I-14693.

<sup>136</sup> Case C-159/02 *Turner v Grovit* (2004) ECR I-3565. In the case the Court held that granting an injunction restraining foreign proceedings before a court of another Member State on the ground of abuse of process was inconsistent with the Brussels Convention.

<sup>137</sup> Case C-185/07 *West Tankers*, paras 13-14.

condition in order that mutual trust between the courts of the Member States may be established and applied. Moreover, it was considered clear from the judgment in *Marc Rich*<sup>138</sup> that the exclusion in Article 1(2)(d) of the Regulation applies not only to arbitration proceedings as such, but also to legal proceedings the subject matter of which is arbitration.

The judgment in *Van Uden*<sup>139</sup> stated that arbitration is the subject matter of proceedings serving to protect the right to determine the dispute by arbitration, which was the case in the main proceedings. The House of Lords added that since all arbitration matters fall outside the scope of the Regulation, an injunction addressed to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa cannot infringe the Regulation.<sup>140</sup>

Finally, the House of Lords pointed out that the courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, it pointed out that if the courts in other Member States also adopted the practice it would make the EC more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.<sup>141</sup>

In those circumstances, the House of Lords decided to stay its proceedings and to refer the matter to the Court for a preliminary ruling. The House of Lords asked the Court if it is consistent with the Regulation for a court of a Member State to issue an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement.<sup>142</sup>

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<sup>138</sup> Case C-190/89 *Marc Rich*.

<sup>139</sup> Case C-391/95 *Van Uden*.

<sup>140</sup> Case C-185/07 *West Tankers*, paras 15-16.

<sup>141</sup> *Ibid.*, para. 17.

<sup>142</sup> *Ibid.*, para. 18.

Before this debated decision, the Court was already dealing with the respective problem or at least with the interconnected issues in *Marc Rich, Van Uden and Mostaza Claro*<sup>143</sup>. In *West Tankers Inc.*<sup>144</sup>, the parties had agreed upon an express arbitration clause, whereby London was to be the seat of arbitration, and therefore subject to English law. Despite this arbitration clause, the Court held that the English court's grant of an anti-suit injunction to uphold the arbitration agreement was incompatible and inconsistent with the Regulation.

The Court reasoned that allowing the English court to grant an anti-suit injunction directly stripped other Member State courts of the ability to examine their own jurisdiction's questions pursuant to the Regulation, thereby violating the mutual trust among EU Member States.<sup>145</sup> The Court thus appears to have adopted the civil law view of an anti-suit injunction, finding an anti-suit injunction as directly interfering with foreign jurisdictions and the principle of international comity.<sup>146</sup>

The Court also stated that an anti-suit injunction that stops another Member State court from taking legal proceedings regarding the validity or applicability of an arbitration agreement means that a party by referring to the arbitration agreement deprives the possibility of the other party to plead the case in the court where (s)he brought action in accordance with the Regulation. This would in practice mean that the counterparty was deprived of a form of court protection (s)he has the right to.<sup>147</sup> The Court thus ruled that anti-suit injunctions are incompatible with the Regulation.<sup>148</sup>

The Court's ruling in *West Tankers* was not surprising as such, since it corresponded to its earlier case law.<sup>149</sup> The Court has been rather clear on the matter that the division of competence between the Member State courts is directly based on the Regulation. Each court where legal proceedings have been taken has the right to examine its competence

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<sup>143</sup> Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* (2006) ECR I-1042 (consumer protection and arbitration).

<sup>144</sup> See supra note 69.

<sup>145</sup> Case C-185/07 *West Tankers*, para. 29.

<sup>146</sup> Kim 2011, p. 574; Case C-185/07 *West Tankers*, para. 30.

<sup>147</sup> *Ibid*, para. 31.

<sup>148</sup> *Ibid*, para. 34.

<sup>149</sup> See also the Court's ruling in cases C-116/02 *Eric Gasser GmbH v MISAT Srl* (2003) ECR I-1469 and C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd., Changepoint SA*. ECR I-3578.

in the matter. Consequently, a court in another Member State is never considered to have stronger jurisdiction in the matter of deciding whether the first-mentioned court is competent or not.<sup>150</sup> An anti-suit injunction issued by a Member State court towards another Member State court therefore intrudes on the competence division between the Member State courts in a way that is unacceptable according to EU law.

Taking into consideration that the question of interpretation in *West Tankers* concerned the anti-suit injunction, which has little or no value outside of England<sup>151</sup>, the critique may seem surprising.<sup>152</sup> The critique has however foremost been directed against the way in which the Court has been considered to have watered out the arbitration exclusion. The fear after the judgment in *West Tankers* was that the result would be that international arbitration with seat in the EU would be avoided in favour of seats outside the EU, e.g. Zürich, New York or Singapore.<sup>153</sup> However, in retrospect the fear was uncalled for.

Blaming the Court for having left arbitration agreements within the EU vulnerable for attack would be wrong. As a matter of law, its decision in *West Tankers*, as unsatisfactory as the result may have been for some, was justified. For the reasons given by the Court, anti-suit injunctions are incompatible with the Regulation. The problem at the heart of the matter is parallel proceedings in relation to the validity of an arbitration agreement. It was not for the Court to predetermine this reform in one way or another. Hence, the Court's decision in *West Tankers* was an expression of judicial self-restraint rather than stepping out of its area of competence.<sup>154</sup>

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<sup>150</sup> See case C-116/02 *Gasser*, para. 48 and case C-159/02 *Turner*, para. 26.

<sup>151</sup> Anti-Suit Injunctions originated in common law jurisdictions. English courts, for example, started to grant these discretionary remedies two centuries ago. See Lew, Julian D.M. *Anti-Suit Injunctions Issued by National Courts. To Prevent Arbitration Proceedings*, in Gaillard 2005, p. 25.

<sup>152</sup> Knuts 2011, p. 498.

<sup>153</sup> Knuts 2011, p. 497-498. See also Wilson, Maura E. *Let Go of That Case! British Anti-Suit Injunctions Against Brussels Convention Members*. *Cornell Int'l Law Journal* Vol. 36, 2003, p. 207-226.

<sup>154</sup> Illmer 2011, p. 655.

### **3.3 General outlines of the Court concerning the application of the Regulation in arbitration proceedings**

To summarise the outlines of the Court's rulings in matters concerning arbitration we can observe a rather consistent interpretive positioning in the cases presented above. Essentially, it is a question about the subject matter of the case, and the question of whether there is a real connecting link between the subject matter of the case and the territorial jurisdiction of the Member State of the court in which the case is pending, in other words, the competence of the court.

What seems to emerge from the decisions in *Van Uden* and *Marc Rich* is that the exception in Article 1(2)(d) is to be limited to cases in which the subject matter of the case is arbitration.<sup>155</sup> An examination of *West Tankers* brings to the fore the fundamentally opposed views civil and common law jurisdictions hold of anti-suit injunctions in the context of international commercial arbitration.<sup>156</sup> The outcome of *West Tankers* was however that anti-suit injunctions are incompatible with the Regulation because of the potentially negative influence they have on the parties' legal protection and the mutual trust between the Member States.

## **4 REVISION OF THE BRUSSELS I REGULATION**

On 6 December 2012, the European Parliament and the Council adopted Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The primary objective of adopting the Regulation was to facilitate the circulation of judgments and to further enhance access to justice within the EU. The revised Regulation will apply to legal proceedings instituted on or after 10

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<sup>155</sup> Such as the appointment or dismissal of arbitrators, orders fixing the place of arbitration, judgments on the validity of arbitration agreements and corresponding orders not to continue arbitration proceedings, or proceedings concerning the revocation, amendment, recognition and enforcement of arbitral awards.

<sup>156</sup> Rainer 2010, p. 434.

January 2015.<sup>157</sup> The new Regulation introduces some key changes aiming to make the recognition and enforcement of judgments given by courts in Member States easier and more effective; however, contrary to the arbitration community's expectations, the Regulation has not fully succeeded in clarifying the contentious interface between legislation and arbitration.

#### 4.1 Preparatory work

In preparation of the new Regulation, the Commission consulted stakeholders and sought extensive external expertise on the matters discussed. It adopted a Green Paper launching a public consultation in April 2009 and commissioned four studies addressing different issues of the reform. Empirical data supporting the preparation of the impact assessment was collected, and the Commission also organised two major conferences, a meeting with national experts and two meetings with experts on arbitration. An inter-service steering group within the Commission provided additional comments.<sup>158</sup>

The revision did not change the arbitration exclusion and Article 1(2)(d) of the Regulation still simply declares that the Regulation will not apply to arbitration. The purpose of the Regulation is established as being the promotion of free circulation of judgments in the area of civil matters in the EU, in accordance with the principle of mutual trust and the guidelines in the Stockholm Programme.<sup>159</sup>

In the next section follows a systematic run-through of the central preparatory work of the new Regulation. The preparatory work illustrates the interplay between the bodies of

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<sup>157</sup> Article 66 of the new Regulation reads as follows: 1) This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. 2) Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

<sup>158</sup> SEC (2010) 1548 final, section 1.

<sup>159</sup> In December 2009 the European Council adopted a legislative plan for 2010-2014 called '*The Stockholm Programme — An open and secure Europe serving and protecting citizens*'. The Stockholm Programme contains, *inter alia*, plans concerning the conclusion by the EU of international agreements in the field of private international law. OJ C 115, 4.5.2010, p.1. See also the Council's press release "*Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU*" (16599/12).

the EU, and also includes the opinions of arbitrations stakeholders and legal scholars of the Member States. Since the preparatory work encompasses the Regulation as a whole, only issues relating to the arbitration exception are presented.

#### 4.1.1 European Commission

The Commission prepares, enforces and supervises the obedience of secondary legislation enacted by the European Parliament and the Council. The role of the Commission is remarkable especially regarding its power of initiative in EU legislation matters. The Commission is a fully independent organ of the EU, which pushes the EU's general interests, and which cannot accept any instructions whatsoever from any Member State government. The Commission is an administrative body that is mainly responsible for for e.g. the realisation of collective policies.<sup>160</sup> The Commission declares that the new Regulation sets out rules determining the international jurisdiction of the courts of the Member States and rules preventing parallel proceedings before the courts of different Member States. It also lays down rules for the recognition and enforcement of judgments of national courts in other Member States.<sup>161</sup>

#### *The Heidelberg report*

The Heidelberg report<sup>162</sup> was published in 2008 by request of the Commission. The goal of the report was to compile a survey of the implementation of the Regulation in the Member States and to draw up proposals for its improvement. One of the main objects discussed was the question of the arbitration exclusion in the Regulation.

The Heidelberg report is an empirical study based on interviews, statistics and practical research in the files of national courts. The main feedback was that the Regulation is widely appreciated. For instance, one interviewee stated, '*[t]he Judgment Regulation is*

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<sup>160</sup> Raitio 2013, p. 118.

<sup>161</sup> COM (2013) 554 final, p. 2.

<sup>162</sup> Heidelberg report (Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) was compiled by Burkhard Hess, Thomas Pfeiffer and Peter Schlosser.



*the best piece of legislation we've ever got from Brussels*'.<sup>163</sup> The report contains several improvement proposals, mainly to develop the general function of the Regulation as an instrument of European Procedural Law.

In relation to arbitration, the Heidelberg report suggested a deletion of the arbitration exclusion completely, although most of the national reports were critical towards a possible extension of the Regulation to arbitration. The question of recognition and enforcement of arbitral awards should thereby be kept outside the scope of the Regulation, giving full effect to the New York Convention. However, the primacy of the New York Convention does not exclude provisions concerning interfaces between the Regulation and the Convention, such as the enforcement of an arbitration agreement, ancillary measures, recognition and enforcement as well as conflicts between arbitral awards and judgments.<sup>164</sup>

To tackle the problem of the possible existence of parallel proceedings and conflicting judgments the authors suggested including the following provision as a new Article 27A of the Regulation:

*A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity and/or the scope of that arbitration agreement.*<sup>165</sup>

Historically the arbitration exclusion has been defined as referring to the functioning relationship between the Brussels Regime and the New York Convention. As follows from the Heidelberg report, the Regulation has nevertheless been considered to work quite well. The report introduced two improvement proposals: either to completely remove Article 1(2)(d) from the Regulation in order to maintain the priority of the New York Convention through Article 71 of the Regulation, or to tackle the interplay

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<sup>163</sup> Heidelberg Report, p. 1.

<sup>164</sup> Heidelberg Report, paras 116-120.

<sup>165</sup> *Ibid.*, para 134.

between arbitration and the Regulation.<sup>166</sup> The first alternative was presented as a proposal for a new Article 22(6) of the Regulation:

*The following courts shall have exclusive jurisdiction, regardless of domicile, (...) (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place.*<sup>167</sup>

In other words, the purpose of the article is to clarify that only the Member State court where the arbitration proceedings first took place has the competence to rule proceedings that support arbitration.<sup>168</sup> This matter was touched upon in case *Marc Rich* (ancillary proceedings)<sup>169</sup>.

The report also touched upon the question of parallel proceedings concerning the validity of an arbitration agreement in different Member States.<sup>170</sup> It brought forth a need to decide that it should be obligatory to stay proceedings in order to avoid parallel proceedings. The proposal, sometimes called an anti-torpedo<sup>171</sup>, was included in the proposed Article 27A.

According to the proposal, the court must stay proceedings in case the defendant questions the competence of the court. By deciding that courts in other Member States have to await ruling from the court of the seat of arbitration, it would be possible to avoid parallel procedures concerning the arbitration agreement.<sup>172</sup>

The Heidelberg report also deals with the question of the seat of arbitration. A guideline was presented as follows:

*The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent, lacking such a designation the*

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<sup>166</sup> Heidelberg Report, para. 133.

<sup>167</sup> *Ibid*, para. 132.

<sup>168</sup> Knuts 2011, p. 499.

<sup>169</sup> See *supra* note 70.

<sup>170</sup> Heidelberg Report, para. 134.

<sup>171</sup> Knuts 2011, p. 500.

<sup>172</sup> *Ibid*.

*court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.*<sup>173</sup>

In other words the parties have to decide on where the seat of arbitration is situated, or decide that the seat of arbitration is situated in the Member State where the arbitration proceedings *de facto* takes place. In accordance with the case law of the Court, Article 1(2)(d) of the Regulation is to be interpreted broadly.

### *The Commission's report on the application of the Regulation*

The Commission's report<sup>174</sup> to the European Parliament, the Council and to the European Economic and Social Committee (EESC) concerning the application of the Regulation was prepared in accordance with Article 73 of the Regulation, and its purpose is to present an evaluation of the application of the Regulation in five years from the day that the Regulation has entered into force. A Green Paper that contained proposals on how some questions that had been presented in the report could be improved in the future followed the Report. Both the Report and the Green Paper were published in 2009.

According to the report, the logical ground behind the arbitration exclusion is the New York Convention that regulates the recognition and enforcement of arbitration agreements and arbitration awards.<sup>175</sup> It is repeated in the Commission's report that the Regulation is considered to be a well functioning instrument, nevertheless with some deficiencies.<sup>176</sup>

### *The Green Paper*

Based on the Heidelberg report the Commission published a Green Paper<sup>177</sup>

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<sup>173</sup> Heidelberg Report, para. 125.

<sup>174</sup> COM (2009) 174 final.

<sup>175</sup> COM (2009) 174, p. 9.

<sup>176</sup> COM (2009) 174, p. 3.

<sup>177</sup> 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, 21 April 2009 (COM (2009) 175 final).

accompanying the report. One of the main questions in the Green Paper concerned the disputed relationship between the Regulation and arbitration.

The report and the Green Paper indicated possibilities of a complete and partial deletion of the arbitration exclusion.<sup>178</sup> About the problems concerning parallel proceedings the priority was suggested to be granted to the court at the seat of the arbitration to decide on the validity of an arbitration agreement, potentially supplemented by a time limit and a uniform conflict rule on the law applicable to the validity of arbitration agreements. In addition, the Commission suggested enhancing recognition and enforcement of arbitral awards across the EU supplementing the New York Convention.

The significance of arbitration for international business life is touched upon in the Green Paper, in which it is stated that arbitration agreements should be given the strongest possible effect and that the recognition and enforcement of arbitration awards should be encouraged.<sup>179</sup> The importance of a smooth circulation of judgments in the EU and the prevention of parallel proceedings is specified to represent the main reason to regulate arbitration, otherwise the New York Convention is considered to be a sufficient tool for arbitration practices.

The Green Paper brings forth a proposal for a partial abolishment of the arbitration exclusion from the Regulation. The prognosis for such an abolishment is that court proceedings supporting arbitration may come within the scope of application of the Regulation, and that a special rule regulating the jurisdiction in such cases would increase legal protection. An abolishment would possibly also ensure that all rules in the jurisdiction of the Regulation would be applied on the issuing of precautionary measures in procedures that support arbitration (not just Article 31<sup>180</sup>). It was also stated

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<sup>178</sup> Green Paper suggested that a (partial) deletion of the arbitration exclusion from the scope of the Regulation could improve its interface with court proceedings. See The Green Paper, p 9.

<sup>179</sup> Green Paper, p. 8. Regarding the arbitration exclusion a question (no 7) was asked in the Green Paper: ‘Which action do you consider appropriate at Community level: 1) To strengthen the effectiveness of arbitration agreements; 2) To ensure a good coordination between judicial and arbitration proceedings; 3) To enhance the effectiveness of arbitration awards?’

<sup>180</sup> Article 31 of Council Regulation (EC) No 44/2001 reads “Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”

that an abolishment of the exclusion possibly would allow for the recognition and enforcement of judgments ruling on the validity of an arbitration agreement and clarifying the recognition and enforcement of judgments that are ancillary to an arbitration award, which in its turn would prevent parallel proceedings between courts and arbitration tribunals where the agreement is considered to be invalid in one Member State and valid in another.<sup>181</sup>

The Green Paper also deals with the question of the division of labor between courts and arbitration tribunals. The coordination between proceedings concerning the validity of an arbitration agreement is not clear. An alternative could be to prioritise the Member State courts where the seat of arbitration is situated, to decide on the existence, validity and scope of arbitration agreements. A unanimous rule of conflict is suggested to decrease the risk that the agreement is considered invalid in one Member State and valid in another. The rule of conflict could for instance be to provide information about which Member State's legislation will be applied on the agreement.

An additional rule is proposed in the Green Paper. A rule that would give permission to refuse the recognition of a judgment that is incompatible with an arbitration agreement that has been recognised in accordance with the New York Convention. An alternative to this could be to award the court where the arbitration agreement was created exclusive competence to confirm the enforcement of the judgment as well as procedural fairness. Afterwards the judgment could circulate freely in the EU. A third alternative proposed the use of Article VII<sup>182</sup> of the New York Convention to further simplify the recognition of arbitration awards on EU level.<sup>183</sup>

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<sup>181</sup> Green Paper, p. 9.

<sup>182</sup> Article VII 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting State nor deprive any interested party if any right he may have to avail himself of an arbitral award by the law or the treaties of the country where such award is sought to be relied upon. 2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

<sup>183</sup> Green Paper, p. 9; European Parliament Committee's proposal concerning the position of arbitration in the EU clearly opts for arbitration. As soon as an arbitration clause is at stake, each EU state is freed from the jurisdictional constraints of the Regulation. See *Hans van Houtte*: European Parliament Committee Expresses Views on Arbitration and Court Jurisdiction, Kluwer Arbitration Blog 12 July 2010.

### *The Commission's proposal*

In June 2010, the Commission finally appointed a group of experts to examine the interface between the Regulation and arbitration. This was a result from the critique that followed the reform. The expert group's task involved the examination of every aspect of the interface between arbitration and the Regulation. The expert group gave its recommendations to the Commission in the autumn of 2010. However, the result of the expert group's assessment is covered by the secrecy of the drafting procedure and has thus not been presented in public.<sup>184</sup>

After the consultation, the Commission presented its proposal for a revised Regulation in December 2010.<sup>185</sup> The proposal includes a specific rule on the relation between arbitration and court proceedings. It obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. This modification was asserted to enhance the effectiveness of arbitration agreements in Europe, preventing parallel court and arbitration proceedings, and eliminating the motivation for abusive litigation tactics.<sup>186</sup> The Commission states in its proposal that Member States cannot by their own means ensure that arbitration proceedings in their Member State are properly coordinated with court proceedings going on in another Member State, since the effect of national legislation is limited by the territoriality principle. Action at EU level was therefore deemed necessary.<sup>187</sup>

In the proposal for the new Regulation four main deficiencies were identified: 1) the procedure of exequatur, 2) access to justice in the EU, 3) the efficacy of choice of court agreements, and 4) the interface between arbitration and the Regulation. The overall purpose of the revision was to further develop the European judicial area by abolishing

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<sup>184</sup> Knuts 2011, p. 503.

<sup>185</sup> COM (2010) 748, final. 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 of 14 December 2010.

<sup>186</sup> COM (2010) 748 final, p. 9.

<sup>187</sup> *Ibid*, p. 11.

remaining obstacles in favour of the free circulation of judgments in accordance with the principle of mutual trust. The proposal refers to the Stockholm Programme<sup>188</sup> and the goals set out there by the European Council.<sup>189</sup>

Taking into consideration the interface between arbitration and the Regulation, many arbitration associations expressed their concern regarding the effect of *any* regulation on the leading role of the European arbitration centre on a global level.<sup>190</sup> On the other hand, many stakeholders recognised the problems in question and supported future proceedings. The viewpoints diverged regarding the best way in which to proceed, i.e. either by actively favouring arbitration agreements or by excluding arbitration from the scope of the Regulation in a broader respects.<sup>191</sup>

It is thus evident that the Commission through its proposal has abandoned the standpoint it took in the Green Paper, i.e. that the Regulation would be applicable also on arbitration. The Commission has not accepted the position in the Parliament's Resolution either, in which an expansion of the arbitration exclusion was suggested. Instead the proposal provides a third basis, i.e. that the arbitration exclusion is kept unaltered and that arbitration thus continuously falls outside the Regulation's scope of application, but that the interface between arbitration and Regulation shall be regulated in a better way than earlier, in order to prevent parallel proceedings.<sup>192</sup>

According to the proposal, a new Recital (11) should be inserted in the preamble of the Regulation:

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<sup>188</sup> At a meeting in Brussels on 10 and 11 December 2009 the European Council adopted a new multiannual programme called 'The Stockholm Programme – an open and secure Europe serving and protecting citizens'. The Stockholm Programme sets out the EU's priorities for the area of justice, freedom and security for the period 2010-14. Building on the achievements of its predecessors the Tampere and Hague programmes, it aims to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens.

<sup>189</sup> COM (2010) 171, final, of 20 April 2010. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Delivering an area of freedom, security and justice for Europe's citizens, Action Plan implementing the Stockholm Programme, p. 19.

<sup>190</sup> 'Arbitration has become an industry sector generating considerable turnover at the preferred arbitral seats around the world.2 Against this background it does not come as a surprise that competition for the best place to arbitrate is increasingly played hardball.' Illmer 2011, p. 646.

<sup>191</sup> The Commission's proposal COM (2010) 748, p. 5.

<sup>192</sup> Knuts 2011, s. 503.

*This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.*<sup>193</sup>

The proposal also included a statement that the efficiency of arbitration agreements needs improvement in order to give full effect to the parties' will. This would be the case especially when the seat of arbitration is situated in a Member State. The Regulation would thus include a specific rule, the purpose of which would be to avoid parallel proceedings and the use of abusive procedural tactics. The seat of arbitration would imply a place the parties have chosen or a place that has been appointed by an arbitration tribunal or by some other authority that has been directly or indirectly chosen by the parties.<sup>194</sup>

According to the proposal, arbitration is thus still excluded from the scope of application of the new Regulation, but instead an additional recital has been added to Article 1(2)(d) that now regulates that it is not applicable on arbitration, except in the cases stated in Article 29(4) and 33(3).

Article 29(4) was suggested as follows:

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

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

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

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<sup>193</sup> COM (2010) 748 final, p. 15.

<sup>194</sup> COM (2010) 748, p. 16.



In other words the new article contains a rule that regulates the relationship between arbitration and court proceedings, which did not exist prior to the revision. According to the Proposal, in case the defendant objects that a court is not competent, the court must stay proceedings if the defendant initiates an arbitration proceeding, the seat of which is situated in the EU, or pleads a case in a Member State court where the seat of arbitration is situated, and the arbitration tribunal or the court is obliged to decide on the existence, validity of effect of the arbitration agreement.<sup>195</sup>

Article 33(3) was proposed as follows:

*For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution.*

It is specified in the proposal what Article 29(4) refers to and that arbitration proceedings have been initiated. Arbitration proceedings are considered initiated when a party has appointed an arbitrator or requested that an institution, a public authority or a court shall appoint the arbitration board.<sup>196</sup>

#### **4.1.2 European Parliament**

Nowadays the legislative power of the EU is divided between the European Parliament and the Council, which has been cut out for increasing EU democracy. The Parliament constitutes the most important discussion forum of the EU, where the most central political and national views of the Member States are brought forward.<sup>197</sup> The European Parliament and the Council together enact a regulation, a directive or a decision based on the European Commission's proposal.<sup>198</sup>

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<sup>195</sup> Knuts 2011, p. 504.

<sup>196</sup> *Ibid.*, p. 505.

<sup>197</sup> Raitio 2013, p. 134.

<sup>198</sup> Article 289(1) TFEU.

### *The Parliament's resolution*

With the European Parliament's resolution,<sup>199</sup> the Parliament's Committee on Legal Affairs gave its report as an answer to the Green Paper. In the resolution the Parliament draws the conclusion that arbitration is regulated in a satisfactory way by the New York Convention and by the 1961 Geneva Convention. Thus, the standpoint of the Parliament is that the arbitration exclusion ought to be kept unaltered in the Regulation and it strongly opposes even a partial abolition of the exclusion.<sup>200</sup> The rules of the New York Convention are considered minimum rules and the Member States are free to include legislation in favour of the competence of arbitration boards and arbitration agreements if they consider it necessary. The Parliament also states that it could result in considerable disturbances if exclusive competence would be prescribed to the Member State court where the seat of arbitration is situated, in the way that is suggested in the Heidelberg Report.<sup>201</sup>

The Parliament touches upon the need for a continued access to the use of anti-suit injunctions as one of many national procedural tactics for the support of arbitration. The effect of such proceedings, and the court order that follows in the other Member State, must be left to fall under the scope of the law in that Member States, as the case was prior to the judgment in *West Tankers*.

Regarding the regulation of arbitration, the Parliament opposes an abolishment of the arbitration exclusion, even a partial one. According to the Parliament not only arbitration, but also legal proceedings where the subject matter or an ancillary or preliminary question deals with the examination of the competence of arbitration tribunals or the validity of their decisions, would not fall under the scope of the Regulation.

Moreover, the Parliament believes that Article 31 of the Regulation ought to be

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<sup>199</sup> European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140 (INI)).

<sup>200</sup> *Ibid*, see paras 9-11.

<sup>201</sup> Knuts 2011, p. 502.

broadened with a paragraph according to which a judgment should not be recognised if the court in the original Member State also has rendered a judgment concerning the validity or the extent of an arbitration clause, and in that connection disregarded a rule on arbitration in the Member State where enforceability is sought, if the judgment in that Member State does not give the same result as if the arbitration law of the Member State where enforceability was sought had been applied.<sup>202</sup> This should also be clarified in a recital.

### *The Parliament's proposal*

In June 2011, the European Parliament published its Draft Report.<sup>203</sup> The report, in which the opinion of the European Economic and Social Committee (EESC) has been taken into consideration, a new recital (11)<sup>204</sup> is presented, according to which the Regulation shall not apply on arbitration.

The Parliament's new recital (11) was suggested to read as follows:

*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration or from staying or dismissing the proceedings and 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, regardless of whether the court decided on this as a principal issue or as an incidental question.*

*On the other hand, where a court, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration*

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<sup>202</sup> European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), para. 10.

<sup>203</sup> Draft Report 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) 748 – C7-0433/2010 – 2010/0383(COD)) 28.6.2011.

<sup>204</sup> The European Parliament's Proposal, p. 12-14.

*agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised and, 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, which takes precedence over this Regulation.*

*This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of the 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.*

*There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.*

*A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.*

*However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect party autonomy, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.*

The Parliament is of the opinion that the impact of arbitration agreements must be improved to more effectively in order to give full effect to the parties' will, especially when the agreed or decided seat of arbitration is in a Member State.

The Commission recommends special rules to avoid parallel proceedings and the use of abusive procedural tactics in such circumstances. Regarding this matter the EESC joins the Parliament's position that was presented in the Green Paper. In other words, that arbitration is sufficiently covered by the New York and Geneva Conventions. All Member States are members of both Conventions, and therefore the arbitration exclusion must remain unchanged in the Regulation. The above-mentioned Recital (11)

would be available to clarify the legal situation.<sup>205</sup>

#### 4.1.4 Council of the European Union

The Council of the European Union nowadays constitutes a user of legislative power together with the European Parliament<sup>206</sup>, since the use of so called ordinary legislative procedure has grown more common.<sup>207</sup> In the current situation, it would be an exaggeration to say that the Council is the central user of legislative power, since the former EC Article 202 has been revoked in connection with the entry into force of the Lisbon Treaty.<sup>208</sup>

On 6 December 2012, the Council adopted the revised Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>209</sup> As recommended by the Council, the amended Regulation includes a recital on arbitration<sup>210</sup>, which seems more elaborate and thus requires some analysis. 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 seised of an action in a*

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<sup>205</sup> The European Parliament's Draft Report of 28 June 2011 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. 6.

<sup>206</sup> The Council enacts secondary law, generally in cooperation with the Parliament. The Council has to reach its decisions unanimously or through a majority decision in accordance with Article 238 TFEU or with a qualified majority.

<sup>207</sup> The ordinary legislative procedure gives the same weight to the European Parliament and the Council of the European Union on a wide range of areas (for example, economic governance, immigration, energy, transport, the environment and consumer protection). The European Parliament and the Council adopt the vast majority of European laws jointly.

<sup>208</sup> The content of Article 202 EC has been altered. The corresponding rules are Article 16(1) TEU and Articles 290 and 291 TFEU.

<sup>209</sup> Regulation (EU) No 1215/2012 of 12 December 2012 (recast).

<sup>210</sup> Recital 12 in the preamble of Council Regulation (EU) No 1215/2012. The reason why the recital is now numbered 12 is because the addition of a new recital 11 based on the Proposal for a regulation amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (2013) 554 final), which includes the so-called "patent package" in the Regulation (EU) No 1215/2012. Recital 11 now contains a clarification of the term "court": "*For the purposes of this Regulation, courts or tribunals of the Member States should include courts or tribunals common to several Member States, such as the Benelux Court of Justice when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore, judgments given by such courts should be recognised and enforced in accordance with this Regulation*".

*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, 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 recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.*

*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.*

Recital (12) repeats the arbitration exclusion and defines its scope through some clarifications. It clearly states that Member State courts have the right to refer parties to arbitration, stay or dismiss proceedings, or examine the validity of an arbitration agreement. However, the rulings on the validity of an arbitration agreement are not subject to the rules of recognition and enforcement of the Regulation—although the same does not apply to the substance of the dispute. Moreover, the recital grants precedence to the New York Convention over the Regulation and allows the recognition and enforcement of arbitral awards by Member State courts according to the former, even if the arbitral award conflicts with a judgment of another Member State court. Finally, the proceedings ancillary to arbitration, such as the establishment of an arbitral tribunal, the conduct of arbitration or the annulment, review, appeal, recognition or

enforcement of an arbitral award, do not fall within the Regulation's scope.<sup>211</sup>

The main question arising from the wording of recital (12) is whether it provides a sufficient legal basis for interpretation of the arbitration exception in a way that would allow the reintroduction of anti-suit injunctions in the tool case of lawyers in the EU context. The answer may be interpreted as negative since the requirement of mutual trust remains intact. Thus, a Member State court has no authorisation to grant an anti-suit injunction in relation to proceedings brought in another Member State in breach of an arbitration agreement.

### *Summary*

As has been observed, the preparative work on the new Regulation shows an inconsistency in opinions. The Heidelberg report included two improvement suggestions: to either completely exclude the arbitration exclusion to ensure the precedence of the New York Convention, or alternatively through clarifying the interface between arbitration and the Regulation. The first suggestion was presented together with a new Article 22(6) in the Regulationen that in its turn would solve the issue of which courts should have exclusive jurisdiction in ancillary proceedings supporting arbitration. The question of where the place of arbitration is was to be solved in a recital. The report also suggested adding a new Article 27A to resolve the issue of parallel proceedings.

The Green Paper suggested a partial abolishment of the arbitration exception, due to the opinion that arbitration agreements should be given the strongest possible effect and that the New York Convention provides sufficient rules in that matter. It also proposed adding a special rule regulating the jurisdiction in order to ensure legal protection.

Concerning the validity of arbitration agreements, a rule of conflict should be added to provide information on which Member States' legislation will become applicable on an

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<sup>211</sup> See the Council's 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). 2010/0383 (COD), p. 61.

arbitration agreement in a specific situation. An additional rule was proposed that would give permission to refuse the recognition of a judgment that is incompatible with an arbitration agreement that has been recognised in accordance with the New York Convention. According to the Green Paper an alternative to this could also be to award the court where the arbitration agreement was created exclusive competence to confirm the enforcement of the judgment as well as procedural fairness. Afterwards the judgment could circulate freely in the EU. A third alternative proposed the use of Article VII of the New York Convention to further simplify the recognition of arbitration awards on EU level.

The statement in the European Parliament's answer to the Green Paper was that the New York and Geneva Conventions regulate arbitration in a satisfactory way. Therefore, the arbitration exclusion ought to be kept unaltered in the Regulation, and it strongly opposed even a partial abolition of the exclusion. The opinion was that abolition could result in considerable disturbance if exclusive competence would be prescribed to the Member State court where the seat of arbitration is situated, in the way that is suggested in the Heidelberg report. The Parliament also touched upon the need for a continued access to the use of anti-suit injunctions as one of many national procedural tactics for the support of arbitration, i.e. a restoration of the situation pre *West Tankers*. Moreover, the Parliament proposed a broadening of Article 31 of the Regulation with a paragraph according to which a judgment should not be recognised if the court in the original Member State also has rendered a judgment concerning the validity or the extent of an arbitration clause, and in that connection disregard a rule on arbitration in the Member State where enforceability has been sought. For further clarification, a complementing recital was suggested.

The Commission's proposal included a specific rule on the relationship between arbitration and court proceedings. Through its proposal, the Commission evidently abandoned the position it had taken in the Green Paper. The Commission did not accept the standpoint in the Parliament's resolution either, in which an expansion of the arbitration exclusion was presented. The proposal instead included a third basis, that the arbitration exclusion was to be kept unaltered but with an added recital as well as a special rule in order to avoid parallel proceedings and the use of abusive procedural



tactics. It proposed that the Regulation should not be applicable on arbitration, with the exception of the cases stated in 29(4) and 33(3), articles that constituted new additions to the Regulation.

## **4.2 Assessment of the Revision**

The new Regulation introduces some key changes originally aiming to make the recognition and enforcement of judgments given by courts in Member States easier and more effective. However, contrary to the arbitration community's expectations, the Regulation has not fully clarified the interface between the Regulation and arbitration.

In the new Regulation, international arbitration has been specifically excluded from the Regulation's material scope in a similar way that international arbitration was excluded from Article 1(2)(d) of the current Regulation (EC) No 44/2001. The main argument for excluding international arbitration from these regulations is that the Council evidently is trying to preserve the smooth operation of the New York Convention.

We now arrive at the question of what objectives lay beneath this line of development. After *West Tankers* it was argued among others things that the risk of frustrating the arbitration process is particularly high when a party initiates legal proceedings in a Member State where the judicial process is particularly slow and/or complex, or more likely to favour a local litigant. This could entail unanticipated and potentially significant costs incurred in dealing with the foreign court proceedings.<sup>212</sup> Furthermore, such court proceedings parallel to the arbitral proceedings could ultimately lead to two conflicting decisions based on the same legal content, i.e. an arbitral award and a national court judgment, which are irreconcilable.

The debate regarding the regulation of arbitration in the EU has thus been loud mostly because of the economic point of view of keeping arbitration out of reach from EU legislation and ensuring speed and cost-efficiency. In many cases the debate also originate from common law-countries, where anti-suit injunctions are better known and

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<sup>212</sup> Ippolito & Adler-Nissen 2013, p. 2.

accepted as a procedural tactic used in arbitration. The reason for the outcome in *West Tankers* however was the Court aiming to preserve the goals set out by the Regulation, i.e. promoting the principle of mutual recognition between the Member States and securing the legal protection of parties' that have arrived at an arbitration agreement, and subsequently not intervening in arbitration more than is absolutely necessary.

What remains unresolved though is the issue of parallel legal and arbitral proceedings. By not giving court decisions on the validity of arbitration agreements binding effect, the EU legislators have accepted that legal proceedings and arbitral proceedings concerning the same substance may occur. Thereby, the EU legislators have also accepted the related risk of divergent decisions, or at least left this to be resolved by the courts of the Member States *in casu*. However, if an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts should have no reason not to refer the parties to arbitration.<sup>213</sup>

Juxtaposed, the first and second paragraphs of recital (12) seem to eliminate the malicious use of anti-suit injunctions. The first paragraph 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. The second paragraph provides that, if the foreign court reaches a decision on this matter, it has no binding effect on other Member State courts, which are therefore free to give their own ruling. The beneficial effect of these clarifications is that while parallel court proceedings may still be brought in foreign courts, such proceedings will not prevent arbitral proceedings from commencing or continuing with support from the courts of the seat.<sup>214</sup>

The third paragraph of recital 12 is the mirror image of the second one. It explains that even though a preliminary decision on the validity of an arbitration agreement is in itself not subject to the rules of recognition and enforcement in the new Regulation, the judgment on the merits of the matter should still be recognised and/or enforced. Furthermore, the paragraph adds that the new Regulation does not interfere with the

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<sup>213</sup> Opinion of Advocate General Kokott in *West Tankers*, para. 73.

<sup>214</sup> Ippolito & Adler-Nissen 2013, p. 6.

rules on recognition and enforcement of arbitral awards in the New York Convention.<sup>215</sup>

These statements seem obvious and reasonable. But, at the same time, they highlight that the new Regulation does not fully solve the issue of parallel legal and arbitral proceedings. The fourth paragraph of recital 12 emphasises that the arbitration exception also covers court proceedings related to or in support of the arbitral process (ancillary proceedings). The examples given seem merely to codify what the Court has already stated in its case law.

The new recital (12) does appear to provide for a more arbitration-friendly interpretation of the Regulation, and the fourth paragraph of the recital does expressly state that ancillary proceedings related to the arbitral process fall outside its scope. The legality of anti-suit injunctions would however require a clear legal basis in the wording of the new Regulation.

In conclusion, the clarifications of the new Regulation are welcome but, obviously, they do not provide a clear insight in future scope of the arbitration exclusion and there are also still some deficiencies left unsolved. For example, it does not provide for a solution regarding a party seeking to enforce an arbitral award in a Member State where a national court has held the arbitration agreement invalid. Similarly, a party dissatisfied with the judgment on the validity of an arbitration agreement could initiate proceedings in another Member State, since the latter's court is not bound by the first decision as it falls outside the scope of the Regulation. In the end, the EU legislators seem to have opted more or less for a *status quo*, since the absence of a clear wording still in practice permits parallel proceedings and abusive litigation tactics that challenge international arbitration. Whether the new Regulation will have an impact on arbitration and any form of anti-suit injunction to protect arbitration will be permitted in the EU will probably take years of court practice to clarify.

Arbitration matters are excluded from the Regulation, whether the matter in question is preliminary or not. Thus, the Court's core holding, from which every other position in

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<sup>215</sup> *Ibid.*

its decision derives, has been vitiated by recital (12) of the Recast.<sup>216</sup> It will be much more difficult to assert that an anti-suit injunction preventing such a ruling is within the scope of the Regulation.<sup>217</sup> Recital (12) says that ‘nothing in the Regulation’ should prevent a Member State court from examining an arbitration agreement for validity. However, an anti-suit injunction to protect arbitration is not ‘in the Regulation.’ Rather, it could be considered an ancillary proceeding, which is not covered by the Regulation. Those related actions or ancillary proceedings to which the Regulation should not apply are dealt with in the fourth paragraph of recital (12).<sup>218</sup>

It is clear that the different opinions mainly express a positive stance towards keeping arbitration outside the scope of the Regulation. The problem seems to be reaching an agreement on how the ‘loopholes’ should be filled in order to simultaneously secure legal protection and the principle of mutual trust in the EU. The predominance of the New York Conventions is also undisputable. It is obvious that the preparatory phase aroused an intensive debate concerning the function of the arbitration exclusion. The fact that the Regulation had worked in a satisfactory way came up several times in the different opinions, and also the sufficient functioning of the New York Convention. However, after *West Tankes* it was clear that the matter had to be regulated in some way. The exclusion itself had not earlier caused any problems, but arbitration proceedings still needed a detailed definition in relation to general principles of EU law.

An unaltered Article 1(2)(d) that excludes arbitration from the scope of the Regulation therefore formulated the result presented by the Council, along with an added explanatory recital (12). It is quite obvious that this solution is a compromise based on the strong views that arbitration needs to be kept outside the influence of EU law. However, the added recital codifies the guidelines set earlier by the Court and justifies the Court’s potential involvement in future cases regarding arbitration proceedings. However, the length and complexity of the recital does not really make the legal

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<sup>216</sup> Opinion of Moses, M. in ‘Will Antisuit Injunctions Rise Again in Europe?’. (Moses 2013)

<sup>217</sup> *Ibid.*

<sup>218</sup> ‘*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.*’

situation more transparent or predictable for future implementation. It also seems like the compromise amounts to an attempt to cover every aspect, which in practice waters out the effect the added recital could have disclosed, already in advance.

## **5 EXCLUDING ARBITRATION IN PRACTICE – THE REVISED BRUSSELS I REGULATION**

Above in Chapter 3 the outlines of the Court’s rulings in matters concerning arbitration have been summarised. In this chapter an attempt to take the aforementioned cases and apply the new Regulation on them is presented. This thesis thus includes an assessment of whether the revised Regulation will change the legal situation regarding future arbitration practices in the EU. As has been noted, the arbitration exclusion still exists unchanged in the new Regulation, but recital (12) has been added to the preamble to explain the situations that cases *Marc Rich*, *Van Uden* and, especially, *West Tankers* have proven difficult.

### **5.1 Case law hypothesis – recital (12)**

Article 1(2)(d) of the Regulation still simply states, ‘*This Regulation shall not apply to... arbitration.*’ A clarifying recital has nevertheless been added to the preamble in the new Regulation. Recital (12)<sup>219</sup> of the new Regulation has been presented above in section 4.1.4.

In comparison with Regulation (EC) No 44/2001, which did not contain a clarifying recital regarding the interpretation of the arbitration exclusion, the added recital now specifies the link between the Regulation and arbitration. The recital specifically states that New York Convention takes precedence over the Regulation in arbitration proceedings. But it also clarifies that where a Member State court exercising jurisdiction under the Regulation or under national law has determined that an arbitration agreement

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<sup>219</sup> Regulation (EU) No 1215/2012, recital 12 in the preamble, p. 2.

is null and void, inoperative or incapable of being performed, should not prevent that court's judgment on the substance of the matter from being recognised and enforced in accordance with this Regulation, however in context with the New York Convention.

*Marc Rich* and *Van Uden* indicated a rather broad interpretation of the arbitration exclusion, whereas in *West Tankers*, the interpretation of the Court was narrower. It is now left to see what future case law will look like, and whether the Court will succeed in creating consistent guiding principles as to the interpretation of Article 1(4)(d) of the new Regulation and the consistency with the principle of mutual trust.

### 5.1.1 *Marc Rich*-hypothesis

The happenings in *Marc Rich* have been described above, in section 3.2.1

In order to determine the scope of application of the Brussels Convention, one must look at the subject matter of the dispute. If the subject matter of the main dispute is for instance the appointment of an arbitrator, the Convention does not become applicable. If there is an ancillary matter that the court must resolve in order to resolve the main dispute, the Convention does also not become applicable. This constitutes a broad interpretation of the arbitration exclusion in that the whole procedural setting arbitration in motion is covered by the exclusion.

In *Marc Rich* the question is about one party denying that the proceedings pending before the national court concerns the appointment of an arbitrator. The 'principal or real dispute between the parties', it contended, relates to the existence of an arbitration agreement. Without doubt, that question appears at the present stage of the proceedings to be the most important. From the procedural point of view, it is merely an incidental issue or a preliminary issue. According to one party, the question of the existence of an arbitration agreement must be settled *before* the appointment of an arbitrator can be proceeded with.<sup>220</sup>

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<sup>220</sup> Opinion of Advocate General Darmon in Case C-190/89, para. 25.

It is clearly stated in recital (12) that excluding arbitration from the scope of the Regulation is intended to be interpreted rigidly. The recital specifically states that other Member States cannot interfere, except when it comes to the determination whether an agreement exists at all; Advocate General Darmon also brought up this matter in his opinion in *Marc Rich*.<sup>221</sup> A judgment determining whether an arbitration agreement is valid or not, or, because it is invalid, ordering the parties not to continue the arbitration proceedings was not covered by the Brussels Convention.<sup>222</sup> Part of recital (12) in the new Regulation also states that a ruling given by a Member State Court as to whether or not an arbitration agreement valid should not be subject to the rules of recognition and enforcement set out in the Regulation, regardless of whether the court decided on this as a primary or ancillary issue. However, if the court considers the agreement invalid, this judgment should be recognised and enforceable in the EU in accordance with the third section of recital (12) of the new Regulation.

The new Regulation is still intended to exclude arbitration in its entirety, and to give way to the New York Convention, and so my conclusion in the *Marc Rich*-hypothesis is that the outcome of the case essentially would be the same on the basis of Regulation (EU) No 1215/2012, i.e. that the matter falls outside the scope of application of the new Regulation and that the guidelines in the New York Convention are sufficient.

### 5.1.2 *Van Uden*-hypothesis

A description of *Van Uden* is presented above, in section 3.2.2.

The arbitration exclusion in the Brussels Convention was intended to be very broad, including proceedings before national courts. However, if the subject matter of court proceedings is not preliminary, but rather *parallel* to arbitration proceedings, the Brussels Convention remains applicable *if* the subject matter of the parallel process falls within the scope of the Convention (author's emphases).

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<sup>221</sup> Opinion of Advocate General Darmon in Case C-190/89, para. 24.

<sup>222</sup> OJ 1979 C 59, p. 93, para. 64.

In *Van Uden*, the question concerns interim measures, which, according to the Brussels Convention, are not in principle preliminary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern the protection of a wide variety of rights rather than arbitration as such. The scope of the Convention was thus determined by the nature of the rights the interim measures served to protect.

In the hypothetical case of *Van Uden* being played out on the basis of the new Regulation, the first thing to note is that Article 24 of the Brussels Convention has been altered. The corresponding article is Article 31 of the new Regulation, which reads as follows:

*Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.*

*Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.*

*Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.*

*Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.*

Article 5(1) of the Brussels Convention has also been changed, and according to the new Regulation Article 5(1) persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2-7 of Chapter II in the new Regulation. However, the same content as in Article 5(1) of the Brussels Convention can be retrieved in Article 7(1)(a) in the new Regulation.<sup>223</sup>

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<sup>223</sup> Article 7(1)(a) states that a person domiciled in a Member State may be sued in another Member State



In *Van Uden*, the Court ruled that since the subject matter of the case concerned is arbitration, the Brussels Convention is therefore not applicable. According to the new Regulation, my conclusion is that the subject matter will also not be arbitration in a case like this. Moreover, the Court ruled that on a proper construction, the granting of provisional or protective measures on the basis of Article 24 of the Brussels Convention is conditional on, *inter alia*, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

However, even though the Court had ruled that the subject matter in *Van Uden* was not arbitration, and that the Brussels Convention thus would be applicable in the case, the result may not have been the same on the basis of the new Regulation, because of Article 31. Whereas Article 24 of the Convention stated that '*[a]pplication may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter*', Article 31(1) of the new Regulation states that '*[t]hese actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court*'. Consequently, based on Article 31(1) of the new Regulation, the subject matter would not matter as such, since Article 31(1) specifically prohibits any other court than the court first seised to take action, and so to avoid parallel proceedings.

### 5.1.3 *West Tankers-hypothesis*

A description of *West Tankers* is provided above, in section 3.2.3.

The restriction of a person from commencing/continuing proceedings in another Member State on the ground that it is breach of an arbitration agreement constituted the use of an anti-suit injunction. The case is interconnected with *March Rich* and *Van*

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n matters relating to a contract, in the courts for the place of performance of the obligation in question.

*Uden* and concerns the existence of an arbitration clause. The English court's grant of an anti-suit injunction to uphold the arbitration agreement was incompatible with the Regulation because it strips other Member State courts of the ability to examine their own jurisdiction, and thus violates the principle of mutual trust between Member States.

Also, anti-suit injunctions were considered incompatible because of the fact that they stop other courts from taking legal proceedings regarding the validity or applicability of an arbitration agreement. By referring to an arbitration agreement it deprives a party from the possibility of pleading the case in the court where it brought action based on the Regulation. Thus, it constitutes a deprivation of a form of legal protection.

In *West Tankers*, the deficiency of the interface between the Regulation and arbitration hit its peak, and this case is the main reason why the discussion around the revision of the Regulation has been so heated. Some commentators have been agitated because of the prohibition of using anti-suit injunctions as a means to ensure efficient arbitration proceedings, and many commentators and legal scholar believed that the new Regulation would have dealt with the deficiency more clearly. On the other hand, arbitration stakeholders have also been quite satisfied of the status quo and the potential weakening of the arbitration exclusion.

The conclusion is that the function of the anti-suit injunction is 'baked' into recital (12), in stating that the Regulation should not apply to arbitration, and that nothing in the Regulation should prevent a Member State court, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with its national law.

The recital also explains that a ruling given by a Member State court 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 the Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. This implies that the issue with parallel proceedings has been

dealt with in a quite satisfactory manner. It also implies that the principle of mutual trust does not apply in arbitration proceedings that fall outside the scope of the Regulation.

However, recital (12) also declares that where a Member State court, exercising jurisdiction under the Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or enforced in accordance with the Regulation. This part of the recital also confirms the priority of the New York Convention. However, it looks like this second part of the recital is the mirror image of the first part, which may prove to be rather confusing.

To sum up, based on recital (12) in the preamble of the new Regulation, nothing in the Regulation prevents the courts of a Member State from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. Consequently, anti-suit injunctions used as torpedo actions are not compatible with the new Regulation.

Lastly, the recital declares that the Regulation should not apply to ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of arbitration proceedings or any other aspects of such proceedings. Moreover, the Regulation should not apply to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

This last part of recital (12) clearly restates the question of subject matter, which has been the main outcome of *Marc Rich* and *Van Uden*. Accordingly, when the subject matter of a case is arbitration, the new Regulation is not applicable on the ancillary proceedings or actions relating to the arbitration proceedings. Manifestly, it is left to the courts of the Member States to interpret the question of subject matter *in casu*.

My conclusion concerning the hypothetical *West Tankers* case and the outcome of it based on the new Regulation and recital (12) is that the Court has manifested its earlier

case law and through this advocates the competence of the national courts to examine their own jurisdiction. Therefore the outcome would be more or less the same today, since *West Tankers* quite obviously has motivated the wording of the recital, and the legislator has undoubtedly used it as a base to codify the result in a recital in order to ensure a consistent interpretation in future cases, and thereby also promote transparency.<sup>224</sup>

## 5.2 Trading torpedos for trust?

According to Born essential to the arbitral process is the freedom of parties, and arbitrators, to proceed with their chosen dispute resolution mechanism to a final award, which only then may be subject to judicial review.<sup>225</sup> The emphasis in Europe on e.g. procedural fairness and the principle of mutual trust is sometimes mocked in less controlled states such as the United States that promote an effective arbitration system for businesspersons.

As a conclusion of the hypothetical part above, the conclusion is that the Court and the EU legislators clearly have promoted general EU principles, such as the principle of adequate legal protection, before efficient procedural tactics supporting arbitration, such as anti-suit injunctions. However, the addition of the recital (12) also improved the protection of arbitral proceedings from abusive torpedo actions that have a harmful effect on arbitration proceedings.

Recital (12) allows for the courts of the seat of arbitration to rule on the validity of an arbitration agreement, even if the issue has already been raised before another Member State court. Furthermore, it provides that, if the foreign court reaches a decision on this matter, it has no binding effect on other Member State courts, which are therefore free to give their own ruling. The beneficial effect of these clarifications is that while parallel court proceedings may still be issued in foreign courts, such proceedings will not prevent arbitral proceedings from commencing or continuing with support from the

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<sup>224</sup> For more on the transparency challenge in the EU, see Tiili, V. Transparency – An Everlasting Challenge in Cardonnel, in Rosas & Wahl 2012, p. 473-485.

<sup>225</sup> Born 2009, p. 1033.

courts of the seat of arbitration.<sup>226</sup> In order to determine whether an anti-suit injunctions is justified or not, one would have to look into every case to see whether the lawyers are using it as a tool rather than something that has merit in the particular case. Lew for instance states that past cases reviewed to see how most arbitrators react to anti-suit injunctions show that it is clear that the injunctions were used as a device to stop or delay the arbitration process, and thus crippling the arbitration process.<sup>227</sup>

Knowing that the Member State courts now are able to rule in a case with the support of the Regulation and that they cannot lose competence because of fired torpedo actions, it will lead to an enhanced level of trust and improved judicial cooperation. However, the revision still shows some weaknesses that need to be addressed in the future in order to clarify these issues. While the Commission is setting up rules with the Member States and the execution of EU policies in mind, it must not be forgotten that these very states are members of other conventions and treaties as well. The ratification of a treaty or convention brings obligations that the members need to fulfil. Setting up rules that contravene the obligations under such conventions puts the Member States in the uncomfortable position to decide whether to follow the affected convention or whether to adhere to EU rules.

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<sup>226</sup> *Ibid.*

<sup>227</sup> Lew, Julian D. M. Anti-Suit Injunctions Issued by National Courts. To Prevent Arbitration Proceedings, in Gaillard 2005, p. 27.

## 6 WHERE ARE WE HEADING? – SUMMARY AND CONCLUSIVE ARGUMENTS

*‘The text of a regulation might seem clear enough but capable of a surprising result if interpreted literally.’*

Ronald Dworkin<sup>228</sup>

Complex cases, which raise several intertwined questions either as a matter of claim or as defence where some of the issues could fall outside the scope of the Regulation, are undisputably difficult. The case law lacks real consistency and the problems are particularly intricate. The issues mainly relates to ancillary matters, indirectly raised claims, preliminary issues or preliminary proceedings, defences, incidental questions and provisional measures.<sup>229</sup>

Based on the information presented above we have now seen that the arbitration exception in the Regulation, though explicit, was in practice somewhat watered out by the Court that interpreted the arbitration exclusion narrowly and expanded the scope of Regulation (EC) No 44/2001 to comprise matters ancillary to arbitration, widening the opportunity for parallel proceedings, leading to extended disputes and prohibiting the use of anti-suit injunctions against other Member States’ court proceedings in breach of an agreement to arbitrate. The cases seem to indicate that the principal subject matter of the dispute is an excluded matter, for instance arbitration, and then the entire dispute is excluded from the scope of the Regulation, including any incidental or preliminary matter that would otherwise be included. Provisional measures in support of civil and commercial claims that would otherwise be excluded, under Article 1(2)(d) are within the ambit of the Regulation.

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<sup>228</sup> Dworkin 2006, p. 6.

<sup>229</sup> Magnus & Mankowski 2007, p. 66.

If the main subject matter of the proceedings is not an excluded matter, it appears that the proceedings are within the scope of the Regulation. This is so despite the possibility of incidental, preliminary or ancillary matters falling outside the scope of the Regulation.<sup>230</sup> This proposition includes any defences raised. Proceedings, which do not directly derive from an excluded matter, are included within the scope of the Regulation.<sup>231</sup> Given that the Regulation allows declaratory proceedings, a well-advised litigant may take advantage of local law to frame the issues in the proceedings to fall within or without the Regulation to its benefit.<sup>232</sup>

In particular, in *West Tankers*, the Court referred to the general rule that apart from a few exceptions the Regulation does not empower a court of one Member State to rule on jurisdiction of a court of another Member State. It also found that anti-suit injunctions run counter to the principle of mutual trust between the Member States if they hinder the court of another Member State in the exercise of the powers conferred on it by the Regulation, namely ‘*to decide, on the basis of the rules defining the material scope of the Regulation, including Art. 1(2)(d), whether the Regulation is applicable*’. Broadly speaking, this means that according to the Court, court proceedings related to arbitration fall within the scope of the Regulation and thus outside the arbitration exception. Consequently, issuing an anti-suit injunction to prevent those proceedings would be inconsistent with the Regulation, as this would prevent the court from exercising the power to rule on its own jurisdiction. This in practice could frustrate the arbitration process severely, especially in cases where a party initiates proceedings in a Member State characterised by a slow and/or complicated judicial system. In addition, such court proceedings parallel to the arbitral proceedings could ultimately lead to two conflicting decisions on the same substance.

The revised Regulation (EU) No 1215/2012 included an attempt to clarify the confusing legal situation by adding a recital to the preamble describing the meaning and use of Article 1(2)(d). The recital however, trying to include all the different situations that have been discussed based on the Court's preliminary rulings affecting arbitration in the

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<sup>230</sup> Jenard report, p. 10.

<sup>231</sup> *Ibid*, p. 12.

<sup>232</sup> Magnus & Mankowski 2007, p. 66.

EU, is also confusing in that it seemingly contradicts itself in stating both that anti-suit injunctions are prohibited and that courts do have the right to examine their own jurisdiction (even though the principal goal is to refer the parties to arbitration if an arbitration agreement exists). This may not really abolish the use of malicious anti-suit injunctions in reality, since they are still a possibility in practice.

The question is whether starting legal proceedings in a national court, knowing the consequences it causes (and potentially knowing that the arbitration agreement could be contested in a court), constitutes an illegal procedural tactic when used maliciously, and does it in that case have the same legal definition as in a case where one of the parties genuinely questions the arbitration agreement and needs the protection of possible court proceedings examining the agreement in front of a national court.

Essentially, the matter is about giving different legal definitions to the same act. The legislator has probably considered this, but has still concluded that the principle of mutual trust has a stronger foothold than protecting party confidentiality in arbitration. Moreover, it is clear from the recital that the intention of the new Regulation indeed is to exclude arbitration, and the point of departure in regulating the competence of national courts is not to cripple arbitration proceedings, but to protect the exercise of the powers conferred on the national courts by the Regulation.

EU law has always been destined to form a complete legal order based on a solid construction of fundamental rights or principles and even though it is founded on the principle of conferral from the Member States, it has developed as a 'supranational legal order'.<sup>233</sup> When it comes to judge-made law and different interpretative methods, the question of transparency will probably always remain somewhat unsatisfactory, in the sense that it is almost impossible to attain in a rapidly changing society and social structure.

So where are we heading? Comparing Koulu's view back in 2007 that an intervention from the EU on arbitration is far away in the future with the development that

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<sup>233</sup> Arestis 2013, p. 12.



commenced around the same time, it can probably be agreed that the EU arbitration scene, although widely discussed, has remained rather uninvolved, and the result of the revision is more or less status quo.<sup>234</sup> It has been said that the intensive debate is a result of the increasing popularity of arbitration as an alternative conflict resolution, which has caught commentators', and also the Commission's attention.

The situation we dwell in at the moment is unsatisfactory. Although it might be possible to justify the principles in relation to the assumption of jurisdiction under the Regulation, the problem is merely then postponed to the matter of recognition and enforcement of any judgment given. The new Regulation includes an attempt to solve these deficiencies, mainly through recital (12). But, as we have seen, the recital only provides assistance to some extent, and it seems that we stand before a revision that chose status quo instead of presenting any revolutionary renovations to the arbitration exclusion.

We can only attempt to paint a picture of the future concerning arbitration in the EU, but the fact is that we will have to sit tight and wait for proceedings to happen and the Court to issue further rulings on the interpretation of the revised Regulation, and most importantly, whether EU law will become applicable in a particular case, since that is a prerequisite for the Regulation to come into question at all in arbitration proceedings.

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<sup>234</sup> See Koulu 2007, p. 301.