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At the intersection of court proceedings and arbitration in Europe: the exclusion of arbitration in the Brussels Ia Regulation

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Abstract

The exclusion of arbitration from the scope of application of the Brussels Regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the EU has a long history and is still subject to controversy. After some introductory explanations of the legal framework and relevant principles in the field of law, this minor dissertation examines chronologically all possible involvements of national courts in arbitral proceedings in order to give an overview of the (in-) applicability of the Brussels Ia Regulation to them. For this purpose, the relevant case law of the CJEU and the related legal developments beginning with the adoption of the Brussels Convention up to the entry into force of the Brussels Ia Regulation are being considered. Finally, the legal problems arising from the current state of affairs and how courts should navigate it are discussed with an emphasis on the possible enforcement constellations of contradicting judgments and awards.

Contents

A. Introduction

In 1968, when the then six contracting parties to the Treaty establishing the European Economic Community concluded on the Brussels Convention they were anxious to strengthen the legal protection of persons established in their Community.[1] At this point in time, a major part of legal protection for commercial parties – namely arbitration – was already excluded from the scope of application of this Convention.[2] The reason for this exclusion was mainly to be seen in a planned European Convention providing a uniform law on arbitration as well as in already existing international agreements on arbitration, especially the New York Convention from 1958 on the recognition and enforcement of foreign arbitral awards[3] (hereinafter New York Convention).[4] In the course of time, the plans for a uniform law on arbitration seemed to have evaporated into thin air and it turned out that this simple explanation might not be able to sufficiently provide for all the possible case constellations at the interface between proceedings in front of a national court and an arbitral tribunal.

This realisation was mainly supported by a growth of transnational disputes. First, arbitral proceedings have augmented massively since then and especially within the last 25 years.[5] Second, with globalisation gaining more and more ground, cross-border litigations in front of courts and the connected problems of jurisdiction and enforcement are generally increasing as well.[6] The result of these two developments is a greater awareness among legal practitioners for the challenges arising from the interplay between the two dispute resolution mechanisms. Therefore, the harmonisation of legal bodies dealing with these challenges has been put forward in the European Union and beyond. With the inclusion of more and more countries first into the European Econom-

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1 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (1968), Brussels, 27 September 1968, *OJ L 299*, 32.

2 Art 1(4) Brussels Convention.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 *UNTS* 38.

4 P Jenard 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' (1979) *OJ C 59* 13; L Hauberg Wilhelmsen 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30 *Arb. Int'l* 172.

5 S Menon QC 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' *ICCA Congress 2012 – Opening Plenary Session*, 11 June 2012, para 3, available at *http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf*, accessed on 10 August 2016.

6 PJ Slot *Globalisation and Jurisdiction* 1ed (2004) 1.

ic Community and then the European Union, the European instruments are covering a larger territory. With the entry into force of the Brussels I Regulation in 2002 and the Brussels Ia Regulation in 2015,[7] attempts to optimise the legal mechanisms dealing with jurisdiction of courts and the enforcement of their judgments have continued.

On a bigger stage and with regards to arbitration, after the success of the New York Convention, UNCITRAL has provided a Model Law on International Commercial Arbitration for national legislators in order to assist states in reforming and modernising their laws on arbitral procedure and thereby contributing significantly to an harmonisation of the practice of arbitration.[8]

This minor dissertation aims to provide an overview of the developments concerning the exclusion of arbitration from the scope of application of the European Convention and Regulations. The main question to be examined is which legal consequences result from the exclusion of "arbitration" from the scope of application in Art. 1(2)(d) Brussels Ia Regulation. In the course of the aforementioned, two subquestions will be discussed. First of all, it needs to be evaluated which arbitration-related matters are being covered by Art. 1(2)(d) Brussels Ia Regulation, discussing in chronological order all possible involvements of national courts in arbitration proceedings. Second, the main legal problems that arise from the current state of affairs and how courts should navigate it will be discussed. While doing so, the case law of the Court of Justice of the European Union (CJEU) will be discussed as well as the implications of the recasted Brussels Ia Regulation, which has been in force since 10 January 2015.[9]

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7 Regulation (EU) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 (Brussels I), 16 January 2001,*OJ L 12*, 1; and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia), 20 December 2012, *OJ L 351*, 1.

8 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, *United Nations Publication Sales No. E.08.V.4*, 2008, 1.

9 Art 81(2) Brussels Ia Regulation.

I. Legal Framework

This minor dissertation focuses on EU law and arbitration law. The former consists in this case mainly of the Brussels Regulations[10] and the latter is dominated by the New York Convention and in minor parts by the Geneva Convention. Nevertheless, also the UNCITRAL Model Law will be considered, as it continues to give innovative implications for national legislations, which themselves constitute one of the main legal sources with regards to arbitration.

1. European Law

a) The Treaty on the Functioning of the European Union[11]

With the conclusion of the Treaty establishing the European Economic Community (EEC),[12] the then six Member States agreed that they 'shall, so far as is necessary, enter into negotiations […][about] the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards'.[13] This was the legal basis for the 1968 Brussels Convention, which was not yet an instrument of the EEC itself, but rather an international convention that was negotiated in the same forum as EEC legislation.[14] Therefore, a new version of the Brussels Convention had to be negotiated and concluded every time more states joined the EU, which led to several modifications over the years.[15]

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10 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 17 June 2008, *OJ L 177*, 1, also excludes arbitration (see Art. 1(2)(e)), so that the validity of the arbitration clause cannot fall under that Regulation.

11 Treaty on the Functioning of the European Union (TFEU) 26 October 2012, *OJ C 326*, 1.

12 Treaty establishing the European Economic Community, Rome, 25 March 1957, *298 U.N.T.S. 11*, 3.

13 Art 220 subpara 4 Rome Treaty.

14 T Kruger *Civil Jurisdiction Rules of the EU and their Impact on Third States* 1ed (2008) para 1.06, with further references on the relationship between Art 220 Rome Treaty and the Brussels Convention.

15 Kruger op cit (n14) para 1.10; the arbitration exclusion in Art 1 has always remained, so that these modifications do not affect this work.

The following Treaty of Maastricht[16] modified the Treaty of Rome significantly, but did not entail great changes regarding the legal basis of the Brussels Convention, as Art. 220 of the Rome Treaty was retained.[17]

It was with the Treaty of Amsterdam of 10 November 1997[18] that the competence to legislate on measures in the field of judicial cooperation in civil matters having cross-border implications was transferred from the Member States to the European Community.[19] The legal basis for this competence was Art. 65 EC-Treaty (Amsterdam version), which contained in its first paragraph the predecessor of what was later to become the legal basis of the Brussels Regulations.[20] To this extent, the EC was able to enact Regulations in this area. As they apply directly in every Member State, no act of transposition within the national legislations was needed anymore.[21]

The Treaty of Lisbon, signed on 13 December 2007[22], later assigned the competence to harmonise the European civil procedure law from the EC to the EU. Title IV of the former Maastricht Treaty, providing for a gradual constitution of an area of freedom, security and justice, was transferred into Title V of the TFEU (Art. 67(1) TFEU).[23] The central provision in this title with regards to the Brussels Regulations is Art. 81 TFEU, which provides in paragraph 1 for the development of judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. This provision contains a broad competence of the EU for legislative measures concerning cross-border disputes in order to ensure – among others – the proper functioning of the internal market.[24] Nevertheless, Art. 81(2) TFEU limits this competence as it contains an exhaustive enumeration.[25] The Brussels Regulations then find their specific legal basis in Art. 81(2)(a) TFEU, which

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16 Treaty on European Union, Maastricht, 29 July 1992, *OJ C 191,* 1.

17 Kruger op cit (n14) para 1.11.

18 Treaty of Amsterdam amending the Treaty on European Union, Amsterdam, 10 November 1997, *OJ C 340*, 1.

19 M Rossi 'AEUV – Art. 81' in *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta – Kommentar* 5ed (2016) para 1; T Kruger op cit (n14) para 1.12.

20 Rossi op cit (n19) para 18.

21 Art 249(2) EC-Treaty, now Art 288(2) TFEU.

22 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 17 December 2007, *OJ C 306*, 1.

23 P Stone *EU Private International Law* 2ed (2010) 4; A Stadler 'Europäisches Zivilprozessrecht' in *Zivilprozessordnung mit Gerichtsverfassungsgesetz* 13ed (2016) Vorbemerkung para 2.

24 B Hess 'AEUV – Art 81' in *Das Recht der Europäischen Union* 58ed (2016) para 2; Stadler op cit (n23) Vorbemerkung para 2; S Leible 'AEUV – Art 81' in *EUV/AEUV* 2ed (2012) para 5.

25 Rossi op cit (n19) para 7, with further references.

expressly provides for the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases.[26]

b) The Brussels Ia Regulation

On the basis of the aforementioned, the EU has enacted the Brussels Ia Regulation in 2015. As it is the latest of the subsequent legal tools dealing with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, this paper will focus on the provisions of this Regulation and only refer to the former versions where necessary.

Art. 1 Brussels Ia Regulation sets out the scope of application of the Regulation, which refers in paragraph one in general terms to civil and commercial matters. Of interest in this context is Art. 1(2)(d) Brussels Ia Regulation, which explicitly states that the Regulation shall not apply to arbitration and which was already part of the Brussels Convention since its first version.[27] This seemingly simple exclusion is subject to potential controversy, as its scope was never clearly defined. Does the exclusion only extend to arbitration proceedings itself or also to public court proceedings in support of arbitration? And if the latter, which of these supporting proceedings are covered by the exception and which ones are not? Before as well as after the introduction of the Brussels Ia Regulation – as this minor dissertation will show – only the CJEU was and will be able to interpret the thereby created unpredictability.

2. Arbitration Law

The practice of international arbitration is built on a complex framework of national and international law and in the last instance needs to be enforced by national courts.[28] Only the continuing development of these laws enabled international arbitration to become what it is today. While the rules of arbitral institutions and the practice of experienced arbitration practitioners in general are a part of this regime,[29] the interface of arbitral and court proceedings happens mainly in the frame of the national arbitration laws. These laws in turn often build on the New York Convention of 1958, the

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26 Rossi op cit (n19) para 19.
27 Art 1(2)(4) Brussels Convention.
28 G Born *International Commercial Arbitration* 2ed (2014) 97.
29 N Blackaby *Redfern and Hunter on International Arbitration* 6ed (2015) para 1.224 subs.

1961 European Convention on International Commercial Arbitration and the UNCITRAL Model Law, which itself has implemented and elaborated upon the New York Convention.[30]

a) The New York Convention of 1958

When it comes to arbitration law one will first of all have to consider the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards as one of the cornerstones of international arbitration.[31] The Convention currently has 156 parties, including all leading industrial nations and all EU Member States.[32] With its introduction, for the first time in the history of international commercial arbitration a comprehensive international legal framework for international arbitration agreements and arbitral awards was established.[33] Confusion might arise from the title of the Convention, as it only refers to the recognition and enforcement of arbitral awards while it is in fact covering arbitration agreements as well.[34] This is important with regards to jurisdictional matters, as they often arise from questions relating to the validity of an arbitration agreement. Thus, the scope covered by the Convention largely corresponds to the scope of the Brussels Regulation, which explains why it was necessary to insert a provision about the interaction of the two instruments.[35]

Over the years, some difficulties with regards to the interpretation of some provisions became apparent, which gave rise to a discussion about a revision of the New York Convention.[36] But finding consensus among so many states would be a difficult task and a new convention would lead to a more complicated regime with the old and a new convention in force at the same time. Moreover, as the 1958 Convention in general has largely succeeded, a revision at the moment does not seem to be very likely or fa-

30 Born op cit (n28) 99.
31 Blackaby op cit (n29) para 1.211.
32 UNCITRAL 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) – Status' *UNCITRAL*, 2016, available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html*, accessed on 15 August 2016.
33 Born op cit (n28) 103.
34 Blackaby op cit (n29) para 1.212.
35 See Art 73(2) Brussels Ia Regulation.
36 A recasted version of the Convention has been proposed by AJ van den Berg 'A closer look at the proposed "New New York Convention"' (2008) 3 *G.A.R.* 14.

vourable.[37] Besides that, the UNCITRAL Model Law from the beginning on was also enacted in order to address some – if not all – of these difficulties[38] and an additional '[r]ecommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' has been drafted in 2006 in order to further contribute to a uniform interpretation of the New York Convention.[39]

b) The Geneva Convention of 1961

In 1961, the Economic Commission of the UN adopted the European Convention on International Commercial Arbitration in Geneva (hereinafter European Convention) with the desire to promote the development of European trade and having noted the signing of the 1958 New York Convention.[40] Back then, it was intended to support the trade between east and west in a divided Europe and signed by 16 states, while it now has 31 parties, 17 of them being Member States of the EU.[41] In contrast to the New York Convention, the European Convention covers besides arbitration agreements and arbitral awards also the arbitral procedure.[42] Nevertheless, the small number of parties to the 1961 Geneva Convention limits its relevance significantly, even though it contains some important rules that other instruments in this field of law are lacking.

c) UNCITRAL Model Law

Aside from the 1958 New York Convention, the other milestone in International Commercial Arbitration is the UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law), which has been named the 'most

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37 E Gaillard 'Is There a Need to Revise the New York Convention?' (2008) 2 *Disp. Resol. Int'l* 189.

38 UNCITRAL 'Yearbook of the United Nations Commission on International Trade Law, Volume X' (1979) *A/CN.9/168* 108 para 49; UNCITRAL 'Further work in respect of international commercial arbitration' (1979) *A/CN.9/169* 2 para 9.

39 UNCITRAL 'Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session' (2006) *A/61/17* 61 subs.

40 European Convention on International Commercial Arbitration, Geneva, 21 April 1961, 484 *U.N.T.S.* 364.

41 United Nations 'European Convention on International Commercial Arbitration – Status' United Nations, 2016, available at *https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en* (2016), accessed on 11 September 2016.

42 Born op cit (n28) 118.

important legislative instrument in the field of international commercial arbitration'.[43] It is not a convention, but aims to support national legislators while (re-) modelling their national arbitration laws on a voluntary basis. While the New York Convention focuses on the recognition and enforcement of arbitral agreements and awards, the Model Law deals with the arbitral procedure from beginning to end.[44] Nevertheless, where the two instruments overlap, the UNCITRAL Model Law adopts the provisions of the New York Convention. In general, it attempts to harmonise national arbitration legislations as far as possible in order to facilitate international commercial arbitration.[45]

After some years, some concerns arose especially with regards to the requirement for an arbitration agreement to be in writing and the power of the arbitral tribunal to order provisional measures, so that the original version of 1985 was amended in 2006 in order to modernise the former text.[46] Up until today, 72 states have adopted the Model Law in a total of 102 jurisdictions, among them 17 Member States of the EU.[47]

d) National arbitration laws

All of the above-mentioned international legal instruments contribute to the creation of well-functioning national arbitration laws. Only if the national laws give effect to the fundamentally autonomous process of arbitration through the courts can the system succeed. As arbitration in general is excluded from the Brussels Ia Regulation, and no other uniform legal measure in this area has been enacted on a EU level, the importance of the national arbitration laws within the EU is as high as elsewhere. The lack of harmonising measures within the EU leads to a variety of different arbitration laws among the Member States. Even though a majority of them have enacted national arbitration laws on the basis of the Model Law, some of the major players (e.g. France, England, Sweden and the Netherlands) follow their own approaches.[48] Further, the Member States, having adopted the Model Law, often depart from the original text where they deem it appropriate to do so. Therefore, an analysis of the national arbitra-

43 Born op cit (n28) 134.
44 Blackaby op cit (n29) para 1.219.
45 Born op cit (n28) 135.
46 Blackaby op cit (n29) para 1.220.
47 UNCITRAL 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 – Status' *UNCITRAL*, 2016, available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html*, accessed on 15 August 2016.
48 Born op cit (n28) 139.

tion law at the seat of arbitration before choosing the forum is still highly advisable.[49] The role of national arbitration legislation thus still cannot be underestimated, while indeed the approach undertaken by UNCITRAL with the Model Law seems to be the only realistic attempt to harmonise the different sets of rules dealing with international arbitration worldwide.

II. The principle of *Kompetenz-Kompetenz*

The principle of *Kompetenz-Kompetenz*[50] deals with the power to decide jurisdiction, meaning the competence to decide the court's or tribunal's own competence to decide the case. There are two effects being attributed to the principle, namely its positive and its negative effect. The exact meaning of the principle still depends on the actual national arbitration law and varies from country to country. Therefore, the term should be used with care.[51] Nonetheless, it is helpful to outline the two most significant possible effects of the principle.

1. Positive effect

The positive effect relates to the question whether the arbitral tribunal is allowed to rule on its own jurisdiction or not. Speaking in general terms, this question is almost always to be answered in the affirmative, as most modern national laws expressly provide for this power of the arbitral tribunal.[52] In the Model Law, Art. 16(1) provides that '[t]he arbitral tribunal may rule on its own jurisdiction,[…]'. Such provisions are foremost designed to prevent abusive tactics and make the arbitral process more effective.[53] The arbitral tribunal's power to rule on its own jurisdiction itself though does not necessarily have an impact on the corresponding permission of a court to also decide the jurisdiction of the arbitral tribunal. Consequently, parallel proceedings remain possible.

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49 As also recommended by UNCITRAL op cit (n47).

50 The exact spelling varies from *Kompetenz-Kompetenz* over *competence-competence* to *compétence de la compétence*, depending on the language of the author.

51 Born op cit (n28) 1050.

52 Blackaby op cit (n29) para 5.108.

53 E Brengesjö 'The pursuit of solutions to lis alibi pendens in international commercial arbitration' (2014) 17(2) *Int. A.L.R.* 45.

2. Negative effect

The exclusion of this capacity of national courts to decide jurisdictional objections against the arbitral tribunal until an arbitral award has been made constitutes the negative effect of the principle of *Kompetenz Kompetenz*.[54] Thus, a judicial authority's jurisdiction is excluded as soon as the arbitral tribunal has been seized of the case and can only intervene at the stage of the enforcement of the award, which often may be sought in a country different from the seat of the arbitration. Where provided, the effect is the most ambitious pro-arbitration rule because the possibility of national courts to scrutinise the arbitration agreement is limited as far as possible.[55] Thereby, the danger of diverging decisions on jurisdiction is minimised,[56] so that the negative effect of the principle of *Kompetenz-Kompetenz* can be considered as a fully adequate *lis pendens* rule.[57] In the European Convention, Art. VI(3) implies the negative effect of the principle,[58] even though the last part of the paragraph allows national courts to consider jurisdictional objections on an interlocutory basis if 'they have good and substantial reasons'.[59]

Often, a middle ground is followed that allows the arbitral tribunal to decide on its own jurisdiction while a public court may also do so, but not preventing the arbitral tribunal to continue its proceedings in the meantime. For example, Art. 8(2) Model Law states that arbitral proceedings may be commenced or continued and that even an award may be made despite the issue pending before a national court and thereby avoiding abuse of the proceedings before the national court. The New York Convention does not explicitly refer to the principle but implicitly allows both arbitral tribunals and national courts to decide jurisdictional disputes without clearly giving precedence to any of them.[60] If such middle grounds are followed, parallel proceedings may emerge with the danger of diverging outcomes as a possibility.

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54 Born op cit (n28) 1069.
55 Brengesjö op cit (n53) 45
56 G Carducci 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) 29 *Arb. Int'l* 482.
57 L Hauberg Wilhelmsen 'European Perspectives on International Commercial Arbitration' (2014) 10(1) *J. Priv. Int'l L.* 115.
58 Hauberg Wilhelmsen op cit (n57) 121.
59 Born op cit (n28) 1058.
60 Born op cit (n28) 1052 subs.

III. The consequence of an inclusion or exclusion of a subject-matter from the Regulation

After these general considerations it can be recorded that, in general, the consequence of the inclusion of a subject matter can be explained by referring to the main provisions of the Brussels Ia Regulation.

If a subject matter falls within the scope of the Regulation, these provisions apply. The jurisdiction of a court is determined by Art. 4 of the Brussels Ia Regulation, which in combination with the *lis pendens* mechanism of Art. 29 of the Brussels Ia Regulation provides for a high degree of predictability. Even more important, once a judgment has been made it benefits from the simplifications with regards to its recognition and enforcement, especially the absence of the need for an exequatur procedure according to Art. 39 Brussels Ia Regulation.

The second question is somewhat more difficult to answer. If the excluded subject matter is regulated by another EU Regulation, that Regulation applies, as it is for example the case with regards to matrimonial matters after Art. 1(2)(a).[61] If no such instrument exists, it is the national law of each country that claims validity regarding the specific subject matter. The jurisdiction in disputes arising in the excluded area is governed by the national procedural rules, as is the recognition and enforcement of foreign judgments in this field of law. In principle, this applies according to Art. 1(2)(d) Brussels Ia Regulation also to arbitration. Nevertheless, the national laws still may not infringe basic principles of EU law,[62] which potentially could lead to the necessity of restrictive interpretations regarding some provisions of national laws. Aside from the aforementioned, the variety of different court proceedings having a relation to arbitration leaves the way open for uncertainties regarding the scope of Art. 1(2)(d) of the Brussels Ia Regulation.

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61 H Dörner 'Verordnung (EU) Nr. 1215/2012 des Europäischen Parlaments und des Rates vom 12. Dezember 2012 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (Neufassung)' in *Zivilprozessordnung* 6ed (2015) EuGVVO Art 1 para 8.

62 See for example regarding the freedom of establishment *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* (1999) Case No. C-212/97, E.C.R.I-01459; *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* (2002) Case No. C-208/00, E.C.R. I-09919; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* (2003) Case No. C-167/01, E.C.R. I-10155; regarding the freedom of movement of persons *Carlos Garcia Avello v. Belgian State* (2003) Case No. C-148/02, E.C.R. I-11613; *Grunkin and Paul v. Standesamt Niebüll* (2006) Case No. C-353/06, E.C.R. I-07639.

B. Possible involvements of national courts in arbitral proceedings

I now turn to the question of which arbitration-related matters are covered by Art. 1(2)(d) Brussels Ia Regulation and why (or why not) this is the case. For this purpose, each possible involvement of national courts in arbitral proceedings will be examined chronologically.

I. Challenges to the validity of the arbitration agreement

Even before the arbitral proceedings begin, when the dispute arises, one of the parties to an arbitration agreement may wish to challenge the agreement before a court. A first problem arising in this regard concerns the law applicable to the substantive validity of the arbitration agreement.

Art. II New York Convention requires national courts to recognize the validity of arbitration agreements and to refer the parties to arbitration. The provision does not indicate the substantive law governing the arbitration agreement, which is hindering the smooth functioning of court and arbitral proceedings in this context. Although Art. V(1)(a) of the New York Convention sets out that it is either the law chosen by the parties, or failing such a choice the law of the seat of arbitration or the law as determined by the arbitral tribunal, which is applicable in this regard, the provision only applies at the stage of the enforcement of the award according to its wording.[63] Therefore, different legal bodies may apply different laws with regards to the substantive validity of the arbitration agreement, possibly leading to different results and diverging judgments on the merits.[64]

In the European Convention, Art. VI(2) sets out the criteria as to the substantive validity of the arbitration agreement in the same way as Art. V(1)(a) of the New York

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63 Nevertheless, it is argued that the provision also applies at the stage of the enforcement of the arbitration agreement; see Born op cit (n28) 496 subs; Hauberg Wilhelmsen op cit (n57) 118 subs, with further references.

64 H van Houtte 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21 *Arb. Int'l* 511.

Convention,[65] but is not limiting the scope of application to the enforcement of the arbitral award.[66] In line with this, the provision adds a further criterion, being 'the competent law by virtue of the rules of conflict of the court seized of the dispute' at the pre-award stage.[67] Nevertheless, also this approach possesses legal uncertainties. The rules of conflict of different national courts may again lead to different competent laws being applicable to the substantive validity of the arbitration agreement. Therefore, the risk of diverging judgments emerges also under the European Convention.

The UNCITRAL Model Law adopts Art. V(1)(a) of the New York Convention in Art. 36(1)(a)(i) for the enforcement of arbitral awards and extends its scope to setting aside proceedings in Art. 34(2)(a)(i).[68] Nevertheless, as the approach is in general adopted from the New York Convention, the same reasoning regarding the law applicable to the substantive validity of the arbitration agreement and the related legal uncertainty applies to the UNCITRAL Model Law.[69]

This uncertainty regarding the substantive law being applicable to the validity of the arbitration agreement invites parties that are trying to escape the arbitral proceedings to challenge the validity of the arbitration agreement in different forums. If the possibility of different laws being applied in this regard exists, the possibility of different outcomes also arises.

The party wishing to challenge the arbitration agreement may do so either by bringing the substantial claim(s) in front of a court as if no arbitration agreement existed so that the validity of the arbitration agreement becomes an incidental question, or by asking the court to rule on the validity of the arbitration agreement as the main subject matter.

1. As an incidental question

A party having signed an arbitration agreement, but seeking to escape arbitration because it expects a national court to be more likely to rule in its favour or for other strategic reasons, will often try to start court proceedings regarding its substantial

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65 Born op cit (n28) 502 subs.
66 Hauberg Wilhemsen op cit (n57) 119.
67 Art VI(2)(c) European Convention.
68 Hauberg Wilhemsen op cit (n57) 119.
69 Born op cit (n28) 527.

claim(s) or to obtain a negative declaration. Most likely, the counterparty will then lodge submissions to the effect that the court has no jurisdiction relying on the existence of the arbitration clause while commencing the arbitral proceedings at the same time. The court will then have to decide on the validity of the arbitration agreement as a preliminary question in order to determine whether it has jurisdiction or not; and if it finds the arbitration agreement to be valid, it is only the arbitral tribunal which has jurisdiction, so that the court will have to refer the parties to arbitration. On the contrary, where the court finds the arbitration agreement to be invalid, it could have jurisdiction as to the substance of the case. The question then becomes whether the Brussels Regime would be applicable in these cases or not.

The *Schlosser Report* on the Brussels Convention noted that different interpretations of Art. 1(4.) Brussels Convention were possible in these cases, but left open whether or not they were excluded.[70] The later *Kerameus Report* was more concrete in this regard, stating that the verification of an arbitration agreement as an incidental question must be considered as falling within the scope of the Convention without giving further reasons for this view.[71]

The first time that the CJEU dealt with the matter was the case of *Marc Rich*.[72] Impianti, the allegedly liable party, filed an action for a negative declaration judgment in an Italian court. At the same time, Marc Rich, the opposing party, relied on the arbitration agreement in these proceedings and started an action in order to appoint an arbitrator in the courts of the seat of arbitration (England) after Impianti had denied to take part in the arbitral proceedings. On appeal of the proceedings in order to appoint an arbitrator, the case was referred to the CJEU in order to determine whether or not these proceedings in support of arbitration came within the scope of the Brussels Convention. Impianti thereby contended that the dispute in fact was not about the appointment of an arbitrator, but rather about the existence of the arbitration agreement, which in their opinion would not be excluded from the Convention and should therefore be considered by Italian courts. The CJEU ruled that with regards to the scope of the Convention, ref-

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70 Schlosser, Peter 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice' (1979) *OJ C 79*, 5 March 1979, para 61, 62.

71 KD Kerameus 'Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' (1986) *OJ C 298*, 24 November 1986, para 35.

72 *Marc Rich & Co AG v. Societa Italiana Impianti PA* (1991) Case No. C-190/89, E.C.R. I-3855.

erence was only to be made to the main subject of the case because otherwise the principle of legal certainty would be contradicted as the parties may raise preliminary questions at any time.[73] In the *Marc Rich* case, the main subject matter was the appointment of the arbitrator whereas the validity of the arbitration agreement was only a preliminary issue. This indicated that the application of the Convention was excluded regarding the case in front of the English courts for the reason that the appointment of an arbitrator as the main subject of the case fell under Art. 1(4) of the Brussels Convention because 'the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion'.[74] Therefore, the English courts, as they deemed the arbitration agreement to be valid, were able to proceed with the appointment of the arbitrator, notwithstanding the Italian Court having been seized first.

However, the aforementioned is only one side of the coin. Despite the English courts being able to proceed with the appointment of an arbitrator, the Italian courts also were able to proceed because the *lis pendens* rule of the Brussels Convention did not apply to the English proceedings (as they were not within the scope of the Convention). The Italian Courts were ruling (contrary to the English courts) that the arbitration agreement was invalid because they interpreted the requirement in Art. II of the New York Convention (that an arbitration agreement has to be in written form) narrower than the English courts so that they decided the case on its merits. The merits of the case were the non-liability of Impianti, which came within the scope of the Convention, so that the judgment on this matter fell within the scope of the Convention as well. The power to decide the preliminary question of the validity of the arbitration agreement thereby was not subject to the Brussels Convention, but rather a matter of the national law of the (in the given case Italian) court.[75] As the preliminary question of the validity of the arbitration agreement was subject to national law, it was also possible that the Italian and English courts decided differently in this matter. This could have resulted in diverging decisions on the merits by the Italian court and a hypothetical arbitral tribunal

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73 At para 26, 27.

74 At para 19; see also below B.III. at p 34 subs.

75 *Marc Rich & Co AG v. Societa Italiana Impianti* 'Opinion of the Advocate General Darmon' (1991) E.C.R. I-3855 at para 33, 44.

in England, even though the latter in fact seems not to have been constituted, as Marc Rich in the end entered into an argument on the substance in front of the Italian court.[76]

The principle, that reference is to be made to the main subject of the case in order to determine the scope of application of the Convention, was confirmed in later arbitration related decisions by the CJEU.[77] In *Van Uden*, the Court specified that arbitration is the subject-matter of proceedings where the proceedings serve to protect the right to determine the dispute by arbitration.[78] The incidental question of the validity of the arbitration agreement therefore does not affect the applicability of the Brussels Regime. This interpretation of Art. 1(4) Brussels Convention and Art. 1(2)(d) of the Brussels I Regulation respectively was in general accepted but at the same time a desire for solving the problem of potentially contradicting judgments and arbitral awards emerged.[79]

During the negotiations for the recast of the Brussels I Regulation, several solutions were proposed, which emphasised the incidental question of the validity of the arbitration agreement and the danger of contradicting judgments resulting therefrom.[80] The first officially commissioned statement was the *Heidelberg Report*, which recommended to either delete the exclusion while preserving the prevalence of the New York Convention or to (partly) include arbitration and thereby to admit exclusive jurisdiction to the courts of the seat of arbitration with regards to any supportive proceedings to arbitration.[81] The related Green Paper of the Commission on the Brussels I Regulation

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76 TC Hartley 'The Brussels I Regulation and arbitration' (2014) 63 *Int'l & Comp. L. Q.* 847; O Lando 'Being First. On Uses and Abuses of the Lis Pendens under the Brussels Convention' in *Modern Issues in European Law: Nordic Perspectives : Essays in Honour of Lennart Pêalsson* 1ed (1997) 109.

77 *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line* (1998) Case No. C-391/95, E.C.R. I-7091 at para 31, 33, 34; *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.* (2009) Case No. C-185/07, E.C.R. I-00663 at para 22; *"Gazprom" OAO v. Lietuvos Respublika* (2015) Case No. C-536/13, Celex-Nr. 62013CJ0536 at para 29; even though the court itself did not make a statement in this regard, because it did 'not have sufficient information at its disposal in order to provide a useful answer' (para 58), the AG reiterated this principle at para 98 in his opinion to *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and others* (2015) Case No. C-352/13, not yet published.

78 *Van Uden* supra (n77) at para 33.

79 DT Hascher 'Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention' (1997) 13 *Arb. Int'l* 61; JJ van Haersolte-Van Hof 'The Arbitration Exception in the Brussels Convention - Further Comment' (2001) 18(1) *J. Int'l Arb.* 37; C Ambrose 'Arbitration and the Free Movement of Judgments' (2003) 19(1) *Arb. Int'l* 13; Van Houtte op cit (n64) 513.

80 For a brief overview, see B Den Tandt 'The Recast oft he Brussels I Regulation and Arbitration: Mission accomplished?' (2015) 21(1) *Colum. J. Eur. L.* 95.

81 B Hess, T Pfeiffer and P Schlosser *The Brussels I Regulation 44/2001 – Application and Enforcement in the EU* 1ed (2008) para 131 subs.

seemed to support the latter recommendation of the *Heidelberg Report*.[82] A rather moderate approach was then taken by the Commission's proposal, providing for a *lis pendens* rule with regards to the validity of the arbitration agreement only, giving exclusive jurisdiction to the courts of a Member State being the seat of arbitration.[83]

The turning point in the discussion seemed to be an adverse Report released already before to the European Parliament, which stated in contrary to the above-mentioned proposals that the exclusion of arbitration should in general remain, whereby a clarification of this exclusion in the form of a recital should be adopted.[84] On this basis, the Council thereafter adopted its General Approach disregarding the propositions of the Commission and for the first time introducing a footnote that was later to become Recital 12 of the Brussels Ia Regulation.[85] After some further consultations,[86] the European Parliament eventually adopted the final version of the Brussels Ia Regulation on December 12, 2012.

Regarding the interface between arbitration and the Brussels Ia Regulation in general, a new Recital 12 and a new Art. 73(2) have been added, while the exclusion of arbitration as set out in Art. 1(2)(d) remained.[87] Regarding the preliminary question of the validity of the arbitration agreement, these changes indicate some clarifications, but they do not seem to be able to effectively tackle the problem of parallel proceedings.

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82 Commission of the European Communities 'Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2009) *COM(2009) 175 final*, 21 April 2009, 9; for critical comments on this proposal see P Pinsolle 'The proposed reform of Regulation 44/2001: a poison pill for arbitration in the EU?' (2009) 12(4) *Int. A.L.R.* 62; LG Radicati Di Brozolo 'Arbitration and the Draft Revised Brussels I Regulation- Seeds of Home Country Control and of Harmonisation?' (2011) 7(3) *J. Priv. Int'l L.* 433.

83 European Commission '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) *COM(2010) 748 final,* 14 December 2010, 36.

84 European Parliament 'Report 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' (2010) *EUR. PARL. Doc. 2009/2140 (INI)*, 29 June 2010, 8.

85 Council of the European Union '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) - First reading - General approach' (2012) *2010/0838 (COD), JUSTCIV 209, CODEC 1495*, 1 June 2012, 61.

86 European Parliament, Committee on Legal Affairs 'Amendment 121, Draft Report Tadcusz Zwiefka' (2012) *2010/0383(COD), PE 467.046v0 1-00*, 25 September 2012, 1; European Parliament 'Position of the European Parliament, adopted at first reading on 20 November 2012 with a view to the adoption of Regulation (EU) No .../2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)' (2012) *EP-PETC I-COD(2010)0383*, 20 November 2012, 1.

87 With regards to the legal nature of recitals in EU regulations see Carducci op cit (n56) 470.

Recital 12 of the Brussels Ia Regulation refers to this matter in its paragraphs 1, 2 and 3. Paragraph 1 reiterates the arbitration exclusion and the prevalence of Art. II(3) New York Convention. The very last part of the paragraph thereby underlines the importance of the national arbitration legislation of each Member State, referring the courts with regards to jurisdiction in arbitration-related matters and the examination of the validity of the arbitration agreement to their national law.[88] It is therefore made clear, that a *lis pendens* rule for arbitration related matters, and especially with regards to the validity of the arbitration agreement as a preliminary question, is not included in the Regulation.[89] Paragraph 2 then states that a decision about the validity of an arbitration agreement given by a court of a Member State should not be subject to the rules of the Regulation, 'regardless of whether the court decided on this as a principal issue or as an incidental question'. Paragraph 3 takes up the issue once again, providing for the recognition and enforcement of judgments on the merits that have decided about the invalidity of the arbitration agreement as a preliminary question in accordance with the Regulation.

This pictures the case of the Italian Courts in *Marc Rich*, so that the decision in this case would be the same under the Brussels Ia Regulation. Nevertheless, one clarification results from the interplay between Recital 12(2) and (3):

The Brussels I Regulation and the jurisprudence of the CJEU left space for a court decision on the preliminary issue of the invalidity of the arbitration agreement to benefit from the Regulation's enforcement regime if only the main subject matter of the case came within the scope of the Regulation. The reasons for this are first that the Brussels I Regulation itself did not yet specifically refer to this situation. Second, the jurisprudence of the CJEU supports this view. In *Marc Rich*, it ruled only that in the case of a judgment *not* being within the scope of the Regulation by virtue of its main subject-matter, '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'.[90] The judgment did not contain a statement regarding the reverse situation, where the main subject-matter of the case does come within the scope of the Regulation; therefore, it was left open, if in this case, the preliminary decision on the inva-

88 Carducci op cit (n56) 471.

89 T Linna 'The protection of arbitration agreements and the Brussels I Regulation' (2016) 19(3) *Int. A.L.R.* 72.

90 *Marc Rich* supra (n72) at para 26.

lidity of the arbitration agreement would be able to benefit from the Brussels I Regulation's enforcement regime in the same way as the judgment on the substance of the matter. But this situation was subject to the decision of the CJEU in the later *West Tankers* case.[91] Therein, the Grand Chamber ruled

> 'that, if, because of the subject-matter of the dispute, […] proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application'.[92]

Accordingly, a preliminary decision on the (in-) validity of the arbitration agreement by a Member State court came within the scope of the Brussels I Regulation as long as the main subject-matter of the dispute did come within the scope of the Brussels I Regulation.

By contrast, Recital 12 now splits the judgment into the principal decision on the substance of the matter and the preliminary decision on the invalidity of the arbitration agreement.[93] Also in this situation, the latter 'should not be subject to the rules of recognition and enforcement laid down in this Regulation' according to Recital 12(2); therefore, it is made clear that a ruling on the invalidity of an arbitration agreement – may it be as a preliminary question or not – can never benefit from the Regulation's enforcement regime.

Aside from the aforementioned, Recital 12(3) states in its last sentence also that the New York Convention 'takes precedence over this Regulation', which confirms the tenor of Art. 73(2) of the Brussels Ia Regulation. This could have implications for the handling of the situation in which a national court and an arbitral tribunal rule on the same subject matter.[94]

After all, a court judgment dealing with the validity of an arbitration agreement as an incidental question is covered by the exclusion of Art. 1(2)(d) Brussels Ia Regulation regarding the incidental decision on the validity of the arbitration agreement. This

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91 *West Tankers* supra (n77); the decision is being presented in more detail below under B.II.1 at p 26 subs.

92 At para 26.

93 M Illmer 'Scope and Definitions – Arts 1, 3' in *The Brussels I Regulation Recast* 1ed (2015) para 2.55; SP Camilleri 'Recital 12 of the Recast Regulation: A New Hope?' (2013) *Int'l & Comp. L.Q.* 904; A Auda 'The future of arbitration under the Brussels recast Regulation' (2016) 82(2) *Arbitration* 126; F De Ly 'The Interface between Arbitration and the Brussels Regulation' (2015-2016) 5 *Am. U. Bus. L. Rev.* 505 subs.

94 See below under C.II.2 at p 50 subs.

is based on the fact that it is initially Art. II(3) of the New York Convention providing that in principle the court '[…] shall, at the request of one of the parties, refer the parties to arbitration, […]' and thereby declining jurisdiction for the national court in favour of the arbitral tribunal. In this case, it is the national arbitration laws of the Member States (based on the New York Convention or directly referring to it) being applicable. Only where the court 'finds that the said agreement is null and void, inoperative or incapable of being performed', the New York Convention leaves space for jurisdiction of the national court regarding the main subject-matter. As the New York Convention itself does not set out any rules for the case of a national court finding the arbitration agreement to be invalid, other instruments of law have to apply in this case. After the above examinations, if the national court of a Member State of the European Union finds the arbitration agreement to be invalid, this instrument of law would be the Brussels Ia Regulation, governing both the jurisdiction of the court and the enforcement of its judgment on the merits, regardless the incidental ruling on the invalidity of the arbitration agreement. However, the incidental decision on the invalidity of the arbitration agreement does not benefit from the enforcement regime of the Brussels Ia Regulation and therefore does not bind the courts of other Member States.

2. As the main subject matter of the dispute

In comparison to the foregoing, a dispute in front of a court dealing with the validity of the arbitration agreement as the main subject matter seems to be the exception. Indeed, the international effectiveness of declaratory judgments on the validity of the arbitration agreement has been named to be 'largely theoretical as there are no known litigations or problems in the field'.[95]

Notwithstanding the aforementioned, the *Schlosser Report* already stated in this regard that 'a judgment determining whether an arbitration agreement is valid or not […] is not covered by the 1968 Convention'.[96] The principle set out by the CJEU, that regarding the scope of the Regulation reference is to be made to the main subject of the case, also leads to the conclusion that such cases would fall under the Art. 1(2)(d) exception of the Brussels Ia Regulation, because the validity of the arbitration agreement is directly linked to arbitration in general. A reason for this may be seen in the aim of

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95 Hascher op cit (n79) 42; in the same sense AG Darmon supra (n75) at para 76.

96 Schlosser op cit (n70) para 64.

protecting proceedings in support of arbitration at the seat of arbitration by reason of their neutrality.[97] The new Recital 12 in the Brussels Ia Regulation further supports this result, as paragraph 2 explicitly provides for this interpretation; therefore, judgments dealing with the validity of the arbitration agreement as the main subject matter of the case are covered by the exclusion of Art. 1(2)(d) Brussels Ia Regulation so that these proceedings are subject to the national law of the Member States.[98] Notwithstanding this, a declaratory judgment on the validity of an arbitration agreement could nevertheless prevent the enforcement of a court judgment on the merits from another EU Member State, in which this court considered the arbitration agreement to be ineffective.[99]

II. Anti-suit injunctions in support of arbitration

Once the arbitration agreement has been found to be valid by a court or an arbitral tribunal, English law provides the possibility to issue an anti-suit injunction in order to protect the jurisdiction of the forum determined by the arbitral agreement.[100] Anti-suit injunctions prevent parties from bringing suit in a different court. Failing to respect the injunction would constitute contempt of court with the related consequence of a fine or other disciplinary measures,[101] which can be described as the most aggressive way of avoiding parallel proceedings.[102] Anti-suit injunctions were originally invented as weapons of the courts of equity in their battle against the courts of common law and spread from England to other common law jurisdictions, where they are still used more widely than anywhere else.[103] It is an *in personam* order in relation to which the court (or the arbitral tribunal) has discretion,[104] which is severely restricted if an arbitration agreement exists.[105]

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97 AG Darmon supra (n75) at para 76.
98 In the same way already van Houtte op cit (n64) 514.
99 Art 46, 45(1)(c) Brussels Ia Regulation.
100 England is the best known Member State providing for this option: Supreme Court Act 1981, sect 37(1) regarding national courts; Arbitration Act 1996, Sect 48(5)(a) regarding arbitral tribunals.
101 M Illmer 'Der Kommissionsvorschlag zur Reform der Schnittstelle der EuGVO mit der Schiedsgerichtsbarkeit' (2011) 5 *SchiedsVZ* 250.
102 Kruger op cit (n14) para 5.147.
103 Hartley op cit (n76) 849.
104 Kruger op cit (n14) para 5.147.
105 Illmer op cit (n101) 250.

Cross-border anti-suit injunctions are critical with regards to the doctrine of *comity* as they affect the sovereignty and independence of foreign courts.[106] Even though sanctions can only be imposed on the party disregarding the injunction and not on a foreign court itself, the threat of the sanction prevents the party from commencing proceedings in a foreign court so that it cannot decide its own jurisdiction in the first place.[107] Anti-suit injunctions can be issued by courts and arbitral tribunals, whereby arbitral anti-suit orders serve the same purpose as anti-suit injunctions issued by courts.[108]

With regards to the Brussels Regime, the question is not whether anti-suit injunctions in support of arbitration are excluded from the scope of application according to Art. 1(2)(d) Brussels Ia Regulation as being arbitration related, but rather whether they are compatible with the Brussels Regime in general. The reason for a possible incompatibility is to be seen in the principle of mutual trust, which imposes on the courts of the Member States the obligation to trust each other's legal systems. This principle goes further than *comity* because it does not only require respect for each other by the courts of the Member States, but rather blind trust.[109]

As national courts and arbitral tribunals are governed by different legal instruments, it seems to be favourable to distinguish between the two different instances issuing anti-suit injunctions.

1. By a national court

A national court may issue an anti-suit injunction in support of arbitration in order to prevent a party from making use of dilatory tactics before the arbitral tribunal has been constituted. This may be done by initialising court proceedings on the merits disregarding an arbitration agreement either before or after the opposing party has commenced arbitral proceedings based on the arbitration agreement. As the United

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106 Kruger op cit (n14) para 5.151; G Carducci 'Notes on the EUCJ's ruling in Gazprom: West Tankers is unaffected and anti-suit injunctions issued by arbitral tribunals are not governed by EU Regulation 44/2001' (2016) 32 *Arb. Int'l* 112; regarding the roots and meaning of the doctrine see HE Yntema, 'The Doctrine of Comity' (1965) 65 *Mich. L. Rev.* 9.

107 Kruger op cit (n14) para 5.151.

108 CP Ojiegbe 'From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast' (2015) 11(2) *J. Priv. Int'l L.* 268.

109 Kruger op cit (n14) para 5.153.

Kingdom acceded to the EEC only on 1 January 1973, the problems with the Brussels Regime that can arise in this situation emerged rather slowly.

In line with the aforementioned, the reports on the Brussels Convention did not yet address the admissibility of anti-suit injunctions under the Convention.

English courts had considered the Convention as generally not excluding the possibility of anti-suit injunctions in several cases,[110] until the CJEU had the opportunity to rule on this matter in *Turner v Grovit*.[111] This case did not relate to arbitration, as the purpose of the anti-suit injunction was to protect proceedings in front of English courts and not in front of an arbitral tribunal. Therein, it was the first time that the CJEU ruled that granting an anti-suit injunction was not compatible with the Brussels Convention as it precluded the addressed court of a Member State indirectly from deciding itself about its own jurisdiction, which was incompatible with the principle of mutual trust that the Convention is based on. However, this reasoning did not necessarily mean that anti-suit injunctions by English courts against courts of other Member States in order to protect arbitral proceedings were inadmissible as well, because one could argue that they serve to protect the right to determine the dispute by arbitration in accordance with the *Van Uden* Case,[112] which was already decided by the time the decision in *Turner v Grovit* was made.

The admissibility of anti-suit injunctions in support of arbitration was the subject-matter of the referral to the CJEU in the *West Tankers* case.[113] Allianz and Generali Assicurazioni were insuring Erg and wanted to recover the sums they had paid to West Tankers in front of an Italian court. The reason for this was the collision of a vessel owned by West Tankers and chartered by Erg with a jetty owned by the latter in Italy. The charterparty between West Tankers and Erg included a clause providing for arbitration in London. Relying on the arbitration agreement, West Tankers sought in parallel proceedings a declaration by the High Court of Justice that the dispute was to be settled by arbitration as well as an anti-suit injunction restraining the insurance companies from continuing the proceedings in Italy. After the High Court had ruled in favour of West Tankers and the insurance companies appealed against that judgment, the House of

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110 For cases see Kruger op cit (n14) para 5.162 subs; and TC Hartley 'Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention' (2000) 49 *Int'l & Comp. L.Q.* 171.

111 *Turner v. Grovit* (2004) Case No. C-159/02, E.C.R. I-03565.

112 See below under B.IV.1. at p 36 subs.

113 *West Tankers* supra (n84).

Lords referred the question to the CJEU whether it was 'consistent with Regulation No 44/2001 for a court of a Member State to make 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.'[114] First, the CJEU reiterated the findings from *Marc Rich* and *Van Uden*, drawing the logical conclusion that '[p]roceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001'.[115] Notwithstanding this, the Court found the anti-suit injunction to be inconsistent with the Brussels I Regulation.[116] It based this conclusion on the finding that even though the proceedings did not come within the scope of the Regulation, they may nevertheless undermine its effectiveness by preventing the court of another Member State from exercising its jurisdiction conferred on it by the Regulation.[117] Therefore, when it comes to the admissibility of anti-suit injunctions, reference was to be made to the subject-matter of the proceedings that the injunction aimed on preventing, in the given case being the ceded claims of Erg for damages that the insurance companies claimed for in front of the Italian courts. As stated above, the preliminary question of the validity of an arbitration agreement does not prevent a judgment on the merits from falling within the scope of application of the Regulation,[118] so that the Italian proceedings in *West Tankers* also had to be considered as falling therein. Therefore, the anti-suit injunction prevented the Italian courts from exercising jurisdiction in accordance with Art. 5(3) of the Brussels I Regulation. Thus, the possibility of English courts to issue anti-suit injunctions in support of arbitration in the sense of a prevention of parallel proceedings before the national court of a Member State and an arbitral tribunal were scotched by the judgment.

This result encountered strong criticism, as it defeated a valid option for English courts to resolve the problem of parallel proceedings or torpedo actions at an early stage.[119] In the review process, the *Heidelberg Report*, which was published before the judgment in the *West Tankers* case, stated that the future of anti-suit injunctions de-

114 At para 18.
115 At para 22 subs.
116 At para 32.
117 At para 24.
118 See chapter B.I.1 at p 21 subs.
119 M Illmer 'Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen' (2009) 4 *IPRAX*, 312; H Seriki 'Anti-suit injunctions, arbitration and the ECJ- an approach too far?' (2010) 1 *J.B.L.* 24; S Dutson and M Howarth 'After West Tankers - rise of the "foreign torpedo"?' (2009) 75(3) *Arbitration* 334.

pended on the ruling of the CJEU in this case. But according to it, a party relying on an arbitration agreement would be better protected in any case if arbitration were included in the Regulation and the courts at the place of arbitration had exclusive jurisdiction. This would be because a decision confirming the validity of the arbitration agreement by the court at the place of arbitration would be recognised by the courts of other Member States and prevent them from hearing the case on the merits.[120] *Schlosser* later confirmed this reasoning after the judgment had been rendered.[121] The Green Paper and the following Proposal by the Commission did not specifically refer to anti-suit injunctions, but as they largely referred to the solution of the *Heidelberg Report*, the same argument would have applied and met at least in parts approval.[122]

The European Parliament's adverse Report, which was published after the judgment in *West Tankers* was rendered, took a stand for a return to the status quo before the judgment, meaning that anti-suit injunctions to protect the arbitral jurisdiction should continue to be available as long as they were in conformity with the free movement of persons and fundamental rights.[123] After that Report, the new Recital 12 was already introduced into the process of recasting the Brussels I Regulation in the way it was later adopted.[124]

The relevance of Recital 12 of the Brussels Ia Regulation with regards to the admissibility of anti-suit injunctions in support of arbitration is controversial. Some statements argue that the new recital would allow again for the issuing of anti-suit injunctions in support of arbitration,[125] which would be in accordance with the demand of the first Report of the European Parliament. This view was also supported by Advocate General *Wathelet* in his opinion on the later *Gazprom* case.[126] As this case actually dealt with anti-suit injunctions given by an arbitral tribunal, the judgment is discussed in

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120 Hess op cit (n81) para 122.

121 P Schlosser 'Europe - is it time to reconsider the arbitration exception from the Brussels Regulation?' (2009) 12(4) *Int. A.L.R.* 46.

122 G Carducci 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention - Notes on West Tankers, the Revision of the Regulation and Perhaps of the Convention' (2011) 27(2) *Arb. Int'l* 190 subs; A Estrup Ippolito and M Adler-Nissen 'West Tankers revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?' (2013) 79(2) *Arbitration* 165.

123 European Parliament op cit (n84) 5 subs; opposing opinion Radicati Di Brozolo op cit (n82) 430 subs.

124 See chapter B.I.1 at p 20.

125 A Nuyts 'La refonte du règlement Bruxelles I' (2013) 102 *Revue critique du droit international privé* 15.

126 Opinion of AG Wathelet on *"Gazprom"* supra (n84) at para 132 subs.

the next section.[127] But the opinion given by *Wathelet* is also relevant regarding anti-suit injunctions issued by national courts. He stated that in the *West Tankers* case, the power of the English court to issue the anti-suit injunction would not have been affected under the recast Regulation, because Recital 12(2) now states that a ruling given by a court of a Member State as to the validity of the arbitration agreement should not come within the scope of the Regulation, regardless of whether it decided on this as a principal issue or as an incidental question, as it was the case in the targeted proceedings in Italy. According to *Wathelet*, Recital 12(3) would exclusively apply to the judgment on the substance of the case once the court had determined that the arbitration agreement was invalid. Until then, the issuing of an anti-suit injunction would have been possible, because the Italian case did not (yet) come within the scope of the Regulation, whereas once this decision was made, it would. Aside from the aforementioned, he referred to the legislative history and of course especially to the mentioned Report of the European Parliament and to Recital 12(4), according to which the Regulation shall not apply to 'ancillary proceedings', which would include, in his opinion, court-ordered anti-suit injunctions.

It has been stated that this reasoning overlooks that Recital 12 only refers to the rules of recognition and enforcement and not also to jurisdictional matters laid down in the Regulation and thereby is not completely excluding rulings on the validity of arbitration agreements from the scope of the Regulation, so that *West Tankers* still is in effect.[128]

Notwithstanding the aforementioned point, in my opinion, *Wathelet's* separation of the very same case into two parts seems to be the result of an overinterpretation of Recital 12. The splitting in terms of time of a legal case with regards to its exclusion from the scope of the Regulation appears to be against common practice and would lead to an even stronger run to the courts. It would depend on the time needed by the (in *West Tankers* Italian) court to decide on the validity of the arbitration agreement for how long English courts would be able to prevent the next step in these proceedings by issuing an anti-suit injunction. This would undermine the aim of legal certainty. According to my understanding, Recital 12(2) and (3) have to be read together. This means

127 See below B.II.2 at p 32 subs.

128 B Demirkol 'Ordering Cessation of Court Proceedings to Protect the Integrity of Arbitration Agreements under the Brussels I Regime' (2016) 65 *Int'l & Comp. L.Q.* 399; Hartley op cit (n110) 971 subs.

that in the case of the validity of the arbitration agreement being a preliminary question, it depends on the answer to this question whether or not the judgment falls within the scope of the Regulation. If the court finds the arbitration agreement to be valid, the proceedings in front of this court are finished and its judgment does not fall within the scope of the Regulation in accordance with Recital 12(2). If the court finds the arbitration agreement to be invalid, it may go on with its proceedings leading to a judgment on the merits of the case, which then falls within the scope of the Regulation in accordance with Recital 12(3). Indeed, Recital 12(2) separates the incidental decision on the invalidity of the arbitration agreement regarding its recognition and enforcement from the decision on the substance of the case. This, however, only means that other Member State courts are not bound by the incidental decision on the invalidity of the arbitration agreement, and not that the entire proceedings do not come within the scope of the Regulation until this decision is made. Otherwise, the merely alleged existence of a valid arbitration agreement would enable a party to attack the court proceedings with an anti-suit injunction until the court has found that in fact no arbitration agreement exists. Therefore, the solution presented by *Wathelet* does not convince and appears to aim on artificially re-establishing the pursued status quo before the *West Tankers* decision.

Consistent to the aforementioned, the prevailing view is that Recital 12 does not have any implications as to whether or not anti-suit injunctions by national courts in support of arbitration are admissible, so that national courts would not be able to issue anti-suit injunctions in aid of arbitration under the recast Regulation.[129] The basic reason for this may be that the principle of mutual trust still governs the Brussels Ia Regulation.[130]

Ultimately, again only the CJEU will be able to decide on the permissibility of anti-suit injunctions by national courts under the Brussels Ia Regulation. But as the future of the relationship between the EU and the United Kingdom is very uncertain after the vote for a Brexit, the CJEU may not even have to consider this issue anymore. If the Brexit would mean that Great Britain would no longer be part of the Brussels Regime,

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129 Carducci op cit (n56) 488 subs; G Carducci 'Validity of Arbitration Agreements, Court Referral to Arbitration and FAA § 206, Comitiy, Anti-suit Injunctions Worldwide and their Effects in the E.U. before and after the new E.U. Regulation 1215/2012' (2013) 24 *Am. Rev. Int'l Arb.* 543; Camilleri op cit (n93) 916; Ojiegbe op cit (n108) 278; Hartley op cit (n76) 858; Hartley op cit (n110) 972; Estrup Ippolito and Adler-Nissen op cit (n122) 169 subs; F De Ly op cit (n93) 501; M Moses 'Arbitration/Litigation Interface: The European Debate' (2014) 35 *Nw. J. Int'l L. & Bus.* 24 subs.

130 Brengesjö op cit (n53) 52; Demirkol op cit (n128) 400.

they would no longer have to trust European courts either. Thus, the anti-suit injunction would again be at the disposal of English courts, even where the targeted proceedings would take place in a Member State. But this, of course, would not anymore have anything to do with the Regulation.[131]

2. By an arbitral tribunal

Depending on the arbitration rules, the arbitral tribunal might also itself render an anti-suit injunction in the form of an award once it has been set up, and thereby preventing the parties from following their interests elsewhere. The English Arbitration Act, in section 48, contains an express provision concerning the remedies an arbitrator can order, stating that '[t]he tribunal has the same powers as the court to order a party to do or refrain from doing anything'.[132] Under this provision, the arbitral tribunal is allowed to issue anti-suit injunctions in order to protect its proceedings.[133] While this provision would in principle first of all require that English arbitration law apply to the proceedings, it is generally accepted that arbitral tribunals have regardless of the applicable arbitration law the power to order the remedies contained in section 48 of the English Arbitration Act.[134] The legal basis for this power has been derived from the principle of *kompetenz-kompetenz* in arguing that the arbitral tribunal, having jurisdiction to rule about its own competence, must also be enabled to decide disputes about the arbitration agreement and to sanction breaches thereof.[135] A further reason may be seen in

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131 For a general discussion see K Davies and V Kirsey 'Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?' (2016) 33(4/1) *J. Int'l Arb.* 501; S Masters QC and B McRae 'What Does Brexit mean for the Brussels Regime? (2016) 33(4/1) *J. Int'l Arb.* 483; for a positive statement on the effects of Brexit on English anti-suit injunctions see A Cannon, V Naish and H Ambrose 'Anti-suit Injunctions and Arbitration in London Post-Brexit' *Kluwer Arbitration Blog*, 27 July 2016, available at *http://kluwerarbitrationblog.com/2016/07/27/when-life-gives-you-lemons-make-lemonade-anti-suit-injunctions-and-arbitration-in-london-post-brexit/*, accessed on 28 July 2016; for a negative statement on the effects of Brexit on the English law market in general see B Hess and M Requejo Isidro 'Brexit – Immediate Consequences on the London Judicial Market' *Kluwer Arbitration Blog*, 29 June 2016, available at *http://kluwerarbitrationblog.com/2016/06/29/brexit-immediate-consequences-on-the-london-judicial-market/*, accessed on 2 July 2016.

132 UK Arbitration Act 1996, Section 48(5)(a).

133 T Raphael *The Anti-suit Injunction* 2ed (2010) 196 subs.

134 Brengesjö op cit (n53) 55; Demirkol op cit (n128) 383.

135 E Gaillard 'Anti-suit Injunctions Issued by Arbitrators' in *International Arbitration 2006: Back to Basics? ICCA Congress Series* 13ed (2007) 236.

the arbitrator's obligation to take all the necessary measures to protect the future award.[136]

The Brussels Regime only governs the jurisdiction of national courts and the recognition and enforcement of judgments. Arbitral proceedings in general and therefore also the ones concerned with anti-suit injunctions are not addressed there, so that an incompatibility could only occur at the later stage of the enforcement of the arbitral award, because it is only then that national courts become part of the process. As this work aims on giving an overview of possible court involvements in arbitration proceedings chronologically, this issue would normally have to be dealt with at a later stage.[137] It is only because of some misunderstandings triggered by the *West Tankers* decision that arbitral anti-suit injunctions can reasonably be discussed here.

It was only after the *West Tankers* decision that the case of *"Gazprom" OAO v. Lietuvos Respublika* drew the attention to this matter.[138] In this case, the Republic of Lithuania started proceedings in front of the courts of Lithuania, seeking initiation of an investigation in respect of allegedly improper activities of the board of directors of Gazprom, a company with which they had concluded a shareholder agreement including an arbitral clause. Relying on this clause, Gazprom initiated arbitral proceedings in Stockholm where it claimed inter alia that the arbitral tribunal should order the Republic of Lithuania to discontinue the proceedings pending in Lithuania. The award was rendered accordingly and Gazprom applied for its enforcement to the court where the Lithuanian proceedings were pending. The case made its way up to the Supreme Court of Lithuania, which referred the question to the CJEU 'whether Regulation No 44/2001 must be interpreted as precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State'.[139] It assumed that this could be possible because 'an arbitral award prohibiting a party from bringing certain claims before a national court could undermine the practical effect of Regulation No 44/2001',[140] and thereby basically referring to the *West Tankers* decision. The court reiterated the

136 A Leáñez 'The Future of Anti-Suit Injunctions: The Power of the Arbitral Tribunal to Issue Anti-suit Injunctions' (2010) 14 VJ33 *V. J. Int'l C. L. & Arb.* 35.

137 See chapter B.VI at p 43.

138 *"Gazprom"* supra (n77).

139 At para 27.

140 At para 31.

basic principles of its rulings in *Marc Rich* and *West Tankers*[141] before highlighting the main difference between the case present before it and *West Tankers*: While in *West Tankers* the instance issuing the anti-suit injunction was a national court, in *Gazprom* an arbitral tribunal rendered an award containing the anti-suit injunction.[142] Because of this difference in the instance issuing the injunction, the Court found that there was no conflict under the Brussels I Regulation, which governed only jurisdictional conflicts between national courts. Therefore, the principle of mutual trust could not have been infringed. Moreover, the court stated that the party being faced with the injunction could contest the enforcement of the award, so that 'the court seized would have to determine, on the basis of the applicable national procedural law and international law, whether or not the award should be recognised and enforced'.[143] This would in most cases be the New York Convention, which led the Court to the conclusion that the question asked by the Supreme Court of Lithuania was to be answered in the negative. This meant that the Regulation did not have an impact on the recognition and enforcement of an arbitral award containing an anti-suit injunction.[144]

This result had already been predicted before the judgment was given[145] and was approved of commentators afterwards.[146] If the *West Tankers* judgment had not been given before, the case may not even have made its way to the CJEU, because most likely no confusion with regards to the applicable instruments to judgments and awards would have arisen. No one would have assumed that the Brussels Regime could interfere with an arbitral award, regardless of its content. Only once the problem of anti-suit injunctions issued by national courts had arisen, people were tempted to adapt the given arguments to anti-suit injunctions rendered by arbitral tribunals and thereby forgetting that the reasoning of the CJEU in *West Tankers* required at least the possibility of applying the Brussels I Regulation, whereas arbitral awards are governed by national procedural law and international law. Under the recast Regulation, this has even been further underlined, as Art. 73(2) of the Brussels Ia Regulation now explicitly states that the application of the New York Convention shall not be affected by the Regulation.[147] More-

141 At para 29, 32 subs.
142 At para 35.
143 At para 36 subs.
144 At para 44.
145 Hartley op cit (n76) 855 subs.
146 Carducci op cit (n106) 111 subs; Ojiegbe op cit (n108) 267 subs; Demirkol op cit (n128) 185 subs; TC Hartley 'Antisuit Injunctions in Support of Arbitration: West Tankers still afloat' (2015) 64 *Int'l & Comp. L.Q.* 973.
147 In the same sense De Ly op cit (n93) 504.

over, Recital 12(3) in its last sentence also provides for the prevalence of the New York Convention. Accordingly, anti-suit injunctions issued by arbitral tribunals do not come within the scope of the Brussels Ia Regulation.

III. Proceedings ancillary to arbitration

Once the arbitration agreement has been validated, the arbitral tribunal can be constituted. If one party does not abide by the agreement and refuses to take part in this process, other instances will have to substitute them in this regard. In most cases, the arbitration agreement contains a reference to an arbitral institution and its rules, which usually provide that the arbitral institution carries out ancillary measures in support of the arbitral proceedings.[148] Such measures include the appointment of and the challenge to an arbitrator, the determination of the arbitral seat or the extension of a time limit. But where such a reference to applicable arbitral rules is missing, a further option exists, as in these cases national courts may lend support.

Hereinabove, it already becomes apparent that these proceedings may not be governed by the Brussels Regime. The named measures are very closely linked to the arbitral proceeding itself, and often they are already contained in the arbitration agreement, at least indirectly by referring to arbitral rules. If this is not the case, national arbitration laws determine the applicable procedure.

This was stated in the Reports to the Brussels Convention,[149] confirmed by the CJEU in *Marc Rich* and *Van Uden*[150] and is now made clear by Recital 12(4) of the Brussels Ia Regulation, which states that '[t]his 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'.

Consequently, proceedings ancillary to arbitration undisputedly do not come within the scope of the Brussels Ia Regulation, and are therefore clearly subject to the national laws of the Member States.

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148 UNCITRAL Rules, Art 6-10, 14; ICC Rules, Art 12-15, 18; LCIA Rules, Art 5, 7, 10, 11; SCC Rules, Art 13, 15, 17, 20; DIS Rules, Sect 2, 14.

149 Schlosser op cit (n70) para 64; Kerameus op cit (n71) para 35.

150 *Marc Rich* supra (n72) at para 19 subs; *Van Uden* supra (n77) at para 32.

IV. Provisional measures

Provisional measures may become necessary before the arbitral tribunal has been constituted, but most often during the arbitral procedure itself. They can take various forms under different laws,[151] but within the context of the Brussels Regime (as well as arbitration), they foremost serve the goal 'to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court [or tribunal] having jurisdiction as to the substance of the case'.[152] The different versions of the Brussels Regime have never contained a concrete definition of provisional measures,[153] however the Brussels Ia Regulation has now introduced Recital 25, which seems to explain that the main feature of provisional measures under the Brussels Ia Regulation is their protective nature.[154]

In most cases, national courts and arbitral tribunals both have the power to issue provisional measures. One could assume that before the arbitral tribunal has been constituted, only national courts can be seized in this regard. But many arbitral rules provide for the possibility to appoint a so-called 'emergency arbitrator' having jurisdiction to order provisional measures.[155] Nevertheless, there are some disadvantages to provisional measures ordered by emergency arbitrators, for example problems with their international enforcement, because some national arbitration laws do not contain specific provisions for the enforcement of such orders, so that parties may still prefer to rely on national courts.[156] Once the arbitral tribunal has been constituted, there may at first sight not remain any reason to involve national courts. However, as the arbitral process is based on the autonomy of the involved parties, the power of the tribunal, for example regarding orders involving third parties (e.g. the order for temporary freezing of a bank

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151 For a listing of categories of provisional measures in international arbitration see G Born *International Arbitration: Law and Practice* 2ed (2015) 216.

152 *Reichert and Kockler v. Dresdner Bank* (1992) Case No. C-261/90, E.C.R. I-02149 at para 34.

153 Even though, for the revision of the Brussels Convention, the Commission had proposed to define them as 'urgent measures for the examination of a dispute, for the preservation of evidence or of property pending judgment or enforcement, or for the preservation or settlement of a situation of fact or of law for the purpose of safeguarding rights which the courts hearing the substantive issues are, or may be, asked to recognize', European Commission 'Proposal for a Council Act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union' (1998) *OJ C 33*, 31 January 1998, 32.

154 In the same sense already *St. Paul Dairy Industries NV v. Unibel Exser BVBA* (2005) Case No. C-104/03, E.C.R. I-03481 at para 17 subs.

155 See for example UNCITRAL Rules, Art 26(1); SCC Rules, Art 32(4) and Appendix II, Art 3; ICC Rules, Art 29(1) and Appendix V, Art 1(2); LCIA Rules, Art 9B.

156 Blackaby op cit (n29) para 7.17.

account) or without giving notice to the party against whom the measure is directed (ex parte application), is limited.[157] Therefore, national courts are important in order to issue provisional measures even if the arbitral tribunal has already been constituted.

1. By a national court

First of all, the question arises if national courts have the power to issue provisional measures in support of arbitration. If the arbitration agreement confers the jurisdiction to decide any disputes in relation to the matters defined therein to the arbitral tribunal, how can judges have jurisdiction to decide (parts of) the case in a provisional ruling? The New York Convention does not deal expressly with provisional relief,[158] whereas the European Convention provides that '[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement'.[159] The answer is therefore mainly to be found in the national arbitration laws[160] and also in the applicable arbitration rules[161], which in most cases contain similar provisions.[162] Thus, the question raised can be seen as historically grown as these provisions have not always existed.[163] Nevertheless, depending on the constellation of the case, the decision regarding the provisional measure could even prejudice the result of the arbitration.[164] Therefore, judges should exercise caution when issuing provisional measures, even though they mostly have the power to do so.

Nevertheless, the question remains whether or not provisional measures ordered by a national court in support of arbitration come within the scope of the Brussels Regime.

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157 Blackaby op cit (n29) para 7.18, 7.21.
158 Born op cit (n28) 2523.
159 European Convention, Art VI(4).
160 See for example UNCITRAL Model Law, Art 9; Netherlands Code of Civil Procedure, Art 1022a-c; Swedish Arbitration Act, Sect 25;
161 See for example UNCITRAL Rules, Art 26(9); 2012 ICC Rules, Art 28(2); 2014 LCIA Rules, Art 25(3).
162 An exception in this regard are the Italian provisions on arbitration, which prevent Arbitrators from ordering provisional measures, Art 818 Italian Code of Civil Procedure.
163 Blackaby op cit (n29) para 7.24; Born op cit (n28) 2431 subs.
164 Blackaby op cit (n29) para 7.25.

The different Reports on the Brussels Convention did not yet specifically address this matter, but of course referred to provisional measures in general as they were already then subject to a specific provision on jurisdiction.[165]

The CJEU dealt with the interaction between the article on provisional measures and arbitration in the *Van Uden* case.[166] Van Uden, a Dutch company, was seeking provisional measures relating to the payment of debts from Deco-Line, a German company, arising under a contract containing an arbitration clause in front of the Dutch courts. The *Hoge Raad der Nederlanden* (Supreme Court) asked the CJEU inter alia to rule on the relevance of the fact that the dispute in question was subject to arbitration. The Court first stated that in the presence of an arbitration agreement, the jurisdiction of a court could only be based on the Convention's rule on provisional measures,[167] as the agreement to arbitrate per se excluded the jurisdiction of any court as to the substance of the case.[168] But regarding the Convention's rule on provisional measures, the Court had already stated that if a matter was excluded from the Convention according to Art. 1(2), provisional measures in that case would be excluded as well.[169] As arbitration was excluded from the scope of the Convention,[170] one would have assumed that the same reasoning would have applied in *Van Uden*. But the Court identified provisional measures in support of arbitration as not being ancillary to arbitration[171] but rather parallel to it, and therefore that reference had to be made to the nature of the rights that the provisional measures served to protect.[172] In the case before the Court, the provisional measure was not aimed at protecting the arbitral proceedings, but rather to secure the performance of a contractual obligation. Thus, the rule on provisional measures of the Brussels Convention was applicable.[173] The difference of arbitration being excluded from the scope of the Brussels Regime to the other exceptions listed in Art. 1(2) is that it re-

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165 Art 24 of the Brussels Convention; Jenard op cit (n4) 42; Schlosser op cit (n70) para 183; Kerameus op cit (n71) para 70.

166 *Van Uden* supra (n77).

167 Art 24 Brussels Convention.

168 *Van Uden* supra (n77) at para 24 subs.

169 With regards to Art 1(2)(1) of the Brussels Convention see *Jacques de Cavel v. Louise de Cavel (Cavel I)* (1979) Case No. 143/78, E.C.R. 01055 at para 9 subs; *CHW v. GJH* (1982) Case No. 25/81 E.C.R. 01189 at para 12.

170 Art 1(2)(4) Brussels Convention.

171 The Schlosser Report had stated before that proceedings ancillary to arbitration were excluded from the scope of the Convention, Schlosser op cit (n70) para 64.

172 *Van Uden* supra (n77) at para 33.

173 At para 34.

lates to a chosen procedure instead of areas of material law, so that the earlier reasoning of the Court with regards to the latter did not apply in the same way.[174]

Regarding this outcome, the reactions of commentators were in parts assenting,[175] but for some of them, the differentiation between 'proceedings ancillary to arbitration' and 'parallel proceedings in support of arbitration' was not clear enough, because for example provisional measures indeed supporting the arbitral process and at the same time being provisional, such as provisional measures to submit evidence, would be hard to assign to only one of these categories.[176]

Soon thereafter, when the Brussels Convention was converted into the Brussels I Regulation, a proposal to change the provision on provisional measures was discussed,[177] but in the end the status quo remained.[178]

In the Brussels I review process, the *Heidelberg Report* discussed the influence of arbitration agreements on the power of national courts to order provisional measures again, providing for two alternatives.

First, if their proposal to include arbitration into the scope of the Regulation was being followed, they concluded that

> 'provisional measures of national courts supporting arbitration proceedings would not only fall under Article 31 [of the Brussels I Regulation], but could also be granted by all courts of the Member States under the heads of jurisdiction provided for in Articles 2-26 [of the Brussels I Regulation]'.[179]

Nevertheless, this would not have solved the uncertainty as regards the distinction between 'ancillary' and 'parallel proceedings in support' introduced by the *Van Uden* judgment, because the proposed exclusive jurisdiction of the court at the place of

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174 Kruger op cit (n14) para 6.25.

175 TC Hartley 'Interim measures under the Brussels Jurisdiction and Judgments Convention' (1999) 24(6) *E.L. Rev.* 678 subs; Ambrose op cit (n79) 25; Kruger op cit (n14) para 6.25.

176 Van Houtte op cit (n64) 516; van Haersolte-Van Hof op cit (n79) 29 subs; G Maher and BJ Rodger 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' (1999) 48 *Int'l & Comp. L.Q.* 316; A Dickinson 'Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?' (2010) 6 *J. Priv. Int'l L.* 528 subs; Den Tandt op cit (n80) 93.

177 European Commission op cit (n153) 13-15, 32;

178 European Commission 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' (1999) *OJ C 376E*, 28 December 1999, 8; see also the comment on Section 10 in the Explanatory Memorandum to the Proposal, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:51999PC0348*, accessed on 13 October 2016.

179 Hess op cit (n81) para 124.

arbitration would have only referred to ancillary proceedings,[180] leaving it open what would happen with the so determined parallel proceedings in support of arbitration. From the statement above, one could derive that any court having jurisdiction either in accordance with Art. 2-26 Brussels I Regulation or in accordance with Art. 31 Brussels I Regulation would have the power to order provisional measures, regardless of them being ancillary or not. The provision providing for exclusive jurisdiction at the seat of arbitration would after this interpretation only have applied to ancillary proceedings not being of a provisional nature, such as the appointment of an arbitrator.

Second, if the proposal to delete Art. 1(2)(d) of the Brussels I Regulation was not to be followed, the authors alternatively proposed that the exception of arbitration in Art. 1 should be supplemented by an exception to the exception regarding 'provisional measures not affected, under the law of the Member State, by an arbitration agreement'.[181]

As previously stated, the Green Paper then followed the first approach of bringing arbitration within the scope of the Brussels Ia Regulation, and would therefore have led to the same results.[182]

The following Commission's Proposal again adopted a different approach in this regard. While the exclusive jurisdiction for the courts at the seat of arbitration would have only applied with regards to the scrutiny of the arbitration agreement, a new Art. 36 would have given jurisdiction to any court of a Member State as available under its national law regarding provisional measures, 'even if the courts of another Member State or an arbitral tribunal have jurisdiction as to the substance of the matter'.[183] In this case, any national court would have been able to order provisional measures in support of arbitration if its national law provided so.

In the further review process, these ideas have been discarded. In the final version of the Brussels Ia Regulation, the main change regarding arbitration was the introduction of Recital 12. Regarding provisional measures, the rule on provisional measures[184] has experienced only very slight changes that seem not to affect provisional measures ordered by national courts in support of arbitration. Recital 12 could in any

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180 Hess op cit (n81) para 132.
181 Hess op cit (n81) para 774 subs, 784, 789 subs.
182 Commission of the European Communities op cit (n82) 9.
183 European Commission op cit (n83) 39.
184 Formerly Art 31 Brussles I Regulation, now Art 35 Brussels Ia Regulation.

case only refer to provisional measures in its paragraph 4, stating that '[t]his 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 […]'. The only link to provisional measures in this wording could be the mentioning of 'ancillary proceedings'. But as the CJEU in *Van Uden* has specifically differentiated provisional measures from ancillary proceedings, and as they are not mentioned in the (non-exhaustive) listing of examples despite the review process having dealt with the issue and therefore obviously being well aware of it, it seems to be far-fetched to interpret this wording as including provisional measures.

Thus, in conclusion the principle set out by the CJEU in *Van Uden* still claims validity under the Brussels Ia Regulation.[185] For the sake of clarity, this does not mean that the Brussels Ia Regulation applies in its entirety. Only the Brussels Ia Regulation's rule on provisional measures[186] can constitute jurisdiction for national courts ordering provisional measures in support of arbitration, provided the rights the provisional measures serve to protect come within its scope. Nevertheless, national courts seem to exercise caution when ordering provisional measures in support of arbitral proceedings seated in a different state, because their laws are often 'foreign' to the chosen law of the arbitration.[187]

2. By an arbitral tribunal

Despite the powers of national courts to order provisional measures based on their sovereignty, the parties to an arbitration agreement have in principle conferred the power to decide any disputes arising within its scope to the arbitral tribunal. Indeed, the main sources of law regarding the arbitrator's power to order provisional measures are to be seen in the arbitration agreement and the national laws, as international arbitration conventions rarely deal with the matter.[188] In practice, arbitrators seem to exercise relatively frequently the broad powers conferred to them by these sources.[189]

185 In the same way Den Tandt op cit (n80) 107.
186 Art 35 Brussels Ia Regulation.
187 Born op cit (n151) 226.
188 Born op cit (n28) 2428 subs.
189 Born op cit (n151) 209.

Contrary to the above, a source of law regarding the jurisdiction for and the enforcement of provisional measures ordered by arbitrators cannot be seen in the Brussels Regime. The reason for this is simple: preliminary proceedings conducted by arbitral tribunals are still arbitral proceedings, and those were from the beginning excluded from the Brussels Regime. The different review and recast processes have changed nothing in this regard. Problems related to the arbitration exclusion in the Brussels Regime almost always arose only regarding court proceedings in support of arbitration, not regarding arbitration proceedings themselves.[190] As with anti-suit injunctions ordered by arbitral tribunals, it is only the stage of the enforcement of the provisional measures (in the form of an (provisional) award), where national courts enter the scene.[191] Therefore, provisional measures ordered by arbitral tribunals do not come within the scope of the Brussels Ia Regulation.

V. Annulment of the award

If the loosing party is not satisfied with the award, it will usually try to have it annulled by a national court.[192] Even though the arbitral award is deemed to be final, different legal instruments provide limited grounds for its challenge.

The New York Convention, as the main instrument dealing with arbitral awards, states in Art. V(1)(e) that

> '[r]ecognition and enforcement of the award may be refused […] if [a] party furnishes to the competent authority proof that [t]he award […] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'.

Together with Art. VI of the New York Convention, which refers to Art. V(1)(e), it is generally accepted that the courts of the place of arbitration have exclusive jurisdiction for annulment proceedings.[193] Substantive grounds for the annulment of an arbitral award are in contrary to that not contained in the New York Convention.[194]

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190 With the above discussed exception of anti-suit injunctions ordered by arbitral tribunals, see B.II.2.

191 See below B.VI. at p. 43.

192 Other terms for the word to 'annul' may be to 'set aside' or to 'vacate', see Born op cit (n151) 311.

193 Born op cit (n151) 315 subs; Born op cit (n28) 1549 subs; Blackaby op cit (n29) para 10.26.

194 Born op cit (n28) 3164 subs.

The European Convention is a little more specific, as it provides under Art. IX(1) that a judgment setting aside an award is not a basis for the refusal of recognition of the award if it refers to a substantive review of the merits of the award or local public policy.[195] Regarding the substantive grounds for the setting aside of an arbitral award, reference has however to be made to the national law of the seat of arbitration. In most cases, these grounds resemble strongly the ones set out by Art. V of the New York Convention concerning the refusal to recognise or enforce an arbitral award.[196] The same applies regarding the UNCITRAL Model Law.[197]

It can be deduced that recourse against the award shall only be possible under very limited circumstances, which has been confirmed by the CJEU.[198] If successful, the annulment of the award certainly results in the unenforceability in the state of its origin, whereas the consequences regarding its possible enforcement elsewhere strongly depend on the specific forum where enforcement is sought. The reason for this is to be seen in Art. V(1)(e) of the New York Convention, which only states that recognition and enforcement 'may' be refused on this ground, and thereby leading to differing interpretations by national courts.[199] But in the vast majority of cases, the annulment of the award will result in its unenforceability internationally.

One can assume from this introduction that annulment proceedings do not come within the scope of the Brussels Regime, as they are at least in parts subject to the New York Convention. This was stated by all the Reports on the Brussels Convention,[200] reiterated by the CJEU[201] and is now explicitly laid down in Recital 12(4) of the Brussels Ia Regulation, stating that '[t]his Regulation should not apply to […] any action or judgment concerning the annulment […] of an arbitral award'. Therefore, the variety of national arbitration laws within the European Union governs this issue.

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195 Born op cit (n28) 3623.

196 Born op cit (n28) 3185.

197 UNCITRAL Model Law Art 34.

198 *Eco Swiss China Time Ltd v. Benetton International NV* (1999) Case No. C-126/97, E.C.R. I-03055 at para 35.

199 Born op cit (n28) 3624 subs; Blackaby op cit (n29) para 10.89 subs.

200 Jenard op cit (n4) 13; Schlosser op cit (n70) para 65, referring to the annulment as the 'revocation'; Kerameus op cit (n71) para 35.

201 *Van Uden* supra (n77) at para 32.

VI. Recognition and enforcement of the award

After the arbitral tribunal has finished the proceedings and the award has been rendered, most parties seem to comply with the result voluntarily.[202] If they refuse to do so, the enforcement of the award becomes necessary. If the unsuccessful party alternatively tries to escape the outcome of the arbitral proceedings and issues a claim in a national court regarding the same subject matter, the prevailing party will seek for recognition of the award in order to bar these court proceedings. In both situations, the support of national courts is needed. As the full title of the New York Convention indicates, it is this legal instrument that governs the recognition and enforcement of foreign arbitration awards.

Therefore, these proceedings also do not come within the scope of the Brussels Regime.[203] The Reports were clear on this point[204] and the CJEU left no doubt in this regard either.[205] In line with this, Recital 12(4) of the Brussels Ia Regulation further clarifies the issue, stating that '[t]his Regulation should not apply to […] any action or judgment concerning the […] recognition or enforcement of an arbitral award'. In result, this again leads to the national arbitration laws incorporating the New York Convention being applicable to the recognition and enforcement of arbitral awards and not the Brussels Regime.

VII. Interim Conclusion

At this point, subquestion one about the arbitration-related matters that are covered by Art. 1(2)(d) Brussels Ia Regulation and therefore excluded from its scope of application can be answered by drawing an interim conclusion.

First, the answer regarding the challenge to the validity of the arbitration agreement depends on whether this question is the main subject matter of the case or not. If it

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202 Queen Mary University of London, School of International Arbitration, and Pricewaterhouse Coopers LLP 'International Arbitration: Corporate Attitudes and Practices 2008' 8, available at *http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf*, accessed on 20 October 2016; nevertheless, reliable data on international arbitration are hard to collect, see Blackaby op cit (n29) para 11.02.

203 Nevertheless, courts have to consider the compatibility of the award with fundamental provisions which are essential for the accomplishment of the tasks entrusted to the Community, see *Eco Swiss* supra (n198) at para 32 subs.

204 Jenard op cit (n4) 13; Schlosser op cit (n70) para 65; Kerameus op cit (n71) para 35.

205 *Van Uden* supra (n77) at para 32; *"Gazprom"* supra (n77) at para 41.

is, the Regulation is not applicable in line with Recital 12(2). If it is not, but rather a preliminary question, one has to distinguish once more. In the case of the court finding the arbitration agreement valid and referring the parties to arbitration, the Regulation is also not applicable for the same reason. In the case of the court finding the arbitration agreement to be invalid and therefore giving a judgment on the substance of the case, the Regulation is in line with Recital 12(3) applicable to the judgment on the merits. Nevertheless, the incidental decision on the invalidity of the arbitration agreement is in line with Recital 12(2) still subject to the exception set out in Art. 1(2)(d) of the Brussels Ia Regulation regarding its recognition and enforcement.

Second, the answer regarding anti-suit injunctions in support of arbitration depends on the instance issuing them. If it is an arbitral tribunal issuing the injunction, the Regulation could from the outset only apply to the enforcement of the award containing the injunction. But in line with Recital 12(4), the Regulation does not apply to actions or judgments concerning the enforcement of an arbitral award. Therefore, they are subject to Art. 1(2)(d) Brussels Ia Regulation. If it is a national court issuing the anti-suit injunction in support of arbitration, these proceedings themselves do not come within the scope of the Regulation because they serve to protect the right to determine the dispute by arbitration. Consequently, they would be covered by Art. 1(2)(d) Brussels Ia Regulation. Nevertheless, anti-suit injunctions issued by an English court against the court of a Member State – whether in support of arbitration or not – infringe the principle of mutual trust and are therefore not permitted.

Third, proceedings ancillary to arbitration are covered by Art. 1(2)(d) Brussels Ia Regulation and therefore excluded from its scope of application in line with Recital 12(4).

Fourth, the answer regarding provisional measures in support of arbitration again depends on the instance ordering them. If it is an arbitral tribunal ordering the provisional measure, the same reasoning as for anti-suit injunctions issued by arbitral tribunals applies. Therefore, they are subject to Art. 1(2)(d) of the Brussels Ia Regulation, and thus outside the scope of the Regulation. If it is a national court of a Member State ordering the provisional measure, these proceedings do come within the scope of the Brussels Ia Regulation as long as the rights the provisional measures serve to protect come within its scope. The reason why they are not covered by Art. 1(2)(d) of the

Brussles Ia Regulation is that these proceedings are not concerned with arbitration itself, but rather only with the rights that are finally to be determined by arbitration.

Fifth, actions or judgments concerning the annulment of an award are also covered by Art. 1(2)(d) Brussels Ia Regulation and therefore excluded from its scope of application in line with Recital 12(4).

Sixth, the same applies as regards actions or judgments concerning the recognition or enforcement of an arbitral award.

C. Remaining problems

On the basis of these results, the remaining legal problems can be discussed in order to examine the second subquestion of this minor dissertation.

I. Parallel proceedings

Problems at the intersection of court and arbitral proceedings in the EU result mainly from the fact that before and after the recast of the Brussels I Regulation, the legal framework in this field of law does not prevent parallel court and arbitral proceedings on the merits. The reason for this shortcoming is a jurisdictional overlap of national courts and arbitral tribunals based on the principle of *kompetenz-kompetenz*.[206] Where each judicial body has the power to decide on its own jurisdiction, the danger of diverging outcomes automatically emerges. The variety of approaches with regards to the law applicable to the validity of the arbitration agreement further increases this risk.[207]

That the Brussels Ia Regulation has changed nothing in this regard can be illustrated by its application to the *Marc Rich* case.[208] The decision of the Italian courts on the merits of the case would still have to be recognized and enforced in accordance with the Brussels Ia Regulation (Recital 12(3)), but at the same time would still not have prevented the English courts from deciding differently with regards to the preliminary question of the validity of the arbitration agreement (Recital 12(2)). Therefore, the latter could still be supporting arbitral proceedings commenced in England. The result would again be the danger of the Italian courts and an English arbitral tribunal deciding both on the merits of the case.

II. Enforcement of contradicting legal titles

Parallel proceedings may lead to contradicting legal titles, and each party will most likely seek to enforce the one in its favour. The question is therefore which of the

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206 N Erk *Parallel Proceedings in International Arbitration - A Comparative European Perspective* 1ed (2014) 1.

207 See above under B.I. at p 15 subs.

208 Which was still subject to the Brussels Convention.

legal titles should prevail. Several different constellations need to be distinguished in this regard.

In general, both the Brussels Ia Regulation and the New York Convention provide different grounds for refusal of enforcement of judgments or awards respectively.[209] In the case of contradicting legal titles, several grounds of both instruments may come into question. Besides the grounds provided in these two legal instruments, additional grounds for refusal of the actual enforcement as available under the national law of the Member State addressed may be applicable.[210]

Regarding Member State judgments, the Brussels Ia Regulation contains two specific provisions for the refusal of enforcement of irreconcilable judgments:[211] one for irreconcilable judgments of courts of the Member State addressed (art. 45(1)(c) Brussels Ia Regulation)[212] and one for irreconcilable judgments of courts of another Member State or third States (Art. 45(1)(d) Brussels Ia Regulation)[213]. Besides that, Art. 45(1)(a) Brussels Ia Regulation[214] could provide a further ground for refusal of enforcement of a judgment contradicting an award, referring to an infringement of public policy. Under the Brussels Ia Regulation, there is no longer a need to grant leave to enforce judgments as exequatur was abolished, so that the judgment is directly enforceable if the debtor does not introduce proceedings for non-enforcement.[215] While the Brussels I Regulation provided for an exequatur procedure in two stages – one for the declaration of enforceability in the Member State addressed and one for the challenge of the same – the Brussels Ia Regulation has put an end to the first stage and has only retained the challenge stage.[216] It is at this (formerly) second stage, where a party may invoke the grounds set out by Art. 46, 45 Brussels Ia Regulation. Those grounds therefore relate to the enforceability of a Member State judgment and cannot be considered by the Member State

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209 The European Convention is not an international instrument on the recognition and enforcement of arbitral awards; see DT Hascher 'Commentary on the European Convention 1961' (2011) XXXVI *ICCA Yearbook of Commercial Arbitration* 534 at para 73.

210 Recital 30 Brussels Ia Regulation; Blackaby op cit (n29) para 11.35; Born op cit (n151) 383 subs.

211 J Fitchen 'The Recognition and Enforcement of Member State Judgments – Arts 45-57' in *The Brussels I Regulation Recast* 1ed (2015) para 13.341 subs.

212 Fitchen op cit (n211) para 13.358 subs.

213 Fitchen op cit (n211) para 13.363 subs.

214 Fitchen op cit (n211) para 13.268 subs.

215 Art 39 and Recital 26 Brussels Ia Regulation.

216 Fitchen op cit (n211) para 13.169 subs.

court addressed on its own motion.[217] A distinction in this regard must be drawn to the actual enforcement. While the enforceability relates to the grounds set out in Art. 45 Brussels Ia Regulation, the enforcement itself is subject to the national procedural law of the Member State addressed.[218] Therefore, the grounds for refusal of the actual enforcement of judgments would vary from Member State to Member State, which is why they are not considered in this work. Consequently, the party seeking for enforcement of a judgment will have to apply in each Member State separately.[219] Moreover, the enforceability of a judgment in the Member State of origin is a prerequisite for its enforcement in the Member State where enforcement is sought.[220]

Regarding arbitral awards, two grounds provided in Art. V of the New York convention could potentially serve as a ground for refusal of an arbitral award that is contradicting a Member State judgment. First, Art. V(1)(a) New York Convention could constitute such a ground, if the court addressed finds the arbitration agreement to be invalid.[221] Second, the New York Convention refers in Art. V(2)(b) also to an infringement of the public policy in the country addressed.[222] The difference between these two grounds is that one of the parties needs to request the refusal of enforcement on the ground of Art. V(1)(a), while the court can refer to Art. V(2)(b) on its own motion.[223] Under the New York Convention, the party seeking the enforcement of the arbitral award would in general have to apply for a granting of leave to enforce the arbitral award in the Member State addressed.[224] The enforcement procedure itself would then again be subject to the national procedural law of the state of enforcement.

The UNCITRAL Model Law has adopted Art. V New York Convention with minor drafting changes in its Art. 36.[225] Consequently, in states that have adopted the

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217 J Fitchen 'Enforcement of civil and commercial judgments under the new Brussels Ia Regulation (Regulation 1215/2012)' (2015) 26(4) *I.C.C.L.R.* 145, 146.

218 *Prism Investments BV v van der Meer* (2011) Case-No. C-139/10, E.C.R. I-9511 at para 40; *Coursier v Fortis Bank SA* (1999) Case-No. C-267/97, E.C.R. I-02543 at para 28, with further references.

219 Regarding third state judgments Kruger op cit (n14) para 3.48; *Owens Bank Ltd v Bracco and Bracco Industria Chemica SpA* (1992) Case-No. C-261/90, E.C.R. I-2149.

220 *Owens Bank* supra (n219) at para 23.

221 Born op cit (n151) 389 subs; Blackaby op cit (n29) para 11.66 subs.

222 Born op cit (n151) 407 subs; Blackaby op cit (n29) para 11.105 subs.

223 See Art V(1) 'at the request of the party against whom it is invoked' versus Art V(2) 'if the competent authority in the country where recognition and enforcement is sought finds that'.

224 The New York Convention was able to eliminate the 'double exequatur' requirement, meaning that an arbitral award had to be confirmed at the arbitral seat before being able to be recognised abroad, but the exequatur requirement in the state of enforcement is still apparent; see Born op cit (n151) 387 and Balckaby op cit (n29) at para 11.14.

225 Born op cit (n151) 385.

Model Law, the provisions based on Art. 36(1)(a)(i) and Art. 36(1)(b)(ii) may serve as examples of national statutes dealing with the enforcement of arbitral awards. As there may be significant differences between other national legislations that would have to be considered individually,[226] they are also not subject of this work.

The following scenarios are based on the assumption that the Member State court addressed is not a court at the seat of arbitration, so that the New York Convention is applicable.[227] Besides that, it is assumed that the state of any kind of court proceedings is a Member State of the EU.

1. Possibility of enforcement of the award in the state of the parallel court proceedings

In the state of the parallel court proceedings, the award would only have a chance to be enforced under the New York Convention prior to a decision of this court on the validity of the arbitration agreement.[228] Once the court in this state has found the arbitration agreement to be invalid, recognition and enforcement of the award would most likely be refused on the ground of Art. V(1)(a) New York Convention at the request of the party against whom the award is invoked. As a last resort, the courts in the state of the parallel proceedings may also refer to public policy in accordance with Art. V(2)(b) New York Convention on their own motion.[229] Even though the provision is to be interpreted narrowly,[230] the courts will try to evade undermining the judgment of its own courts at all cost. In regard to a possible enforcement of the award in the state of the parallel court proceedings, the party being able to reach a decision on the validity of the arbitration agreement first clearly has an advantage.

It is only the state of the parallel court proceedings in which the court judgment is a national judgment and therefore not subject to the Brussels Ia Regulation (but rather only subject to the national procedural law). Consequently, this state is unique regarding

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226 Blackaby op cit (n29) para 11.15.

227 All Member States of the EU are signatories to the New York Convention; see United Nations op cit (n41).

228 Agreeing as regards the applicability of the New York Convention Hartley op cit (n76) 866.

229 Illmer op cit (n93) para 2.64.

230 Born op cit (n151) 409 subs.

the enforcement of the contradicting legal titles.[231] Therefore, for the following scenarios it can be assumed that the state of enforcement is any Member State but the state of the parallel court proceedings.

2. Parallel existence of contradicting arbitral award and court judgment at the same time without any of them being enforced yet

In the next scenario, the court judgment and the arbitral award are merely existent at the same time, without any of them being enforced yet. It is assumed that the parties to the dispute then try concurrently in the same Member State to enforce the legal title in their favour.

A clarification in the Brussels Ia Regulation for this constellation results from Art. 73(2) Brussels Ia Regulation and the last part of Recital 12(3): As stated before, national courts of Member States have to recognise and enforce judgments on the merits after a court in an other Member State has found an arbitration agreement to be invalid in accordance with sentence 1 of Recital 12(3). The second sentence however states that this should be without prejudice to the application of the New York Convention by these courts, which is taking precedence over the Regulation. The clarification resulting therefrom can be illustrated by the following example.

A court in Member State A is confronted with a request to enforce the judgment on the merits of a court in Member State B in accordance with Art. 36 and subsequent of the Brussels Ia Regulation. The court in Member State B incidentally found an arbitration agreement to be invalid. At the same time, the court in Member State A is requested to enforce an arbitral award on the same subject matter. This award exists because the arbitral tribunal or any other national court supporting the arbitral proceedings found the arbitration agreement to be valid. Even though the court in Member State A would normally have to enforce the judgment of the court in Member State B in accordance with the Brussels Ia Regulation, this does not prevent it from applying the New York Convention. If the court in Member State A finds the arbitral award to be enforce-

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231 Even though Recital 26 states in its last sentence that ‘a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed’, there are limited grounds for refusal of recognition and enforcement set out in Art. 46, 45 of the Brussels Ia Regulation that can only apply to judgments from Member States other than the Member State addressed.

able under the New York Convention, this result would prevail over its obligation to enforce the judgment of the court in Member State B.[232]

Notwithstanding this, the court in Member State A could possibly refuse the enforcement of the award on its own motion on the ground of a violation of its public policy according to Art. V(2)(b) New York Convention because the award is contradictory to the judgment of the court in Member State B and therefore violates the principle of *res judicata*.[233]

In my opinion, a reason to not refer to this reasoning could be seen in the last part of Recital 12(3): If the obligation to enforce the judgment of the court in Member State B in accordance with the Brussels Ia Regulation should be without prejudice to apply the New York Convention, what would be the underlying reason of the last sentence of Recital 12(3) if this obligation would constitute a breach of public policy pursuant to Art. V(2)(b) of the thereafter applicable New York Convention? Such an interpretation would be circular according to my understanding. Therefore, in the given situation the award should be enforced if no other grounds of refusal are given.

A potential ground for refusing to recognise and enforce the arbitral award could be Art. V(1)(a) New York Convention, if one of the parties makes such a request. The outcome in this regard would depend on whether or not the seized Member State court attributes a preclusive effect to the positive jurisdictional decision of the arbitral tribunal.[234] If it does so, the enforcement of the award would prevail. If it does not attribute a preclusive effect to the arbitral tribunal's finding, it would scrutinise the arbitration agreement anew. Assuming that the party initiating the court proceedings has done so in bad faith, the outcome would most likely be the same.

Consequently, in a situation where a court is confronted with concurrent applications to enforce an award and a judgment that are contradicting, it would have to apply the New York Convention and enforce the award if no ground for refusal is present. This finding is based on Art. 73(2) Brussels Ia Regulation and the last sentence of Recital 12(3) of the Brussels Ia Regulation, which states that the New York Convention takes precedence over the Regulation.

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232 In the same sense Hartley op cit (n76) 865 subs; Hauberg Wilhelmsen op cit (n57) 125; Auda op cit (n93) 127.

233 Hauberg Wilhelmsen op cit (n4) 184.

234 Born op cit (n151) 391.

Nevertheless, timing plays a major role in this scenario as well because it is based on the assumption that both legal titles are existent at the same time, so that the application for their enforcement can be made at the same time.

3. Existence of one legal title before the other

Regarding the situation where one of the legal titles exists before the other, two further scenarios have to be distinguished: First, the situation in which the Member State court judgment is given before the arbitral award, and second, the contrary situation in which the arbitral award is rendered before the Member State court judgment.

a) Judgment existent, award not

In the first scenario, the arbitral proceedings are not yet concluded, but the Member State court has already decided on the merits of the case. If the prevailing party seeks to enforce the judgment in the courts of a different Member State, this court would have to do so in accordance with Chapter III of the Brussels Ia Regulation. The grounds for refusal of enforcement set out in Art. 46, 45 Brussels Ia Regulation do not refer to parallel arbitral proceedings. In result, the judgment would therefore prevail, at least until the award is made.[235]

b) Award existent, judgment not

In the second scenario, the arbitral award is already rendered whereas the court proceedings are still going on. If the prevailing party applies in this scenario for the enforcement of the award, any Member State court will be obliged to declare it enforceable in accordance with Art. III – V of the New York Convention.[236] The mere existence of parallel court proceedings in a different Member State court does not affect this obligation and also does not constitute a ground for refusal of enforcement after Art. V of the New York Convention. A possibility in this situation would be Art. V(1)(a) of the New York Convention if the court of enforcement would find the arbitration agreement

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235 In the same sense for Germany and the scenario that also the arbitral award is already existent P Mankowski 'Kann ein Schiedsspruch ein Hindernis für die Anerkennung einer ausländischen Entscheidung sein?' (2014) 5 *SchiedsVZ* 214; arguing for an end of the arbitral proceedings based on the principle of *res judicata* in this situation Hartley op cit (n76) 865.

236 In the same way Hartley op cit (n76) 865.

to be invalid as well. In this regard, the situation is not different to the situation where both titles are already existent but not enforced yet.[237]

Therefore, the party being able to reach a final decision in the proceedings pursued by it first has also in the scenario of one legal title being existent before the other an advantage over its opponent.

4. Both legal titles existent, one of them already enforced

Once one of the legal titles has already been enforced, it is clearly in the interest of legal certainty to not permit the enforcement of the contradicting second legal title as well. The main question in this situation is on which legal ground the refusal to enforce the latter title could be based. In this regard, one can differentiate between the attempt of enforcement in the same forum where the first legal title has already been enforced and the attempt of enforcement in a different state. Within those scenarios, it has again to be distinguished between the arbitral award already being enforced and the court judgment already being enforced.

a) Enforcement in the same state

If enforcement is sought in the state where a contradictory title has already been enforced, there are in fact almost no chances to succeed.

i. Judgment already enforced, later application for enforcement of the award

If the judgment has already been enforced, the attempt to enforce a contradictory award afterwards would be denied on the basis of either Art. V(1)(a) or Art. V(2)(b) New York Convention.

Art. V(1)(a) of the New York Convention would not mandatorily be a ground for refusal of enforcement of the award, because the enforcement of the Member State court judgment on the merits has not necessarily affirmed its incidental decision on the invalidity of the arbitration agreement of the issuing court, but only its decision on the

237 See above C.II.2 at p 50.

merits of the case.[238] If the refusal on the basis of Art. V(1)(a) New York Convention is requested by a party, the court of enforcement may therefore decide on its own whether it finds the arbitration agreement to be invalid or not.

Even if it would find the arbitration agreement to be valid and refuse to apply Art. V(1)(a) of the New York Convention, it would most likely apply Art. V(2)(b) of the New York Convention in order to avoid undermining the earlier enforcement of the judgment on the merits in the same forum.[239]

ii. Award already enforced, later application for enforcement of the judgment

If the award is already enforced in the state where an application is made to enforce the later judgment of another Member State court, several options to deny the enforceability of the judgment can be considered.

Firstly, Arts. 46, 45(1)(a) Brussels Ia Regulation could provide a ground for refusal of enforcement of the Member State judgment based on its recognition being 'manifestly contrary to public policy (ordre public) in the Member State addressed'. The settled case law of the CJEU concerning the interpretation of this provision is that it must be interpreted strictly and that the limits of the concept are a matter of interpretation of the Regulation.[240] The wording 'manifestly' already implies this strict line of interpretation. The ground can in principle be pleaded together with other grounds provided in Art. 45(1) Brussels Ia Regulation.[241] Regarding its potential application to the refusal of enforcement of a Member State judgment in the state where a contradicting award has already been enforced, one may refer to different connecting factors. It has been stated that a manifest disregard of a valid arbitration agreement could constitute a ground for refusal of enforcement according to Arts. 46, 45(1)(a) Brussels Ia Regulation.[242]Alternatively, it has been argued that reference to the provision may be made at least where the contradictory award has the effect of *res judicata* according to national law.[243] The first reasoning seems to overlook the second sentence of Art. 45(3) Brussels

238 See Recital 12(2), (3) first sentence.
239 In the same sense Mankowski op cit (n235) 214.
240 *Trade Agency Ltd v. Seramico Investments Ltd* (2012) Case No. C-619/10, ECLI:EU:C:2012:531 at para 48 subs; regarding the predecessor Art 34(1) of the Brussels I Regulation and referring to earlier decisions of the CJEU.
241 J Fitchen op cit (n211) para 13.278.
242 Illmer op cit (n93) para 2.66, with further references.
243 Hauberg Wilhelmsen op cit (n4) 178.

Ia Regulation, which states that '[t]he test of public policy […] may not be applied to the rules relating to jurisdiction'. Even though the rules relating to jurisdiction in chapter II themselves do not refer to arbitration agreements, applying the test of public policy because a court has declared jurisdiction in accordance to those provisions despite a valid arbitration agreement would constitute an indirect breach of Art. 45(3)(2) Brussels Ia Regulation. Already the *Jenard Report* had stated that 'public policy is not to be used as a means of justifying a review of the jurisdiction of the court of origin [which] reflects the Committee's desire to limit so far as possible the concept of public policy'.[244] This desire is still current.[245] The limited role of the public policy test is also the reason why it is in general not to be applied in the situation of contradicting awards and judgments. The irreconcilability of legal titles is already subject to Art. 45(1)(c), (d) Brussels Ia Regulation. Other situations where the public policy test is applicable appear to be much more severe than the infringement of a valid arbitration agreement.[246] Therefore, Art. 45(1)(a) of the Brussels Ia Regulation is not a suitable ground for refusal of enforcement of a judgment contradictory to an already enforced arbitral award.

Secondly, a direct application of Arts. 46, 45(1)(c) of the Brussels Ia Regulation referring to the Member State court judgment granting leave to enforce the arbitral award could hinder the enforceability of another Member State's later court judgment on the merits. This way, the arbitral award could serve as a shield against the Member State court judgment if the enforcement of the contradicting legal titles is sought in the same state. The provision constitutes an unreserved precedence of the national decision,[247] but is limited to judgments given in the Member State addressed. However, also this attempt poses difficulties. The judgment granting leave to enforce the arbitral award is clearly outside the scope of the Regulation, because its main subject matter is the enforcement of an arbitral award. This means that the procedure would have to be repeated in every state where enforcement of the court judgment is sought, but not that it cannot constitute a ground for refusal in accordance with Art. 45(1)(c) Brussels Ia Regulation. The application of this provision does not require a judgment within the Regulation's substantive scope.[248] However, more importantly the judgment granting leave to enforce the arbitral award would have to qualify as a judgment in the sense of Art. 2(a)

244 Jenard op cit (n4) 46.
245 Fitchen op cit (n211) para 13.396.
246 Such as for example a breach of human rights, judgments procured by fraud, acts facilitating human trafficking, illicit trade in body parts; see Fitchen op cit (n211) para 13.290 subs.
247 Stadler op cit (n23) Art 45 para 12.
248 Hartley op cit (n76) 866; Illmer op cit (n93) para 2.67, with further references.

of the Brussels Ia Regulation.[249] The CJEU has ruled in this regard, that a judgment in this sense is only given where a 'judicial body of a Contracting State [is] deciding on its own authority the issues between the parties'.[250] While the specific procedural mechanisms of the national arbitration laws of the Member State by which leave is granted to enforce foreign arbitral awards under the New York Convention are not similar, they in general do not provide for a review on the substance of the case.[251] Consequently, the court granting leave to enforce the arbitral award does not decide on its own authority the issues between the parties. A direct application of Arts. 46, 45(1)(c) of the Brussels Ia Regulation to the Member State court judgment granting leave to enforce the arbitral award is therefore out of the question because this judgment does not fulfil the requirements of Art. 2(a) of the Brussels Ia Regulation according to the jurisprudence of the CJEU.[252]

Thirdly, different views exist on whether an application by way of analogy of Arts. 46, 45(1)(c) of the Brussels I Regulation can constitute a ground for refusal of enforcement of the judgment in the state where the award has already been enforced.[253] The reason for the application by way of analogy would be that the award is not a judgment. But the prerequisites of an application by way of analogy would also have to be given, as the provision is only directly applicable to earlier court judgments and not to earlier arbitral awards. Under the German doctrine, these requirements would be a situation of comparable interests and a statutory gap that is not intended. Comparable interests may be given between court judgments and arbitral awards, because the latter are supposed to have the same effect as the first. A statutory gap is also apparent, as the situation of contradicting judgments and awards is not regulated. But when it comes to this gap not being intended, one may raise objections. The legislator has explicitly excluded arbitration from the scope of the Brussels Regime, because it deemed the New York Convention to deal with this issue sufficiently. The statutory gaps arising from this exclusion have been known at least when recasting the Brussels I Regulation, as the review process proves. This lack of regulatory measures may be based on the inability of the responsible bodies to find consensus. But it would be against the law adopted by

249 This is a requirement that Art 45(1)(c) and Art 45(1)(d) have in common, see Fitchen op cit (n211) para 13.344 subs.

250 *Solo Kleinmotoren v. Boch* (1994) Case No. C-414/94, E.C.R. I-02237 at para 17.

251 Illmer op cit (n93) para 2.67.

252 Assenting Fitchen op cit (n211) para 13.347; De Ly op cit (n93) 507; opposing Hauberg Wilhelmsen op cit (n4) 177 subs; Hartley op cit (n76) 866.

253 Stadler op cit (n23) Art 45 para 13, with further references.

them to ignore their decision to keep arbitration excluded from the Regulation by applying its provisions by way of analogy to the matter they have intentionally excluded. Moreover, the CJEU seems also to be sceptical of analogous applications of the grounds set out in Art. 45(1) of the Brussels Ia Regulation.[254] Consequently, an application of Arts. 46, 45(1)(c) of the Brussels Ia Regulation by way of analogy cannot be the solution of the problem of diverging judgments and awards.

Fourthly, there is some discussion as to whether the last sentence of Recital 12(3) has to be interpreted in a way giving general precedence to the arbitral award over a contradicting judgment.[255] If yes, Art. 45(1)(a) or (d) Brussels Ia Regulation should be taken into account in order to give effect to this general precedence,[256] or Recital 12(3) should be treated as an additional ground for refusal in Art. 45 Brussels Ia Regulation.[257] However as shown above,[258] Recital 12(3) Brussels Ia Regulation gives only precedence to the application of the New York Convention over the Brussels Ia Regulation, not to the arbitral award over a contradicting judgment. Moreover, the foregoing examination has revealed that Art. 45 Brussels Ia Regulation does not really provide a solution for the situation of contradicting judgments and arbitral awards.

After all, a suitable ground for refusal of enforcement of a judgment being contradictory to an arbitral award already enforced in the same forum does not exist.

b) Enforcement in different forums

When enforcement of the contradicting title is later sought in a different Member State, the question arises if the already enforced title can constitute a ground for refusal of enforcement elsewhere in the EU. One may again distinguish between the judgment being enforced before the contradicting arbitral award and the award being enforced before the contradicting judgment.

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254 *Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA* (2013) Case No. C-157/12, ECLI:EU:C:2013:597 at para. 39: 'since the list of grounds for non-enforcement is exhaustive, [...] those grounds must be interpreted strictly and may not therefore be given [...] an interpretation by analogy [...]'.

255 Camilleri op cit (n93) 905; De Ly op cit (n93) 507; adverse opinion Illmer op cit (n93) para 2.69.

256 Camilleri op cit (n93) 905.

257 De Ly op cit (n93) 507.

258 See above C.II.2 at p 50 subs.

i. Judgment already enforced, later application for enforcement of the award

If a court judgment of Member State A has already been enforced in Member State B, a court in Member State C would still be free to apply the New York Convention when it is facing an application for enforcement of a contradicting foreign arbitral award. The court in Member State C is not bound by the decision on the invalidity of the arbitration agreement of the court in Member State A. The reason for this is again Recital 12(2), (3) of the Brussels Ia Regulation. The question in this constellation is only whether or not the enforcement of the judgment in Member State B has some implications on the application of grounds for refusal of enforcement of the contradicting arbitral award as set out in Art. V New York Convention in Member State C.

Regarding the application of Art. V(1)(a) of the New York Convention, nothing really changes in comparison to the enforcement in the same state.[259] In a different state, the courts are also not bound by the incidental decision on the invalidity of the arbitration agreement of the courts in Member State A and can therefore decide on their own in this regard.

One may consider an application of Art. V(2)(b) of the New York Convention in order to refuse the enforcement of the arbitral award. The reason for this could be seen in an undesired contradiction within the EU disturbing the free circulation of judgments if the Member States do not consider a contradictory judgment of each other's courts when being faced with the application to enforce an arbitral award. The CJEU has ruled that – while 'it is in the interest of efficient arbitration proceedings that […] refusal to recognise [or enforce] an award should be possible only in exceptional circumstances'[260] – it is also necessary to give effect to fundamental provisions of the TFEU, which 'may be regarded as a matter of public policy within the meaning of the New York Convention'.[261] In the hierarchy of norms, the Brussels Ia Regulation and its provisions are located below the TFEU. But the Regulation is based on Art. 81(2)(a) TFEU, which could indicate that a possible infringement of the Regulation could also be seen as a matter of public policy within the meaning of the New York Convention. Nevertheless, given the first statement of the CJEU regarding the exceptional nature of grounds for refusal of recognition and enforcement of arbitral awards, the application of the public

259 See above C.II.4.a)i. at p 53 subs.
260 *Eco Swiss* supra (n198) at para 35.
261 At para 39.

policy test as set out by Art. V(2)(b) of the New York Convention in order to refuse the enforcement of a contradictory arbitral award in a Member State different from the one that has already enforced the judgment seems to be unlikely. The Member States of the EU remain individual legal entities, and as arbitration is not governed by a uniform European Union instrument, they remain free to decide individually about the application to enforce an arbitral award. In contrary to the enforcement in the same forum,[262] the courts in Member State C do not run counter to a judgment already enforced by their own courts. In the end, the scenario is not really different from the situation where the court judgment and the arbitral award are existent at the same time, without any of them being enforced yet.[263] Therefore, the courts in Member State C have to apply the New York Convention and will enforce the award if no ground for refusal is present.

ii. Award already enforced, later application for enforcement of the judgment

If the arbitral award is already enforced in Member State B, it may possibly serve as a shield against the enforcement of the judgment of Member State A in Member State C where enforcement is sought, because the courts there are not bound by the incidental judgment on the invalidity of the arbitration agreement from Member State A pursuant to Recital 12(2) Brussels Ia Regulation.[264] As long as none of the legal titles are enforced in Member State C, the situation there is again the same as the one where the court judgment and the arbitral award are existent at the same time, without any of them being enforced yet.[265] Consequently, the arbitral award prevails in Member State C unless a ground for refusal of enforcement is given. Then, it is again the question on which legal ground the enforcement of the contradicting judgment from Member State A could be refused in Member State C.

Regarding the effect of the enforcement of the arbitral award in Member State C on the available grounds for refusal of enforcement of the contradicting judgment in this state, the scenario is the same as in the situation where the arbitral award has only been enforced in the same state and not also in a different one.[266]

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262 See above C.II.4.a)i. at p 53 subs.
263 See above C.II.2. at p 50 subs.
264 Illmer op cit (n93) para 2.64.
265 See above C.II.2. at p 50 subs.
266 See above C.II.4.a)ii. at p 54 subs.

But regarding the earlier enforcement of the arbitral award in Member State B, a further ground for refusal of enforcement of the contradicting judgment in Member State C could be considered. Arts. 46, 45(1)(d) Brussels Ia Regulation inter alia apply when a foreign judgment that is produced for enforcement in the Member State addressed is irreconcilable with another foreign judgment already given in a Member State other than the Member State addressed.[267] The requirements set out by the provision are stricter than the ones of Art. 45(1)(c) Brussels Ia Regulation, as its application is limited to judgments involving the same cause of action and the same parties.[268] But as these restrictions are not given in the scenario in question, they are not causing the inapplicability of Art. 45(1)(d) Brussels Ia Regulation. Therefore, the same two options as for Art. 45(1)(c) Brussels Ia Regulation regarding its application can be discussed.[269] First, Art. 45(1)(d) Brussels Ia Regulation could be applied directly by referring to the judgment granting leave to enforce the arbitral award in the different Member State. As this judgment does not come within the scope of the Brussels Ia Regulation,[270] it would qualify as a judgment from a third state in this context, which only has an impact on the point of time from which it is deemed to fulfil the conditions for its recognition in the Member State addressed, but not on the applicability of the provision in general.[271] But again, this judgment does not fulfil the requirements of a judgment in the sense of Art. 2(a) Brussels Ia Regulation, so that a direct application of the provision is not possible.[272]

Second, Art. 45(1)(d) Brussels Ia Regulation could be applied by way of analogy referring to the contradicting arbitral award itself and thereby equating it with a judgment from a different Member State or from a third State respectively.[273] However, the arguments against an application by way of analogy of Art. 45(1)(c) Brussels Ia Regulation[274] are applicable in the same way regarding an application by way of analogy of Art. 45(1)(d) Brussels Ia Regulation.[275] The stricter requirements of the provision may

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267 Fitchen op cit (n211) para 13.364.
268 Fitchen op cit (n211) para 13.363.
269 See above C.II.4.a)ii. at p 54 subs.
270 Ibid.
271 Because the judgment granting leave to enforce the arbitral award is outside the scope of the Brussels Ia Regulation, the conditions for its recognition are set out by the national law of the Member State addressed. For the consequences thereof see Fitchen op cit (n211) para 13.367 subs.
272 Assenting Mankowski op cit (n235) 213.
273 In favour of this solution ibid; Illmer op cit (n93) para 2.66.
274 See above C.II.4.a)ii. at p 54 subs.
275 In the same sense Fitchen op cit (n211) para 13.348.

further support this result. Consequently, when the award has already been enforced in a different Member State, there may be a few more options that can be considered regarding a possible ground for refusal of enforcement of the contradicting judgment elsewhere in the EU, but in result a suitable option is again not existent.

III. Interim conclusion

After all, the examination of the different possible scenarios of enforcement of contradicting legal titles resulting from the failure to prevent parallel proceedings between national courts and arbitral tribunals has shown that the current legal framework is not sufficiently able to provide for acceptable solutions. The table below outlines this finding in a summarised form.

<table>
<tr><td colspan="7">1. In the Member State of the parallel court proceedings, the arbitral award would not be enforced on grounds of Art. V(1)(a) or Art. V(2)(b) New York Convention.</td></tr>
<tr><td colspan="2" rowspan="2">In any other Member State:</td><td colspan="2">Foreign judgment</td><td colspan="2">Foreign award</td><td rowspan="2">Result</td></tr>
<tr><td>existent</td><td>enforced</td><td>existent</td><td>enforced</td></tr>
<tr><td colspan="2">2.</td><td>(+)</td><td>(-)</td><td>(+)</td><td>(-)</td><td>Enforcement of award in accordance with NYC</td></tr>
<tr><td>3.</td><td>a)</td><td>(+)</td><td>(-)</td><td>(-)</td><td>(-)</td><td>Enforcement of judgment in accordance with Brussels Ia Regulation</td></tr>
<tr><td></td><td>b)</td><td>(-)</td><td>(-)</td><td>(+)</td><td>(-)</td><td>Enforcement of award in accordance with NYC</td></tr>
<tr><td rowspan="2">4.a) Enforcement in the same forum</td><td>i.</td><td>(+)</td><td>(+)</td><td>(+)</td><td>(-)</td><td>No enforcement of the award based on Art. V(1)(a) or V(2)(b) NYC</td></tr>
<tr><td>ii.</td><td>(+)</td><td>(-)</td><td>(+)</td><td>(+)</td><td>No enforcement of the judgment; problem of ground for refusal in Brussels Ia Regulation:
• Arts. 46, 45(1)(a) (-)
• Arts. 46, 45(1)(c), direct application by reference to judgment granting leave to enforce the arbitral award (-)
• Arts. 46, 45(1)(c), application by way of analogy to the arbitral award (+/-)
• General prevalence of arbitral award based on Art. 73(2), Recital 12(3) (-)</td></tr>
</table>

4.b) Enforcement in different forum	i.	(+)	(+)	(+)	(-)	Enforcement of award in accordance with NYC
	ii.	(+)	(-)	(+)	(+)	No enforcement of the judgment; problem of ground for refusal in Brussels Ia Regulation: – Regarding the effect of the enforcement of the award in the same forum: • Arts. 46, 45(1)(a) (-) • Arts. 46, 45(1)(c), direct application by reference to judgment granting leave to enforce the arbitral award (-) • Arts. 46, 45(1)(c), application by way of analogy to the arbitral award (+/-) • General prevalence of arbitral award based on Art. 73(2), Recital 12(3) (-) – Additionally regarding the effect of the enforcement of the award in a different forum: • Arts. 46, 45(1)(d), direct application by reference to judgment granting leave to enforce the arbitral award (-) • Arts. 46, 45(1)(c), application by way of analogy to the arbitral award (+/-)

This contributes to the predicament that, on the one hand parallel proceedings remain possible under the Brussels Ia Regulation, while on the other hand no well defined solution for the resulting problems regarding the enforcement of the possibly contradicting legal titles is being provided. Until those shortcomings are eradicated, the best way to deal with the necessary refusal to enforce a contradictory judgment is an application by way of analogy of Art. 45(1)(c), (d) Brussels Ia Regulation respectively, depending on whether or not enforcement of the judgment is sought in the same Member State. Even though the statutory gap can hardly be seen as unintended, a solution for the refusal of enforcement of the contradicting judgment is needed. Otherwise, the aim of legal certainty is put at stake.

The different scenarios outlined have also shown that timing plays an important role in the situation of parallel proceedings and potentially contradictory judgments.

The party first being able to reach a judgment or award on the merits has a clear advantage from that point of time. This encourages the parties to race to court litigation and arbitral proceedings.[276] Moreover, it could potentially influence the quality of the arbitral proceedings in a negative way. Once the arbitrators know that they are under pressure to conclude the proceedings as early as possible, they are more likely to sacrifice high quality awards for fast results.

To answer the second subquestion of this minor thesis, it can be stated that the main legal problems resulting from the exclusion of arbitration from the scope of applicability of the Brussels Ia Regulation that remain are based on the possibility of parallel proceedings in front of Member State courts and arbitral tribunals. This can lead to possibly contradicting awards and judgments, which raises problems regarding the unavailability of grounds for the refusal of their enforcement. Accordingly, the party succeeding first has an advantage, so that a run to the courts and tribunals may emerge.

276 Hauberg Wilhelmsen op cit (n57) 125; Hauberg Wilhelmsen op cit (n4) 185.

D. Conclusion

In conclusion, these shortcomings seem to stem from the unsuccessful process of enacting a European Union instrument providing a uniform law on arbitration. When the Member States of the EEC concluded on the Brussels Convention, they were aware that the New York Convention would not cover all parts of arbitration. Then as well as now, its scope is limited to the recognition and enforcement of arbitration agreements and arbitral awards. The founders of the Brussels Regime expected a uniform law on arbitration in the form of a European Convention to deal with all other parts related to arbitral proceedings. This way, a complete exclusion would have made sense. Instead, it is now a hotchpotch of national arbitration laws in the Member States dealing with these issues, because a uniform law on arbitration within the EU has never successfully been enacted. It is only for this reason that extensive and complicated jurisprudence of the CJEU was and is necessary in order to clarify the scope and meaning of the arbitration exclusion in the Brussels Regime.

In order to answer the research question of this minor dissertation, the legal consequences resulting from the exclusion of arbitration from the scope of application of the Brussels Ia Regulation can be summarised as follows:

The dividing line between arbitration in the sense of the exclusion and the scope of application of the Brussels Ia Regulation is drawn by the case law of the CJEU. It runs in general along the main subject matter of the dispute, which is determined by the rights the proceedings serve to protect. If this is the right to determine the dispute by arbitration, the exclusion principally applies. Notwithstanding this, the CJEU has developed some exceptions to this rule, which are now at least in parts subject to Recital 12.

Where the exception applies, it is the national arbitration laws of the Member States governing jurisdiction, recognition and enforcement of arbitration related judgments. The national arbitration laws in the Member States are in turn often based on or referring to international conventions such as the New York Convention. If the exception does not apply, these matters are dealt with by the Brussels Ia Regulation.

The interpretation of the arbitration exclusion of the CJEU as set out by Recital 12 has contributed to a certain degree of legal uncertainty, especially because parallel court litigation and arbitral proceedings remain possible under the Brussels Ia Regula-

tion. This gives rise to further problems at the stage of enforcement, which contribute to a run to the courts and arbitral tribunals because in most cases the legal title that is issued first prevails.

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