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**UNIVERSITY OF CAPE TOWN**  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

LL.M. Minor Dissertation

**The Interface of the Brussels I Regulation with  
Arbitration Proceedings  
-  
Revision of Brussels I**

**Donata v. Enzberg**

**VNZDON001**

Supervisor: Dr. Thalia Kruger

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Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to the length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## A) Introduction

The time has passed where people contracted only within the boundaries of their own countries. The world has opened up and personal mobility, transnational communications and global trade increases constantly. Regardless of the associated advantages like economic growth, trade between parties located in different countries created many problems from a legal perspective. Questions on the applicable law, the determination of jurisdiction and the requirements under which a foreign judgment can be enforced in another country arose. The private international law<sup>1</sup>, which is regulated by every country independently, addresses these questions.<sup>2</sup> Within the European Union (EU) the international private law is unified and implemented supranationally.<sup>3</sup> One of these instruments is the Brussels I Regulation<sup>4</sup>. It determines the jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes between individuals resident in different Member States of the EU. By stipulating a set of rules applicable within all countries of the EU, the Brussels I Regulation contributes to unification and therefore a simplification of the private international law in its field of application.

Since coming into force a couple of years ago the European Commission was obliged to present a report on the efficiency of the application of the Brussels I Regulation accompanied with proposals for adoptions, if needed.<sup>5</sup> In doing so the Commission published such a report<sup>6</sup> ('the Report') together with a Green Paper on the Brussels I Regulation<sup>7</sup> ('Green Paper') on 21 April 2009 based on a study, the so called Heidelberg Report<sup>8</sup>, carried out by German Professors, who had been assisted by experts from various EU countries. The Green Paper's purpose was to launch a broad consultation among interested parties on possible ways to improve the operation of the Regulation with respect to the suggested adjustments to the

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<sup>1</sup> Also called private international law or conflict of laws.

<sup>2</sup> R Fentiman (1996) *Conflict of Laws* xii.

<sup>3</sup> T Kruger *Civil jurisdiction rules of the EU and their impact on third states* In.01.

<sup>4</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1.

<sup>5</sup> The obligation exists according to Art. 73 Brussels I Regulation.

<sup>6</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial matters, COM(2009) 174 final.

<sup>7</sup> Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial matters, COM(2009) 175 final.

<sup>8</sup> Study JLS/C4/2005/03 presented by D Hess, T Pfeiffer and P Schlosser, available at [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf) [accessed on 14 December 2010].

Brussels I Regulation raised in the Report.<sup>9</sup> It focused inter alia on the Regulation's interface with arbitration proceedings, which are generally excluded from its scope according to Art. 1 (2) (d). Arbitration as an alternative to litigation has become increasingly popular especially in the field of international trade.<sup>10</sup> As a chosen private system of justice it does not follow the rules of national court proceedings. However, although the aim is to exclude court interference to the most possible extent, arbitration is yet dependant on the courts' support. They alone have the power to enforce a certain degree of legal standards and to rescue the system when it is in danger of failing.<sup>11</sup> These arbitration related court proceedings create an indistinct interface with the Brussels I Regulation, since it is sometimes unclear whether or not they are covered by the scope of the exclusion of Art. 1 (2) (d). The possibility of parallel litigation and arbitration proceedings caused by this fact weakens arbitration. Not least because of the recent *West Tanker*<sup>12</sup> decision of the European Court of Justice ('ECJ') this problem and possible ways to avoid it became subject of a comprehensive and long lasting debate.

The Green Paper proposed many possible amendments in order to ensure a smooth circulation of judgments in Europe and prevent parallel proceedings; one of the most radical was to delete the arbitration exclusion completely.<sup>13</sup> The suggestions sparked a lot of critique, expressed inter alia in the many responses during the Green Paper's consultation period. On 14 December 2010 the European Commission finally published a concrete proposal for a revised Brussels I Regulation<sup>14</sup> ('Proposal'). It remains to be seen whether the European Parliament and the Council of Ministers will adopt the Proposal.

The paper's aim is to convey an understanding of the complex interface between the Brussels I Regulation and arbitration and to analyse and evaluate possible ways to improve their interaction. In doing so, it gives at first a brief overview about the history and the scope of the Brussels I Regulation and about the laws most important to arbitration. Moreover, the reasons behind the exclusion of arbitration from the Brussels I Regulation will be explained.

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<sup>9</sup> See introduction of the Green Paper.

<sup>10</sup> I Carr *International Trade Law* 615, 621; for a more detailed overview of the advantages of arbitration see N Blackaby; C Partasides *Redfern and Hunter in International Arbitration* paras 1.86-1.151.

<sup>11</sup> N Blackaby; C Partasides, op cit note 10 at paras 7.01, 7.02.

<sup>12</sup> *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* C-185/07 [2009] E.C.R. I-663.

<sup>13</sup> Green Paper, p 8.

<sup>14</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 December 2010 COM(2010) 748/3.

Following, the paper points out the interface between the two fields and illustrates the problems which occur in this context and how the courts and academia have responded. The proposed changes from the Heidelberg Report on the Green Paper to the recently published Proposal will be introduced and finally evaluated. The paper will end with a concrete suggestion on how the Brussels I Regulation should be amended in order to keep the attractiveness of the EU countries as a place of arbitration.

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## **B) The current legislation**

Litigation and arbitration are not regulated in the same way in the European Union. While there exists a uniform regulation, the Brussels I Regulation, which provides a set of rules on the determination of jurisdiction as well as rules on the recognition and enforcement of judgements given in another Member State, a similar regulation for arbitration on a European level is not in existence. This chapter gives an overview of the history and the scope of the Brussels I Regulation and with regard to the topic of this work the most important laws applicable in international arbitration.

### I) Brussels I Regulation

#### *1) History*

The Brussels I Regulation has quite a long history and took various forms before it finally ended up as we know it today. The aim was from the beginning to facilitate cross-border litigation and therefore cross-border trade by allowing a quick and efficient enforcement of judgments rendered in a state different from that where it should be enforced.<sup>15</sup> At the present time the Brussels I Regulation is described as one of the most successful instruments on judicial cooperation in the European Judicial Area.<sup>16</sup>

#### a) Brussels Convention

The routes of the Brussels I Regulation go back to 1968 when the then six Member States of the European Economic Community<sup>17</sup> (which subsequently became the European Community and then the European Union) agreed on the Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters<sup>18</sup> ('the Brussels Convention'). This Convention was established with the goal to increase economic efficiency and to promote a single market by harmonising the rules on jurisdiction and preventing parallel litigation. By including common rules on jurisdiction, rather than only addressing the issue of the effect of civil judgements in other Member States, the drafters went beyond the restraining

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<sup>15</sup> U Magnus, P Mankowski/ Magnus *Brussels I Regulation* 7.

<sup>16</sup> B Hess; T Pfeiffer; P Schlosser *The Brussels I Regulation 44/2001* 17.

<sup>17</sup> Belgium, France, (West)Germany, Italy, Luxembourg and the Netherlands.

<sup>18</sup> Of 27 September, [1972] OJ L299/32.

aim of Art. 293 (ex Art. 220) of the Treaty establishing the European Community<sup>19</sup> ('TEC'), which was the legal basis of the Brussels Convention.

From the time the Brussels Convention went into force, on 1 February 1973, to 1999 it was the sole instrument on European procedural law and due to its comprehensive, uniform and autonomous interpretation by the ECJ<sup>20</sup> one of the most successful conventions in private international law. Furthermore, a homogenous application was supported by the official expert report of Jenard<sup>21</sup> which served as a commentary of the Brussels Convention.<sup>22</sup> New Member States were according to Art. 65 of the Brussels Convention required to accept the Brussels Convention as part of the Community's legal order - at least as a basis for negotiations. This is the reason why by now five versions of the Brussels Conventions exist. Every time new Member States acceded to the European Community, the Convention was adapted and ratified by all the old and new Members with some amendments.<sup>23</sup>

Moreover the rules of the Brussels Convention were extended with only slight changes to the States belonging to the European Free Trade Association ('EFTA') by the Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments of Civil and Commercial matters.<sup>24</sup>

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<sup>19</sup> The current version of the Treaty Establishing the European Community, 29 December 2006, OJ C 321E/37 can be found on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>. Art. 293 says: „Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: [...] - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”

<sup>20</sup> The uniform interpretation was guaranteed by the Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L229.

<sup>21</sup> 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968' [1979] OJ C59/1 [hereafter Jenard Report].

<sup>22</sup> See preface of the Jenard Report.

<sup>23</sup> The four so called 'accession conventions' are the Convention on the accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcements of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1978] OJ L304/11, accompanied by the official expert report of P. Schlosser 'Report on the Convention on the Accession of the United Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice' [1979] OJ C59/71 [hereafter Schlosser Report]; the Convention on the accession of 25 October 1982 of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice Luxembourg [1982] OJ L388/1; the Convention on the accession of 26 May 1989 of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and enforcements of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1989] OJ L285/1 and the Convention the accession of 29 November 1996 of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 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 [1997] OJ C15/1.

<sup>24</sup> [1988] OJ L319/9 [hereafter Lugano Convention].

However, unifying the rules of private international law by means of conventions has proved inadequate to the task of creating a single market. This is mainly due to the fact that a convention, as an instrument agreed on by the single parties, lacks the capacity to bind the various legal systems of the Member States which the Community Acts possess.<sup>25</sup> Moreover the necessity of renegotiating every time a new Member States wishes to accede to the EU always causes the risk of new compromises and can be very time consuming.

#### b) Brussels I Regulation

Since 1997, the last version of the Brussels Convention, the institutional framework had changed which led to the fact that the rules were now contained in the form of a regulation rather than an international treaty as before. This was due to the entry into force of the Treaty of Amsterdam<sup>26</sup> in 1999. Based on the new competences of Art. 61 and 65 TEC<sup>27</sup>, the European Community has implemented several instruments in the field of civil procedure in order to contribute to the development of a European Judicial Area (EJA). The Brussels I Regulation was the first of a series of regulations leading to the ‘europeanisation’ of private international law.<sup>28</sup> It was issued in 2000 and entered into force on 1 March 2002. The result of this new form that the Brussels I Regulation took is that it does not have to be renegotiated every time new Member States accede to the EU. In contrast to its predecessor, as a regulation, it forms part of the so-called *acquis communautaire*, which represents the entire body of legislation that is in force in the EU and that a new member state receives immediately upon accession.<sup>29</sup> Hence all States that became Member of the European Union since 2001<sup>30</sup> had to accept the Brussels I Regulation as a requirement of membership and it became part of their legal system since it is a binding and directly applicable community act. The Regulation now applies to all EU Member States including Denmark, which has a special position though.<sup>31</sup>

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<sup>25</sup> B Pasa; G Benacchio *The Harmonization of Civil and Commercial Law in Europe* 271.

<sup>26</sup> Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities [1997] OJ C340/173.

<sup>27</sup> Art. 65 in conjunction with Art. 61 (c) states: ‘...in order to establish progressively an area of freedom, security and justice the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Art. 65’; and under (b) it states that this includes ‘promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction’.

<sup>28</sup> H van Lith, *International Jurisdiction and Commercial Litigation* 31.

<sup>29</sup> T Kruger ‘Review article – Civil jurisdiction and the issue of legislating for the EU’ (2010) Vol. 6 No.2 *J. Priv. Int. L.* 501,502.

<sup>30</sup> Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004 and Bulgaria and Romania in 2007.

<sup>31</sup> Denmark opted out of Titel IV of the EC Treaty, including Art. 65, as stated in Arts. 1 and 2 of the Fifth Protocol of the EC Treaty concerning the position of Denmark. As a result, community instruments adopted in

With regard to its content, which was amended at the same time, most of the provisions are very similar or in great parts even identical to those of the former Brussels and Lugano Convention, on which principles it is based. Nevertheless some changes were made, especially with respect to contract jurisdiction. Following this the text of the Lugano Convention was revised in order to align the 1988 version with the modifications made in the Brussels I Regulation.<sup>32</sup>

However, for those EFTA countries which acceded to the EU the Lugano Convention was, as a bilateral agreement, superseded by the Brussels I Regulation as far as relations between member states are concerned. For relations with other EFTA States, the Lugano Convention continues to apply. The same applies to the various versions of the Brussels Conventions.<sup>33</sup> Yet, with regard to its interpretation both the ECJ's interpretation of the unmodified provision of the Brussels Convention and its Explanatory Reports shall according to paragraph 19 of the preamble of the Brussels I Regulation remain applicable and therefore are still of great influence. Moreover, the ECJ continues to play an active role in the unification process as a supranational institution interpreting the Brussels I Regulation.<sup>34</sup>

## 2) *Scope of the regulatory provisions*

As mentioned before the Brussels I Regulation determines jurisdiction and provides for the free circulation of judgements that are passed within the EU. According to Art. 1 it only applies in civil and commercial matters and shall not extend to revenue, customs or administrative matters.

In subsequence 2 of Art. 1 some areas are explicitly excluded from the scope of the Brussels I Regulation. One of these exceptions stipulated in Art. 1 (2) (d) is arbitration.<sup>35</sup> It is not clear from the wording how far-reaching this exclusion is supposed to be and whether only the

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the field of judicial cooperation in civil matters do not apply to Denmark. The same right was reserved for the U.K. and Ireland under Art. 3 of that same Protocol but these countries 'opted in'. See H van Lith, op cit note 28, p 32. See the Preamble of the Brussels I Regulation paras (20) and (21). Although the Regulation is not directly applicable to Denmark, it has effectively been extended to Denmark by a separate agreement between the EU and Denmark (Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2006] OJ L120/22) which took effect on 1 July 2007.

<sup>32</sup> Council Decision on the signing on behalf of the Community of 10 September 2007, 12247/07, JUSTCIV 218.

<sup>33</sup> However, according to Art. 68 (1) Brussels I Regulation the Brussels Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to Article 299 of the TEC.

<sup>34</sup> H van Lith, op cit (note 28) p 33.

<sup>35</sup> Furthermore '[t]he Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security...?' Art. 1 (2) Brussels I Regulation.

arbitration proceeding itself or court proceedings that are ancillary or otherwise related to arbitration should be captured as well. Practitioners and academics have discussed a lot about the interpretation of the arbitration exclusion and the problem was also addressed in the Jenard and Schlosser Report<sup>36</sup> and continually subject of ECJ judgements, which, however, shall be considered in detail below.<sup>37</sup>

### 3) *Why is arbitration excluded?*

The question that arises, is for which reason arbitration is excluded from the scope of the Brussels I Regulation. In order to find an answer one has to go back to the origins of the Regulation once more. The Brussels Convention came into existence on the basis of the request of Art. 293 (ex Art. 220) TEC<sup>38</sup>, which envisaged the simplification of recognition and enforcement of both judgments and arbitral awards. Although the Brussels Convention, created on that article, provided for a system of the intra-European recognition and enforcement of judgments and even made a step further as it introduced uniform rules of international jurisdiction as well, it excluded arbitration from its scope on the other hand.<sup>39</sup> A similar regime in an independent treaty was not created either. Since the legal basis would have been expressly given with the then Art. 220 TEC uncertainty concerning the basis of authorisation is not the reason for the arbitration exclusion.

One of the main reasons in 1968 for excluding arbitration from the scope of the Brussels Convention was the fact that ‘the Council of Europe ha[d] prepared a European Convention providing a uniform law on arbitration’ that probably would be ‘accompanied by a protocol which would facilitate the recognition and enforcement of arbitral awards’.<sup>40</sup> However, this convention never came into existence since it had only been signed by Austria and Belgium and only the latter country has actually ratified it.<sup>41</sup>

With the failure of the target convention on arbitration the most obvious reason for excluding arbitration disappeared at first sight. Nevertheless, the arbitration exception was retained when the Brussels Convention was firstly updated in 1979 on the occasion of accession by Great Britain, Ireland and Denmark.<sup>42</sup> The reason given in the Schlosser Report for doing so

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<sup>36</sup> Jenard Report, 13; Schlosser Report, 92-93.

<sup>37</sup> See chapter C) I).

<sup>38</sup> See B) I) 1) a).

<sup>39</sup> Art. 1 (4) Brussels Convention.

<sup>40</sup> See Jenard Report 13.

<sup>41</sup> H van Houtte ‘Why not include arbitration in the Brussels Jurisdiction Regulation?’ (2005) Vol. 13 No. 1 *Arb Int* 510.

<sup>42</sup> Convention of 9 October 1978, op cit (note 23).

was 'because all the Member States of the Community, with the exception of Luxembourg and Ireland, had in the meantime become parties to the United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards<sup>43</sup>, and Ireland [was] willing to give sympathetic consideration to the question of her acceding to it.'<sup>44</sup> The New York Convention, which now became the sole reason not to cover arbitration in the Brussels Convention, had already been mentioned as a supplementary reason in 1968, though the European Convention and the Protocol were considered to be more efficient.<sup>45</sup>

A further presumption which has been raised by academia is the possible lack of familiarity with the arbitration process.<sup>46</sup> In order to support this theory the following example has been cited: The European Commission's Green Paper on Alternative Dispute Resolutions ('ADR')<sup>47</sup> excludes arbitration from its scope on the grounds that 'arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions' and that 'arbitration is the subject of a certain number of legislative instruments in the Member States and at an international level, such as the 1958 New York Convention [...] or [...] the 1966 European Convention providing a Uniform Law on Arbitration.'<sup>48</sup> The question whether arbitration is in fact more similar to court proceedings than to ADR shall not be addressed here. However, since the 1966 Convention never came into existence, the reference to it does not appear to be a well-founded explanation and may be indicative of a less profound engagement with the functioning of arbitration.

During the preparation of the Brussels I Regulation the arbitration exception was not explicitly discussed anymore<sup>49</sup> and therefore remained as Art. 1 (2) (d) in the Brussels I Regulation without any further explanation.

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<sup>43</sup> Also known as New York Convention and hereafter NYC.

<sup>44</sup> Schlosser Report, 92 para 61.

<sup>45</sup> H van Houtte, op cit (note 41) p 510.

<sup>46</sup> H van Houtte, op cit (note 41) p 511.

<sup>47</sup> Green Paper on Alternative Dispute Resolutions in Civil and Commercial Matters of 19 April 2002 COM (2002) 196 final.

<sup>48</sup> Green Paper on ADR op cit (note 47) point 1, 1.1, 2 [2].

<sup>49</sup> See Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1999] OJ C 376/1.

## II) Arbitration Laws

As shown above international arbitration is neither covered by the Brussels I Regulation nor by a similar European treaty or regulation. It is not the purpose of this paper to give a detailed enumeration and explanation of arbitration laws; nevertheless, the following section shall give a rough overview of the laws that might have influence on international arbitration proceedings, i.e. those that play a decisive role when it comes to the interface with the Brussels I Regulation.

International arbitration involves a multitude of different systems of law or legal rules. In an average case it is likely to happen that at least five systems of law have a bearing on the arbitration.<sup>50</sup> These are 1) the law governing the arbitration agreement, 2) the law governing the existence and proceedings of the arbitral tribunal, the so called *lex arbitri*, 3) the substantive law, 4) other applicable rules and non-binding guidelines and 5) the law governing recognition and enforcement of the award. Most of these laws, i.e. 1) - 4), can be chosen by the parties themselves directly or indirectly whilst the winning party who seeks enforcement is with regard to the law governing recognition and enforcement solely depended on the law of that country where the money or the assets of the losing party are.

For a better understanding of the problematic interface between the Brussels I Regulation and arbitration, as it will be shown in chapter C), the following section will briefly focus on the law governing recognition and enforcement and the *lex arbitri*.

### *1) New York Convention*

The law governing the 'recognition and enforcement of the award' is the one that immediately catches one's eye in connection with the Brussels I Regulation on jurisdiction and the 'recognition and enforcement of judgments'. Equal to judgments in international law disputes, an award issued in one country that is supposed to be enforced in another does not serve its purpose if the latter country does not recognise the award, requests a repeated substantive examination of the case or requires the arbitral award to first be recognised by the courts of the State in which the award was issued. If the losing party does not fulfil its obligations arising out of the award voluntarily, the enforcement must take place through the national

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<sup>50</sup> N Blackaby; C Partasides op cit (note 10) at para 3.07.

courts at the place of enforcement, operating under its own procedural rules, which vary from country to country.<sup>51</sup>

However, all EU Member States are party to the New York Convention.<sup>52</sup> With more than 140 signatories it is the international treaty on the recognition and enforcement of international awards with the widest scope of application.<sup>53</sup> Its' very simple but at the same time tremendous significance is that it provides for the effectiveness of arbitration agreements and for an uncomplicated and effective method of obtaining recognition and enforcement of foreign arbitral awards within all Contracting States.

The first aspect is dealt with in Art. II which states that Contracting States shall recognise arbitration agreements<sup>54</sup> and that 'the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.<sup>55</sup>

Once an award was rendered, the winning party only needs to supply the award and the arbitration agreement according to Art. IV NYC and recognition and enforcement can then only be refused under the exhaustive grounds listed in Art. V NYC which either have to be raised and proofed by the losing party<sup>56</sup> or can be objected by the enforcing court.<sup>57</sup> Hence, the New York Convention takes a 'pro-enforcement approach' and provides for an award's presumptive recognition, subject to only narrow enumerated exceptions.<sup>58</sup>

The Convention is in existence since 1959 without ever being changed and is described as the 'the single most important pillar on which the edifice of international arbitration rests'.<sup>59</sup> It is basically this significant international convention that the arbitration exclusion was intended to avoid conflict with.<sup>60</sup>

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<sup>51</sup> N Blackaby; C Partasides, op cit (note 10) at para 11.36.

<sup>52</sup> List of all member states available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) [accessed 24.11.2010].

<sup>53</sup> N Blackaby; C Partasides, op cit (note 10) at para 11.39.

<sup>54</sup> If it fulfills the requirements listed in Art. II (1) NYC.

<sup>55</sup> Art. II (3) NYC.

<sup>56</sup> Grounds listed in Art. V 1 NYC.

<sup>57</sup> Grounds listed in Art. V 2 NYC. This is the case, if (a) the subject matter of the difference is not capable of settlement of arbitration or (b) the recognition and enforcement of the award would be contrary to public policy.

<sup>58</sup> G Born *International Commercial Arbitration Vol II* 2711.

<sup>59</sup> J. G. Wetter 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' [1990] 1 *Am Rev Int'l Arb* 91.

<sup>60</sup> C Ambrose 'Arbitration and the Free Movement of Judgements' (2003) Vol.19 No.1 *Arb Int* 5; Jenard Report, 13; Schlosser Report, 92 para 61.

## 2) *Lex arbitri*

Another system of law that is worth to have a closer look at in the context of this paper is the *lex arbitri*. It is the law of the country in whose territory the arbitration takes place and it governs the arbitration itself and the way in which it is conducted.<sup>61</sup> Hence, in contrast to the substantive law or the procedural rules like the ICC<sup>62</sup> or UNCITRAL<sup>63</sup> rules for example which are normally expressly chosen by the parties, the *lex arbitri* is only indirectly determined by the choice of the place of arbitration.

Depending on the respective laws for arbitration of the various countries, the *lex arbitri* might be expected to deal for example with the definition of an arbitration agreement, the entitlement of the arbitral tribunal to rule on its own jurisdiction, interim measure protection and court assistance, to list just a few important aspects.<sup>64</sup> Although the parties can and often do choose procedural rules like the ICC or UNCITRAL rules, the *lex arbitri* is binding on the parties to the extent that it contains mandatory provisions or where the chosen institutional rules are silent.<sup>65</sup> It is therefore advisable for the parties to select their place of arbitration carefully with regard to the legal choice they make at the same time. However, this contains the benefit that the parties can foresee the courts' tendency to interfere or the outcome of possible court decisions due to the provisions contained in the *lex arbitri* and the common practice of the courts of the respective country.

In order to illustrate the influence of the *lex arbitri* the challenge of jurisdiction shall be taken as an example. Even though it is widely accepted that a tribunal has the power to rule on its own jurisdiction, which is commonly known as the doctrine of *kompetenz-kompetenz* (competence-competence), the extent of this right may vary from state to state. According to the German § 1032 ZPO<sup>66</sup>, which is based on Art. 8 UNCITRAL Model Law<sup>67</sup>, a court before which an action is brought in a matter which is subject to an arbitration agreement shall, if a party so requests, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. This requires a detailed scrutiny of the validity of the arbitration agreement. However, in France a summary review is according to Art. 1458 (1) CPC<sup>68</sup> and its legal interpretation sufficient and if the semblance of an

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<sup>61</sup> N Blackaby; C Partasides, op cit (note 10) at para 3.34.

<sup>62</sup> International Chamber of Commerce Rules of Arbitration in force as from 1 January 1998.

<sup>63</sup> UNCITRAL Arbitration Rules adopted December 15, 1976 as revised in 2010.

<sup>64</sup> More aspects listed in N Blackaby; C Partasides, op cit (note 10) at para 3.43.

<sup>65</sup> N Blackaby; C Partasides, op cit (note 10) at para 3.50.

<sup>66</sup> Deutsche Zivilprozessordnung (German Code of Civil Procedure).

<sup>67</sup> UNCITRAL Model Law on International Commercial Arbitration from 1985 with amendments as adopted 2006.

<sup>68</sup> Code de procédure civile (French Code of Civil Procedure).

applicable arbitration agreement is given the French courts have to decline jurisdiction and leave the final decision to the arbitral tribunal.<sup>69</sup> Thus, the powers conferred to the courts with reference to the decision on the validity of an arbitration agreement can vary considerably depending on the applicable *lex arbitri*.

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<sup>69</sup> F Niggermann ‘West Tankers, die “exception française“ und die Reform der EuGVVO‘ (2010) *SchiedsVZ* 69.

## C) Interface of Brussels I and Arbitration proceedings

As shown above, the rules of jurisdiction and the recognition and enforcement of judgments in Europe are regulated by the Brussels I Regulation. The recognition and enforcement of arbitral awards are based on the New York Convention and apart from that, various other legal systems govern international arbitration.<sup>70</sup>

On first sight it may seem questionable why the Brussels I Regulation might be amended to the effect that arbitration should in some way be taken into account. In order to be able to answer this question, it is important to analyse what, and as the case may be, where the interface between the regulation and arbitration proceedings is and what problems may arise due to the arbitration exclusion.

### I) Scope of the arbitration exclusion

The first requirement for a smooth operation of a legal act, treaty or regulation is that its scope is clearly defined. However, this is not the case for the arbitration exclusion in Art. 1 (2) (d). Its extent has first in the Brussels Convention and later in the Brussels I Regulation always been subject to discussion and controversy. This concerns in particular the question to what extent proceedings in front of national courts which are somehow linked to the arbitration proceedings fall under the arbitration exception. Depending on the answer thereon, different rules of jurisdiction are applicable and the judgment either benefits or not from the advantageous recognition and enforcement system of the Brussels I Regulation.

#### *1) Initial uncertainties*

##### a) Jenard, Schlosser and Evrigenis-Kerameus Report

Due to the remarks set out in the Jenard Report, it was clear from the very beginning in 1968 that the Brussels Convention does not apply to the recognition and enforcement of arbitral awards and for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration.<sup>71</sup> For the latter case proceedings setting aside awards were taken as an example. In 1978 when the Brussels Convention was revised on the occasion of the accession of the U.K., Ireland and Denmark it was agreed that the text of the exception

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<sup>70</sup> See B) II).

<sup>71</sup> See Jenard Report, 13.

should not be amended.<sup>72</sup> However, the Schlosser Report which accompanied the accession convention specified the scope of the arbitration exception a little bit towards a broad application in reaction to the discussion which had arisen. Two positions had basically been emerged; the first one, mainly represented by the U.K., was in favour of a very extensive interpretation. The proponents of this view were of the opinion that the provision covers all disputes which the parties had agreed to be settled by arbitration including any secondary disputes connected with the arbitration. The other point of view expressed on behalf of the original Member States, is that the exception only regards proceedings before national courts as part of arbitration if they refer to arbitration proceedings.<sup>73</sup> The Schlosser Report points out that the Brussels Convention does not cover ‘court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance’. The same applies to ‘a judgment determining whether an arbitration agreement is valid or not, or because it is invalid ordering the parties not to continue the arbitration proceedings’.<sup>74</sup> Excluded from the scope of the Brussels Convention are furthermore ‘proceedings and decisions concerning applications for the revocation, amendment recognition and enforcement of arbitration awards’.<sup>75</sup> It seems reasonable that these arbitration-related proceedings are excluded from the Brussels Convention. The application of its general grounds for jurisdiction<sup>76</sup> would lead to unpractical jurisdictions. This applies especially for the basic rule laid down in Art. 2, which establishes that persons shall be sued in the courts of the state in which they are domiciled. However, in international arbitration the seat is generally in a neutral third country, which rather qualifies the courts of that state since they have usually the closer connection to the events.

With the accession of Greece in 1982 the last expert report dealing with the Arbitration exception was issued.<sup>77</sup> The Evrigenis-Kerameus Report reflects the fact that in practice the issue of whether there is a valid arbitration agreement can arise in two different ways. Either it represents the main claim, e.g. if a party claimed a declaration that the arbitration agreement validly exists, or is it raised as a preliminary or incidental issue typically in form of a

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<sup>72</sup> H van Houtte, *op cit* (note 4), p 513.

<sup>73</sup> See Schlosser Report, 92 at para 61.

<sup>74</sup> Schlosser Report, 93 at para 64.

<sup>75</sup> Schlosser Report, 93 at para 65.

<sup>76</sup> Art. 2-4 Brussels Convention / Brussels I Regulation.

<sup>77</sup> Report on the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1986] OJ C298/1 [hereafter Evrigenis-Kerameus Report].

jurisdictional challenge raised by the defendant. In the first scenario the proceedings are not covered by the Brussels Convention whereas the arbitration exclusion is not applicable in the second case.<sup>78</sup>

b) Validity of the arbitration agreement - Marc Rich case

In spite of these guidelines set out in the expert reports, uncertainty about the exclusion's scope remained. Hence, in 1991 the ECJ was concerned with the specific scope of the arbitration exclusion in *Marc Rich* and further specified it.<sup>79</sup> This case dealt with the question whether the Brussels Convention covers court proceedings to appoint an arbitrator when the defendant alleges that a valid arbitration agreement does not exist. Hence, it incidentally addressed the issue of whether the decision about the validity of an arbitration agreement as a preliminary question falls within the scope of the arbitration exception of the then Art. 1 (4) Brussels Convention and therefore not within the scope of the Convention.

In 1998 Marc Rich and Impianti entered into a contract on the sale of Iranian crude. After both parties had agreed on certain amendments to the first offer, Marc Rich sent a telex message setting out the terms of the contract including one clause concerning 'law and arbitration'.<sup>80</sup> After the loading of the oil had been completed, Marc Rich complained that the Cargo was contaminated. Thereupon Impianti summoned Marc Rich to appear before the Regional Court in Genoa, Italy, who contested the court's jurisdiction, relying on the arbitration clause. Almost at the same time he commenced arbitration proceedings in London, in which Impianti in turn refused to take part. As a result Marc Rich instituted proceedings before the High Court of Justice in London for the appointment of an arbitrator in accordance with the English Arbitration Act of 1950. Impianti objected to the court's jurisdiction with the argument that the dispute did not concern arbitration itself but the existence of a valid arbitration agreement. Hence, as an incidental issue it would not fall under the arbitration exclusion of Art. 1 (4) and the issue had to be decided in Italy according to the Brussels Convention.

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<sup>78</sup> Evrigenis-Kerameus Report, 10 para 35.

<sup>79</sup> *Marc Rich & Co AG v Società Italiana Impianti PA (the Atlantic Emperor)* C-190/89 [1991] E.C.R. I-3855.

<sup>80</sup> The clause said: 'law and arbitration: Construction, validity and performance of this contract shall be construed in accordance with English law. Should any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London. One to be appointed by each of the parties hereto and the third by the two so chosen, their decision or that of any two of them shall be final and binding on both parties.'

The ECJ ruled that '[a]rticle 1 (4) of the Brussels Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue to that litigation.'<sup>81</sup> It argues that the determination of whether a dispute falls within the scope, reference must be made 'solely to the subject matter of the dispute'.<sup>82</sup> The subject matter is the appointment of an arbitrator, which is a measure of setting arbitration proceedings in motion and therefore doubtlessly 'ancillary' to arbitration and thus excluded from the scope of the Brussels Convention. Despite its first appearance the decision is not inconsistent with the guidelines set out in the Evrigenis-Kerameus Report. Indeed the Report says that the verification of the validity of an arbitration agreement as an incidental question must be considered as falling within the scope of the Brussels Convention.<sup>83</sup> However, this applies to cases where the invalidity is raised as an objection during proceedings falling with regard to their nature (e.g. a claim for the contractually owned performance) under the scope of the Convention, which was not the case in *Marc Rich*. The pure fact that the preliminary issue relates to the validity of the arbitration agreement does not affect the exclusion from the scope of the Brussels Convention of a dispute which's subject-matter falls within the sphere of arbitration and therefore within the arbitration exclusion.<sup>84</sup>

Besides the clear and broad interpretation of Art. 1 (4)<sup>85</sup> the ECJ stated in this decision that it depends only on the subject matter of the main claim and not on the objections to that claim for determining whether the claim falls under the arbitration exception.

The result of such proceedings not falling under the Brussels Conventions leads to the fact that the *lis pendens* rule<sup>86</sup> does not apply and that proceedings seeking the appointment of arbitrators do not have to be stayed because of the previously introduced proceedings on the merits of the case.<sup>87</sup> While this on the one hand strengthens arbitration, on the other hand it opens the floodgate for parallel proceedings and incompatible outcomes, since it makes it possible that the arbitration goes ahead while the court first seized may rule that the

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<sup>81</sup> At para [29].

<sup>82</sup> At para [26].

<sup>83</sup> 10 at para [35].

<sup>84</sup> *Marc Rich* at para [28].

<sup>85</sup> Arbitration was intended to be excluded in its entirety. See *Marc Rich* at para [18].

<sup>86</sup> Art. 21 Brussels Convention and now Art. 27 Brussels I Regulation.

<sup>87</sup> T Kruger, *op cit* (note 29) p 507.

arbitration agreement is invalid and gives a judgment on the merits contrary to the arbitral award.

c) Protective measures - van Uden

A further case that followed up with the ambit of the arbitration exception was the *van Uden* case.<sup>88</sup> This decision dealt with the question whether provisional or protective measures in cases in which proceedings may be or have already been initiated before arbitrators fall within the arbitration exception.

Arbitration proceedings had according to the arbitration agreement already been initiated by the Dutch carrier van Uden in the Netherlands for unpaid debt with a slot charter agreement when the claimant additionally applied to the national court in Rotterdam for an interim injunction securing the same debt. The defendant, a German company named Deco Line, objected to the Dutch court's jurisdiction on grounds that under the Brussels Convention it should be sued in Germany as its place of domicile. Hence, the question was to what extent the fact that the claim for the debt was the subject of an arbitration agreement had an impact on the jurisdiction of the national court under the Convention.

The ECJ again pointed out that the intention of Art. 1 (4) of the Brussels Convention was 'to exclude arbitration in its entirety, including proceedings brought before national courts' and referred in this respect to its judgment in *Marc Rich*.<sup>89</sup> It further said that 'it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. [...] Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect'.<sup>90</sup> The right to be protected was one conferred by a contract. Hence, the own nature of the right falls within the scope of the Brussels Convention which as a consequence make the interim measures trying to protect this right falling under the application of the Convention as well. Due to the fact that the right which the interim measure tries to protect is not within the sphere of arbitration the interim measure cannot be described as 'ancillary' to arbitration.

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<sup>88</sup> *Van Uden Maritime BV v Deco-Line KG*, C-391/95 [1998] E.C.R. I-7091.

<sup>89</sup> At para [31] with reference to para [18] of the *Marc Rich* case.

<sup>90</sup> At para [33].

The ECJ made clear in its decision that the Brussels Convention applies whenever the subject matter of the provisional measure concerns the performance of the contractual obligation itself and does not concern the arbitration proceedings. The fact that the contractual issue was supposed to be resolved by arbitration is not decisive. By referring to the nature of the right which shall be protected as the determining factor<sup>91</sup> the ECJ takes up its decision in *Marc Rich* where it considered the subject-matter of the main claim as the relevant criterion<sup>92</sup>.

However, the distinction between proceedings that are ‘ancillary’ and those which are ‘parallel’ to arbitration is unfortunate and may contribute to confusion.<sup>93</sup> It seems difficult to draw a clear line e.g. when provisional measures deal with the submission of evidence to the arbitrators providing a claim or with the appointment of an expert to assess the damage claimed.<sup>94</sup>

According to the judgment the Brussels Convention does not prevent courts, without any territorial link or other restriction, from taking provisional measures that cross arbitration proceedings in other Member States.<sup>95</sup> This leads to the questionable outcome that only the provisional measure would fall within the scope of the Convention, because the main claim is subject to an arbitration agreement. Moreover this result is an incentive for seeking such measures at a court within the EU due to the fact that such a measure can be enforced anywhere else in the EU but not automatically elsewhere pursuant to the New York Convention.<sup>96</sup> Especially where such measures virtually anticipate the final ruling, the application undermines the parties’ decision to refer their dispute to arbitration and to have interim measures issued in accordance with the *lex arbitri*, which they have chosen by locating the seat of arbitration.

## 2) Remaining problems

Although the expert reports have started to give a guideline for the interpretation of the arbitration exclusion and the ECJ has given two important decisions concerning its scope, not all problematic aspects could have been solved and thus there are still some points that remain unclear.

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<sup>91</sup> See *van Uden* at para [33].

<sup>92</sup> See *Marc Rich* at para [26].

<sup>93</sup> C. Ambrose, op cit note 60, p 23.

<sup>94</sup> Examples given in H van Houtte, op cit (note 41) p 516.

<sup>95</sup> H van Houtte, op cit (note 41) p 516.

<sup>96</sup> N Blackaby; C Partasides, op cit (note 10) at 5.132.

First of all the different terms used for the delimitation whether proceedings fall within or without the scope of the Brussels Convention lead to confusion and demarcation problems. Thus in the Evrigenis-Kerameus Report a distinction was made between ‘principal’ and ‘incidental’ issues<sup>97</sup>, in *Marc Rich* decision between ‘subject matter’ and ‘preliminary’ issue<sup>98</sup> and finally the ECJ in *van Uden* draw the line between ‘ancillary’ and ‘parallel’ proceedings.<sup>99</sup> Besides, neither the judgment in *van Uden* nor the Schlosser report define the term ‘ancillary’ abstractly but only give examples.<sup>100</sup> This leads to legal uncertainty in cases which are even just slightly different from the selected examples.

Moreover the ECJ decisions induce practical problems. While *van Uden* somehow weakens the parties’ choice of the *lex arbitri*<sup>101</sup>, the decision in *Marc Rich* leads to or at least does not prevent parallel proceedings.<sup>102</sup> The same applies to declaratory judgments on the validity. Such judgments are not recognised under the Brussels Convention since they do not fall under its scope of application as clearly set out in the Evrigenis-Kerameus Report. Thus, if one party is not satisfied with the court’s decision it can still let a court of another Member State decide on the same question.

It should be noted at this point that the adoption of the Brussels I Regulation is without prejudice to the explanations issued under the Brussels Convention. This follows from the fact that the arbitration exception was not modified when the Convention was converted in a Regulation. According to Art. 19 of the preamble of the Regulation the interpretation of the Brussels Convention both by the ECJ and expert reports should therefore remain applicable.

## II) Parallel proceedings

A severe problem of the arbitration exclusion, which was even encouraged by the *Marc Rich* judgment, is that it opens the possibility for parallel proceedings. While a court generally competent under the Brussels I Regulation may commence proceedings at the investigation of the claimant, the respondent can institute arbitration proceedings in another Member State. If

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<sup>97</sup> OJ C298/1, 10 at para [35].

<sup>98</sup> See *Marc Rich* at para [26].

<sup>99</sup> See *van Uden* at para [33].

<sup>100</sup> M Illmer; I Naumann ‘Yet another blow – anti-suit injunctions in support of arbitration agreements within the European Union’ (2007) *Int ALR* 149.

<sup>101</sup> See B) I) 1) c).

<sup>102</sup> See B) I) 1) b).

the arbitral tribunal considers the arbitration agreement valid, it will render its award regardless of the court proceedings. This is in contradiction with the general aim in the EU of a harmonious administration of justice within the EU.<sup>103</sup> Besides the risk of contradictory decisions that might occur, the duplication of work causes a waste of resources and makes parallel proceedings very undesirable. Moreover, the possibility of parallel proceedings is an incentive for parties who want to delay a process. It is common that a party in such a case sues the other party on purpose in front of court that is known for its long processing times only to gain time.<sup>104</sup>

### *1) Art. II (3) New York Convention*

Reading Art. II (3) NYC parallel proceedings should at first sight actually not be possible. Under this article a court before which an action is brought in breach of a valid arbitration agreement must decline jurisdiction, unless the arbitration agreement is void, inoperative or incapable of being performed. Although the New York Convention provides for a rule that imposes a duty on the courts of the Contracting States to recognise arbitration agreements and consequently to refer to arbitration it is, however, insufficient to fully deal with parallel proceedings since it does not provide for coordination between arbitration and litigation.<sup>105</sup> As a result both institutions will continue with their proceedings, if the court finds the arbitration agreement to be void but the tribunal does not. The New York Convention does not say whether one should decide first as a general principle or which law is applicable for this question.<sup>106</sup> Thus, an avoidance of parallel proceedings cannot be achieved by Art. II (3).

### *2) Anti-suit injunctions*

A common strategy in common law jurisdictions to address this problem is by way of anti-suit injunctions.<sup>107</sup> An anti-suit injunction is an order issued by a court that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction.<sup>108</sup> In the context of arbitration agreements the substantive interest in that sense is the right not to

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<sup>103</sup> Recital (15) of the Brussels I Regulation.

<sup>104</sup> Since Italian courts are very often chosen for this purpose, it is often called the 'Italian torpedo'.

<sup>105</sup> G Kaufmann-Koehler 'How to handle parallel proceedings: a practical approach to issue such as competence-competence and anti-suit injunctions' (2006) Vol 2 No.1 *Dispute Resolution International* 112.

<sup>106</sup> G Kaufmann-Koehler, *ibid* note 105.

<sup>107</sup> T Pfeiffer 'EUGH: Anti-suit injunction auch auf der Grundlage einer Schiedsvereinbarung unvereinbar mit Brüssel I-Verordnung' (2009) *LMK* 276971; in the U.K. for example the High Court has the power to grant injunctions supporting arbitration agreements pursuant to section 37(1) Senior Courts Act 1981 and section 44(1), (2) (e) Arbitration Act 1996.

<sup>108</sup> T Kruger, *op cit* (note 3) at para 5.147.

invoke a jurisdiction under the Brussels I Regulation but instead to have all disputes determined by arbitration.<sup>109</sup> Such an injunction is not directed against the foreign court itself but against the other party and its non-observance is seen as a contempt of court and entails penalties up to imprisonment and attachment of the respondent's assets.<sup>110</sup> Since it does not interfere with the sovereignty of the foreign court directly but only tries to influence the defendant's behaviour abroad, it is predominantly recognised that it does not violate rules of comity.<sup>111</sup>

However, anti-suit injunctions have always been subject to controversial discussions. Whilst on the one hand it provides for a mechanism scotching claims which's only aim it is to torpedo the procedure before the competent court or arbitral tribunal it can also hinder procedures before a court that do is the competent court or the tribunal on which the parties had validly agreed on.<sup>112</sup>

#### a) Anti-suit injunctions and the Brussels I Regulation

Although the Brussels I Regulation does not contain any explicit reference to anti-suit injunctions, such injunctions rendered within the EU are contrary to the principle of mutual trust, which implies that the EU Member States respect and trust in each others' courts and their respective decisions.<sup>113</sup>

The principle of mutual trust was already pointed out in the ECJ's decision in *Gasser*.<sup>114</sup> Although the case itself was not concerned with anti-suit injunctions as such but rather with the lis pendens rule under Art. 21 of the Brussels Convention<sup>115</sup>, the problem was quite similar. The ECJ had to decide whether an exception of Art. 21 can be made if the claimant has brought proceedings in bad faith before a court without jurisdiction and that court first seized has not decided the question of its jurisdiction within a reasonable time. The ECJ stated that due to the principle of mutual trust the Contracting States have to trust each other's legal

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<sup>109</sup> O Santomauro 'Sense and Sensibility: Reviewing West Tankers and dealing with its implications in the wake of the reform of the EC Regulation 44/2001' (2010) Vol. 6 No. 2 *J Priv Int L* 282.

<sup>110</sup> M Lehmann 'Anti-suit injunctions zum Schutz internationaler Schiedsvereinbarungen und EuGVVO' (2009) *NJW* 1645.

<sup>111</sup> T Pfeiffer, *ibid* note 107; the counter opinion states that by prohibiting a party from initiating procedures, the sovereignty and independence of a foreign court is necessarily affected. See TC Hartley 'Comity and the Use of Anti-suit Injunctions in International Litigation' (1987) *AJCL* 506.

<sup>112</sup> M Lehmann, *ibid* (note 110).

<sup>113</sup> T Kruger, *op cit* (note 3) at para 5.153.

<sup>114</sup> *Gasser v MISAT* C-116/02 [2003] E.C.R. I-14693.

<sup>115</sup> The lis pendens rule states that 'where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.'

system and judicial institution and are not allowed to ignore Art. 21 even if the court first seized excessively delays the case.<sup>116</sup>

Finally, with the decision in the *Turner* case the ECJ could explicitly overturn the practice of the English courts by declaring anti-suit injunctions within the EU illegal.<sup>117</sup> In this case the English court, being the court first seized, issued an anti-suit injunction in order to restrain the other party from continuing proceedings it had commenced in Spain. The ECJ again pointed out with reference to its judgment in *Gasser* the principle of mutual trust on which the Brussels Convention is based.<sup>118</sup> Hence, ‘every prohibition imposed by a court restraining a party from commencing or continuing proceedings before a foreign court undermines the latter jurisdiction to determine the dispute’.<sup>119</sup> This applies even where the party against whom the injunction is directed is acting ‘in bad faith with a view to frustrating the existing proceedings’.<sup>120</sup>

The practice of issuing anti-suit injunctions within countries falling under the scope of the Brussels Convention was conclusively rejected by this judgment. The reason behind it is that the Regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States, which must trust each other to apply those rules correctly.

#### b) Anti-suit injunctions in connection with arbitration – West Tanker

However, the *Turner* case was not concerned with arbitration. The question if the principle laid down in this decision could be adopted for a scenario where a court issues such an injunction in support of arbitration agreements was recently decided in the *West Tanker*<sup>121</sup> case.<sup>122</sup> With a highly controversial decision<sup>123</sup> the ECJ declared anti-suit injunctions relating

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<sup>116</sup> At para [70]-[72].

<sup>117</sup> *Turner v Grovit and others* C-159/02 [2004] E.C.R. I-3565.

<sup>118</sup> At para [24].

<sup>119</sup> At para [27].

<sup>120</sup> At para [31].

<sup>121</sup> *Ibid* (note 12).

<sup>122</sup> The possibility to decide on this problem seemed to appear in 1998 already when the question whether an English court could order a party to discontinue proceedings before a French court because of an arbitration clause was referred to the ECJ, *Alfred C. Toepfer International GmbH v Sociere Cargill France* [1997] EWCA 2811 (Civ). However, the *Toepfer* case was withdrawn before a decision was rendered.

<sup>123</sup> See critique e.g. K Noussia ‘Antisuit injunctions and arbitration proceedings: What does the future hold?’ (2009) Vol 26 *J Int'l Arb* 311; S Wolff ‘Tanking arbitration or breaking the system to fix it? A sink or swim approach to unifying European judicial systems: The ECJ in *Gasser*, *Turner*, and *West Tankers*’ (2009) Vol. 15

to the protection of arbitration agreements as incompatible with the Brussels I Regulation as well.

In this case a vessel owned by West Tanker and chartered by Erg Petroli Spa collided with a jetty owned by Erg in Italy in August 2000. The charter agreement contained a clause providing for arbitration in England. Erg claimed compensation from its insurers Allianz and Generali and commenced arbitration proceedings in London against West Tankers for the excess that was not covered by the insurance contract. However, Allianz and Generali after having paid Erg compensation under the insurance policies brought court proceedings against West Tankers before the Tribunale di Siracusa in Italy due to their right of subrogation to Erg's claim in order to recover the sums they paid to Erg. West Tanker raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement and at the same time began proceedings before the High Court in England seeking an injunction restraining Allianz and Generali from continuing their proceedings in Italy. The High Court of Justice of England and Wales granted the anti-suit injunction in accordance with the common practice in English courts.<sup>124</sup> On appeal, the House of Lords referred the question of the consistency of the injunction with the Brussels I Regulation to the ECJ.

The ECJ denied such consistency and therefore extended its findings in *Turner* to injunctions in protection of arbitration agreements, however, with a very surprising explanation. The original divergence in academia was whether injunctions restraining a breach of an arbitration agreement fall within the arbitration exception. The further question whether such an injunction was moreover irreconcilable with the Regulation was only raised under the assumption that it does fall within its scope of application.<sup>125</sup>

However, the judgment excluded the anti-suit injunction from the scope of the Brussels I Regulation but nevertheless came to the conclusion that it undermines the Regulation's effectiveness.<sup>126</sup> The ECJ argued for his conclusion by means of a tactical manoeuvre. To

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*CJEL online* 67, 68; R. Fentiman 'Arbitration and antisuit injunctions in Europe' (2009) *CLJ* 280; M Illmer; I Naumann, op cit note 100, p 156.

<sup>124</sup> *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà SpA and others* [2005] EWHC 454 (Comm).

<sup>125</sup> C Ambrose op cit (note 60) p 21.

<sup>126</sup> At para [24].

begin with, the court referred to the proceedings on the merits before the court in Italy, which are covered by the Brussels I Regulation.<sup>127</sup>

Following the aforementioned, the ECJ concluded that the English injunction hindered the Italian court to exercise its jurisdiction given under the Brussels I Regulation and to decide about the validity and scope of the arbitration agreement itself.<sup>128</sup> Hence the anti-suit injunction, although outside the Regulation itself, affects the proceedings in Italy and intervenes with the Italian court's rights given under the Regulation. The ECJ supported its finding by referring to Art. II (3) NYC, which entitles a court seized to examine the validity of an arbitration agreement before referring it.<sup>129</sup>

With this argumentation the ECJ widens the scope of application of the Brussels I Regulation to a new extent: it does not just cover proceedings falling under their scope anymore but also such proceedings which only affect the Regulation.<sup>130</sup> Some commentators see this as a disproportionate limitation of the arbitration exclusion in favour of the ECJ's aim of the 'unification of rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters'.<sup>131</sup> <sup>132</sup> Moreover the ECJ's reference to the principal of 'mutual trust' in this constellation is criticised. This would presume that one court operating outside the scope of the Regulation and therefore not bound by its regime is nevertheless bound by the principles underlying this regime.<sup>133</sup> In addition the decision does not respect the parties' choice of the *lex arbitri* by not giving the forum expressly chosen priority. In contrast, others support the judgment from a more practical point of view, arguing that anti-suit injunctions constitute an indirect interference with court proceedings which is simply not good for Europe.<sup>134</sup>

Yet, the mass of criticism and the multitude of written articles on this highly contentious judgment do not change the fact that the EU Member States are *de facto* bound by this

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<sup>127</sup> At para [26] and [27]; The objection made by the defendant that a valid arbitration agreement is opposed to the jurisdiction of the Italian court does not exclude the applicability of the Brussels I Regulation, since it is just a preliminary issue, see *Evrigenis-Kerameus Report*, 10 at para 35.

<sup>128</sup> At para [28].

<sup>129</sup> At para [33].

<sup>130</sup> M Lehmann, *op cit* (note 110) p 1646.

<sup>131</sup> *West Tanker* at para [24].

<sup>132</sup> S Wolff, *ibid* (note 123); R. Fentiman, *op cit* (note 123) p 280.

<sup>133</sup> M Illmer; I Naumann, *op cit* note 100, p 156; However they argue that the application of the national law by the English court must not impair the effectiveness of the operation of EU law according to the principle of 'effet utile' 156.

<sup>134</sup> P Santomauro, *op cit* (note 109) p 293, 294.

decision and have to deal with its consequences<sup>135</sup> unless the legislator amends the Brussels I Regulation in order to attenuate the effects of the judgment.

### c) Significance for practice

Following from *West Tanker* anti-suit injunctions are no longer a possibility to oppose parallel proceedings. While the court may consider the arbitration agreement invalid and consequently continues proceedings and delivers a judgment on the merits, the arbitral tribunal may come to an opposite decision and issue an award incompatible with the court judgment.

Furthermore the decision confers decisive rights to the court competent under the Brussels I Regulation. One of the central questions in this decision was which court is the one competent to decide whether a claim falls within the scope of the arbitration agreement or not. This question is essential. Due to the fact that a party who wants to avoid arbitration only needs to raise the objection that the agreement is void or does not cover the claim in question, it is of particular importance who has the power to decide on the validity and scope of the arbitration agreement. The judgment in *West Tanker* awards this competence to the court competent under the Brussels I Regulation.<sup>136</sup>

However, the fact that even before *West Tanker* anti-suit injunctions within the EU were consequently denied by civil law jurisdictions, which form the majority, should not be overlooked.<sup>137</sup> The problem of parallel proceedings and torpedo claims shall not be underestimated and diminished by that fact; however, it is not a brand new dilemma in the EU triggered by this judgment as it sometimes may appear with regard to the discussions on that case. Nevertheless, for London as an important place of arbitration in Europe the decision may cause a huge loss of attractiveness.

### 3) *Effet négative de la compétence-compétence*

Another way of facing the problem of parallel proceedings is on ground of the principle of the ‘*effet négative de la compétence-compétence*’ (negative effect of competence-competence)

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<sup>135</sup> It is beyond the scope of this paper to discuss the extensive problem of the binding force of preliminary rulings issued by the ECJ. For a detailed discussion see I Klöckner *Grenzüberschreitende Bindung an zivilgerichtliche Präjudizen*.

<sup>136</sup> M Lehmann, op cit (note 110) p 1647.

<sup>137</sup> M Illmer; I Naumann, op cit (note 100) p 157.

which is a standard practice in French courts. As mentioned above<sup>138</sup> France does not only allow arbitral tribunals to decide on their jurisdiction<sup>139</sup> but also awards a negative effect to the principle of competence-competence by prohibiting courts from making any determination on the jurisdiction of an arbitral tribunal before it has done so itself. In contrast to the positive effects of competence-competence which does similar to Art. II (3) of the New York Convention provides for the respect for the tribunal's areas of responsibility but not for any coordination between court and arbitral proceedings<sup>140</sup>, the negative effect clearly gives priority to the tribunal to decide about the validity of the arbitration agreement.

French courts used this principle of the 'effet négative de la compétence-compétence' also on an international level by applying it both, in international cases where French law was applicable and in cases, where the place of arbitration was outside France.<sup>141</sup> Yet, after *West Tanker* the universal interpretation of the negative competence-competence would most probably not stand up to scrutiny by the ECJ anymore since it allows the courts expressly to decide about the validity of an arbitration agreement with regard to their own jurisdiction.<sup>142</sup>

#### 4) Conclusion

At the moment there does not exist a valid and effective way to avoid or prohibit parallel proceedings within the EU. The instruments used in England and France, allowed on the basis of their national laws, have lapsed due to the ECJ decision in *West Tanker*. The judgment does not allow for an interference of the court's right to decide on its own jurisdiction under the Brussel I Regulation in any way. Hence, this again paves the way for the opportunity of torpedoing and tactically delaying proceedings by picking a court under the Brussels I Regulation which is known for its slow processing times. Even though these courts might not be competent they have all the time in the world to decide on the validity of the arbitration agreement.

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<sup>138</sup> See B) II) 2).

<sup>139</sup> Which is described as the positive effect of competence-competence.

<sup>140</sup> See C) II) 1).

<sup>141</sup> P Schlosser "'Brüssel I und Schiedsgerichtsbarkeit' (2009) *SchiedsVZ* 136; see as an example for an universal application of this principle *Legal Department of the Ministry of Justice of the Republic of Iraq v. Fincantieri - Cantieri Navali Italiani, et al.* Court d'appell de Paris, [2007] *Revue de l'arbitrage* 87.

<sup>142</sup> S Bollée 'Jurisprudence européenne' (2009) *Rev arb* 421.

### III) Judgments in breach of arbitration agreements

A problem closely related to the one of parallel proceedings is the handling of judgments delivered in breach of an arbitration agreement at the enforcement stage. According to the interpretation of the scope of the arbitration exception<sup>143</sup> there is at present some consensus that a judgment rendered in disregard of an arbitration agreement is covered by the Regulation.<sup>144</sup> Moreover scholars broadly accepted that Title III on ‘recognition and enforcement’ of the then Brussels Convention does not correspond to Title II ‘jurisdiction’ with the effect that a court enforcing a judgment does not take into consideration the grounds for jurisdiction of the court of origin anymore.<sup>145</sup> Consequently a judgment is enforceable within the EU under the Brussels I Regulation even if it was rendered in disregard of a valid arbitration clause.

This being a highly unsatisfying result has induced academia to find the following legal possibilities to circumvent such an outcome.

#### *1) Non-recognition in accordance with Art. 71 (1) Brussels I Regulation*

Some authors suggest that non-recognition should be based on Art. 71 (1) Brussels I Regulation. It follows from that provision, which gives precedence to specific conventions, that the Regulation is not intended to affect existing treaties. Hence, in order to avoid a conflict with obligations under the New York Convention, its Art. II (3) superseded the Brussels I Regulation.<sup>146</sup> Although this approach is consistent with the arbitration exception’s intention to avoid conflict with the New York Convention, it is, nevertheless, legally not well founded.<sup>147</sup> It follows from both the Brussels Convention and the Brussels I Regulation that their subordination only applies where another convention lays down conditions for the recognition and enforcements of *judgments*.<sup>148</sup> Yet, the New York Convention simply requires courts to refer disputes to arbitration if a respective clause exists but does not provide for jurisdictional rules or those of recognition of judgments.<sup>149</sup>

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<sup>143</sup> Discussed under B) D).

<sup>144</sup> K Svobodová ‘Arbitration Exception in the Regulation Brussels I’ in D Sehnálek, J Neckář, J Valdhans, M Radvan *Dny práva - 2008 - Days of Law* 25.

<sup>145</sup> J-P Beraudo ‘The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgments’ (2001) *J Int'l Arb* 021.

<sup>146</sup> J-P Beraudo, op cit note 145, p 02; Beraudo refers to Art. 57 (1) Brussels Convention which, however, equals Art. 71 (1) Brussels I Regulation; H van Houtte ‘May Court Judgements that Disregard Arbitration Clauses and Awards be enforced under the Brussels and Lugano Conventions?’ (1997) Vol. 13 No. 1 *Arb Int* 88; he argues that Art. II NYC impliedly obliges the enforcing court to refuse enforcement of a foreign judgment whenever the enforcing judge considers the arbitration clause to be valid.

<sup>147</sup> C. Ambrose op cit (note 60) p 17.

<sup>148</sup> Art. 57 I Brussels Convention and Art. 71 (1) Brussels I Regulation.

<sup>149</sup> See also K Svobodová, op cit note 144, p 26.

## 2) *Public policy*

Another basis on which non-recognition is attempted to be justified, is on grounds of public policy.<sup>150</sup> Accordingly, a recognising court can scrutinise on its own whether a case comes within the scope of the Brussels I Regulation and may refuse recognition if it comes to the conclusion that a valid arbitration agreement exists and its disregard is thus a violation of public policy according to Art. 34 (1) Brussels I Regulation.<sup>151</sup> The strong and inevitable argument against this opinion is Art. 35 (3) Brussels I Regulation. This article precludes a revision of the jurisdiction by the recognizing court in general and even specifically mentions the test of public policy referred to in Art. 34 (1) in this regard as not applicable.

## 3) *Résumé*

The arbitration exception thus not only allows for parallel arbitration and court proceedings but also for the enforcement of court judgments on the merits in other Member States that may clash with an arbitral award that can also be enforced in that Member State.<sup>152</sup> Neither Art. 71 (1), nor public policy arguments provide a legal ground for refusing a judgment delivered in breach of an arbitration agreement. Apart from that, there is a move within the EU to further facilitate the recognition and enforcement of foreign judgments by abolishing the ‘*exequatur*’<sup>153</sup> procedure.<sup>154</sup> Citizens and businesses in the EU, which provides an internal market without frontiers, shall no longer have to undergo the time consuming and expensive procedure of getting a declaration of enforceability.<sup>155</sup> This would result in the fact that a judgment rendered in an EU Member State is automatically enforceable in another Member State without being subject to an examination for possible grounds for refusal anymore. Assumed that this idea will prevail, there also would no longer be a scope for refusal for judgments rendered in breach of an arbitration agreement anyway.

The shown interfaces between the Brussels I Regulation illustrate the problems which may arise and which are able to delay and complicate arbitration proceedings and make it more costly. Hence, it is not surprising that a resolution for the indicated difficulties is discussed by practitioners and academia.

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<sup>150</sup> See K Svobodová, *op cit* (note 144) p 26.

<sup>151</sup> See also H van Houtte, *op cit* (note 146) p 88, who sees a judgment in disregard of Art.II NYC as a violation of public policy.

<sup>152</sup> H van Houtte, *op cit* (note 41) p 514.

<sup>153</sup> Exequatur is the procedure of validation of a court’s decision and its declaration of enforceability a court in a country different from that one where the judgment was issued has to follow in order to make it enforceable.

<sup>154</sup> See e.g. Green Paper question 1; the Proposal, suggested Art. 38-46.

<sup>155</sup> See Green Paper, p 2.

## D) Proposed Changes

Although the Brussels I Regulation is generally described as a highly successful piece of EU legislation<sup>156</sup> there are areas which could be improved as the last chapter has shown. The problems in connection with the arbitration exclusion have undoubtedly existed already for a long time but with the continuously increasing popularity of international arbitration and the recent *West Tanker* decision the interface with the Brussels I Regulation became more significant. In order to be able to meet these constantly changing requirements in practise, legislation always needs to be kept up to date. Before the issuing of the Brussels I Regulation the necessary renegotiations under the Brussels Convention every time a new State acceded to the EC were taken as an opportunity to reconsider and change the Convention according to demand.<sup>157</sup> Since the Regulation forms now part of the *acquis communautaire* renegotiations do not take place anymore. However, the EU legislator was aware of the need for updated legislation. According to Art. 73 of the Brussels I Regulation the European Commission is supposed to issue a report on the efficiency of its applications no later than five years after its entry into force in 2002.

Somewhat belatedly such a Report<sup>158</sup> was published on 21 April 2009 together with the Green Paper on the Brussels I Regulation<sup>159</sup>. Whereas the Report summarises the examined difficulties with regard to the application of the Brussels I Regulation, the Green Paper released by the European Commission is a discussion document intended to stimulate debate and launch a process of broad consultation, at a European level, on possible ways to improve the operation of the Regulation with respect to the concrete raised questions based on the Report.<sup>160</sup> Hence, both documents serve as a basis for a public consultation on the operation of the Regulation.<sup>161</sup>

Within the consultation period which ended on 30 June 2009 the European Commission received 130 contributions from Member States, national and regional authorities, third

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<sup>156</sup> See chapter B) I) 1).

<sup>157</sup> T Kruger, op cit (note 29) p 502.

<sup>158</sup> Ibid (note 6).

<sup>159</sup> Ibid (note 7).

<sup>160</sup> See Green Paper, p 2.

<sup>161</sup> The Report, p 3.

countries, international organisations, practitioners and academics.<sup>162</sup> After the consideration of all these reactions the Commission published a concrete proposal for a revised ‘Regulation of the European Parliament and of the Council in jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’<sup>163</sup> on the 14<sup>th</sup> of December 2010. It is now for the European Parliament to adopt the Proposal and for the Council of Ministers to approve it under the ordinary legislative procedure (co-decision); however, proposals for changes or even a denial of the amendment of the Regulation, which would have the effect that the Regulation would stay in force in its current version, are possible as well.<sup>164</sup> The final decision is expected within two to three years.

Whilst all reports and papers are obviously concerned with a possible improvement of the Brussels I Regulation in general, this paper will concentrate only on the evaluation and proposals concerned with the interface between the Brussels I Regulation and arbitration. This chapter shall illustrate the different approaches and their scientific basis beginning with the Heidelberg Report up to the recently published Proposal.

#### D) Heidelberg Report

In preparation of the Green Paper the Commission tendered an evaluation with which the ‘Institute of Foreign and International Private and Economic Law’ of the University of Heidelberg in Germany was commissioned. The resulting report, called the Heidelberg Report, is a comprehensive study of the practical operation of the Regulation in 24<sup>165</sup> Member States.<sup>166</sup>

##### *1) The study’s results*

The clear answer from the research done was that the overwhelming majority of persons interviewed is of the opinion that the Brussels I Regulation is a ‘well-balanced instrument on

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<sup>162</sup> Many of them are available for the public at [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm).

<sup>163</sup> Ibid (note 14).

<sup>164</sup> Art. 294 of the Treaty on the functioning of the European Union [2008] OJ C115/47 (‘TFEU’).

<sup>165</sup> The new Member States Romania and Bulgaria as well as Denmark were not included in the study.

<sup>166</sup> Study JLS/C4/2005/03 presented by D Hess, T Pfeiffer and P Schlosser, available at [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf) [accessed on 14 December 2010].

judicial cooperation which works efficiently' although some provisions and the case law of the ECJ were criticised.<sup>167</sup>

In dealing with the arbitration exclusion in Art. 1 (2) (d) the Heidelberg Report recognises the difficulties concerning the determination of its scope. It reflects the most important of the ECJ's decisions in that context<sup>168</sup> and summarises that they created some clarity on the one hand but that the complete exclusion of arbitration has also lead to increasing criticism in the legal literature.<sup>169</sup> Nevertheless a possible extension of the Brussels I Regulation to arbitration was generally refused and there was seen no need for it due to the good functioning of the New York Convention.<sup>170</sup>

The main point of criticism that was expressed is the possibility of parallel proceedings and the resulting question of the handling of judgments disregarding the existence of arbitration agreements. Such a situation may occur with judgments on the validity of an arbitration agreement due to the fact that these judgments fall outside the scope of the Brussels I Regulation and are therefore not recognised under its Art. 32 et seq. Consequently the arbitration clause may be seen as valid in one but void in another Member State.<sup>171</sup> Although this reality is found unsatisfactory it seems to arise only rarely in practise.<sup>172</sup>

It was proposed to include such decisions in the scope of the Brussels I Regulation by deleting the arbitration exclusion in Art. 1 (2) (d).<sup>173</sup> However, under these circumstances a rule was demanded in order to avoid forum shopping within the countries of the Member States. It was mentioned that a party of an arbitration agreement should generally be protected from being sued in any ordinary jurisdiction, particularly a 'foreign' court without any connection to the arbitration. Proposed was an obligation for courts to stay their proceedings once proceedings for declaratory relief are already instituted in the country of the place of the arbitration.<sup>174</sup> The Heidelberg Report denies the partly expressed fear that the New York Convention could be touched thereby with the explanation that its' prevalence would be secured by Art. 71 Brussels I Regulation. Furthermore, the deletion would not lead to an extension to arbitration

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<sup>167</sup> Heidelberg Report at paras 1, 60.

<sup>168</sup> *Marc Rich* and *van Uden* see at para 106, 107.

<sup>169</sup> At para 108.

<sup>170</sup> Heidelberg Report at paras 109, 115.

<sup>171</sup> See detailed explanation of this problem under chapter C) II).

<sup>172</sup> Heidelberg Report at para 122.

<sup>173</sup> Heidelberg Report at para 122.

<sup>174</sup> Heidelberg Report at para 123.

proceedings themselves since they could still not be qualified as ‘court’ proceedings and arbitral awards not as ‘judgments’.<sup>175</sup>

A deletion of the arbitration exception would also include ancillary proceedings in its scope of application. Some legal writers even suggested addressing arbitration ‘positively’ by giving the state courts of the seat of arbitration exclusive jurisdiction for ancillary proceedings.<sup>176</sup>

Moreover the idea of implementing an article that addresses the formal validity of an arbitration agreement was suggested.<sup>177</sup> Hence this question would be regulated on a community level with the consequence that an agreement valid under that law would also be valid for courts of all Member States. Yet this suggestion raises difficulties. Besides the criticised direct overlapping with Art. II NYC, precisely the regulation of this question on a community level at the expense of the autonomous concepts in the Member States was objected.<sup>178</sup>

The last interface between the Brussels I Regulation and arbitration relates to recognition and enforcement. In order to avoid that an arbitral award and a judgment on the same issue can both be enforced<sup>179</sup>, it was proposed to either assimilate arbitral awards with judgments and hence to decline enforcement of court judgments on grounds of Art. 34 (3), (4) Brussels I Regulation or to add a fifth ground for non-recognition under Art. 34 Brussels I Regulation to arbitration.<sup>180</sup>

## 2) Proposal given by the Heidelberg Report

In spite of the shown dissatisfaction the clear reaction of the national reporters was not to change the present situation.<sup>181</sup> Nevertheless the Heidelberg report seems to see slight changes indispensable.

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<sup>175</sup> Heidelberg Report at para 122.

<sup>176</sup> H van Houtte, op cit (note 41) p 518.

<sup>177</sup> Heidelberg Report at para 126; H van Houtte, op cit (note 41) p 520 proposed a new Art. 23bis with would read as follows: ‘When the parties have agreed that an arbitral tribunal with its seat in a Member State has jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, such an agreement shall be in writing or evidenced in writing. Where such an agreement is concluded between the parties, the courts of the Member States shall have no jurisdiction over their disputes unless the arbitral tribunal or the court of the seat of arbitration has decided that the arbitral tribunal has no jurisdiction.’

<sup>178</sup> Heidelberg Report at para 126, i.e. footnote 196.

<sup>179</sup> See chapter C) III).

<sup>180</sup> Heidelberg Report at para 127; in favor of an enlargement of Art. 34 see also H van Houtte, op cit (note 41) p 521.

<sup>181</sup> Heidelberg Report at paras 115, 131.

a) Deletion of the arbitration exclusion

It proposes either ‘to delete Article 1 (2) (d) JR<sup>182</sup> and to preserve the prevalence of the New York Convention by Art. 71 JR’ or ‘to include a specific provision on supportive proceedings to arbitration’ in the Brussels I Regulation.<sup>183</sup>

b) Exclusive jurisdiction in ancillary proceedings

Concretely proposed is an Art. 22 (6) that addresses an exclusive jurisdiction for ancillary proceedings, read as follows: ‘*The following courts shall have exclusive jurisdiction, regardless of domicile, [...] (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place.*’<sup>184</sup> Moreover some guideline for a uniform determination of the place of arbitration possibly aligned to Art. 20 of the 1985 UNCITRAL Model Law on International Commercial Arbitration would be needed if the place is not determined in the agreement.<sup>185</sup> A new recital with the following wording is suggested: ‘*The place of arbitration shall depend on the agreement of the parties or determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent. Lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.*’<sup>186</sup>

c) Lis pendens rule taking arbitration into account

In order to regulate the situation of concurring litigation on the validity of the arbitration agreement, the inclusion of an Art. 27 A is suggested ‘*A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity and/or the scope of that arbitration.*’<sup>187</sup> This mandatory rule serves to avoid parallel litigation and gives priority to the courts of the place of arbitration.

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<sup>182</sup> Abbreviation for Jurisdiction Regulation which is synonymous with Brussels I Regulation.

<sup>183</sup> Heidelberg Report at para 131; H van Houtte proposes a deletion of the arbitration exclusion plus provisions which address arbitration positively, see op cit (note 41) p 518-521.

<sup>184</sup> Heidelberg Report at para 132.

<sup>185</sup> B Hess; T Pfeiffer; P Schlosser, op cit (note 16) at para 124.

<sup>186</sup> Heidelberg Report at para 136.

<sup>187</sup> Heidelberg Report at para 134.

## II) Green Paper

On the basis of the Heidelberg Report the European Commission drew up the Report on the application of the Brussels I Regulation accompanied with the Green Paper. The Report also points out that the Brussels I Regulation is a highly successful instrument, which has facilitated cross-border litigation and is broadly appreciated among practitioners, which, however, does not exclude that it may be improved.<sup>188</sup> Following that, the Green Paper provides eight questions regarding possible amendments accompanied with explanations and own suggestions for improvement by the European Commission itself. The question raised in the context of possible modifications concerning arbitration is to be found under number 7. It asks:

*‘Which action do you consider appropriate at Community level:*

- *To strengthen the effectiveness of arbitration agreements;*
- *To ensure a good coordination between judicial and arbitration proceedings,*
- *To enhance the effectiveness of arbitration awards?’*

The Report itself names many of the problems, emphasised in chapter C and adds that recognition and enforcement under the New York Convention is considered less swift and efficient than the recognition of judgments under the Brussels I Regulation.<sup>189</sup> The Green Paper again elaborates on these problems arising from the interface between the Brussels I Regulation and arbitration in more detail and shows different possibilities how to amend the Regulation in this respect.<sup>190</sup> All suggested amendments take into account that arbitration has become a matter of great importance to international commerce and that arbitration agreements should as a consequence be given the fullest possible effect. Besides, the Green Paper reports that the New York Convention is generally perceived to operate satisfactorily and is broadly accepted and appreciated among practitioners. The drafters therefore take the view that it seems appropriate to leave the operation of the New York Convention untouched but to address certain specific points relating to arbitration in the Regulation to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.<sup>191</sup>

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<sup>188</sup> The Report, p 3.

<sup>189</sup> The Report, p 9.

<sup>190</sup> Green Paper, p 8-9.

<sup>191</sup> Green Paper, p 8.

### *1) Deletion of the arbitration exclusion*

The first proposal is (at least a partial) deletion of the arbitration exclusion laid down in Art. 1 (2) (d), which would lead to the fact that court proceedings in support of arbitration come within the scope of the Regulation. In this respect the Green Paper reflects the view in the Heidelberg Report, although the reference to a ‘partial deletion’ is new but unfortunately not further specified.

The Green Paper notes that a deletion of Art. 1 (2) (d) could ensure that all the Regulation’s jurisdiction rules apply for the issuance of provisional measures in support of arbitration.<sup>192</sup> Moreover court decisions rendered in arbitration matters could benefit from the simplified rules of recognition set out in the regulation. Namely the recognition of judgments on the validity of an arbitration agreement and those setting aside arbitral awards would be allowed with the effect of preventing parallel proceedings with possible different outcomes. Hence, such an amendment is described as a good possibility to improve the interface of arbitration and court proceedings.

### *2) Exclusive jurisdiction in ancillary supportive proceedings*

The Green Paper also picks up on the recommended rule allocating jurisdiction in ancillary supportive proceedings in order to enhance legal certainty.<sup>193</sup> It suggests granting exclusive jurisdiction to the courts of the Member States of the place of arbitration along with the definition of uniform criteria that allow determining the place of arbitration.<sup>194</sup>

### *3) Priority rule for courts of the seat of arbitration*

The Report points out the aim of a better coordination between proceedings concerning the validity of an arbitration agreement which might be brought before a court and at the same time before an arbitral tribunal. It picks up the problem of parallel proceedings discussed in detail above.<sup>195</sup> Proposed is a priority rule in favour of the courts of a Member State where the arbitration takes place. Put into practise this could be a direct reference to the proposed Art. 27 A in the Heidelberg Report or it could also mean that these courts might have exclusive jurisdiction when it comes to decide on the existence, validity and scope of the arbitration

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<sup>192</sup> And not only Art. 31 Brussels I Regulation as it is the case since the ECJ’s decision in the *van Uden* case.

<sup>193</sup> As proposed in the Heidelberg Report with an Art. 22(6).

<sup>194</sup> Green Paper, p 9, i.e. fn 14 which, however, says that if the place of arbitration cannot be defined on the basis of an agreement or the decision of the tribunal, the ‘courts of the Member States’ which would have ‘jurisdiction’ over the dispute under the Regulation in the absence of an arbitration agreement shall be the deciding factor, rather than ‘the court that would have general jurisdiction’ as proposed in the Heidelberg Report, illustrated in this chapter under I) 2) b).

<sup>195</sup> See C) II).

agreement. In the first case, this could be problematically for some jurisdictions which do not have a procedure for declaratory relief.<sup>196</sup> A further suggestion, which cannot be found in the Heidelberg Report is that this rule for jurisdiction could be combined with a strengthened cooperation between the courts seized, including time limits for the party contesting the validity of the agreement.

#### *4) Uniform conflict rule concerning the validity of an arbitration agreement*

The idea of a uniform conflict rule concerning the validity of arbitration agreements is also not mentioned in the Heidelberg Report. The Green Paper in contrast proposes such a rule, without offering a concrete suggestion though. It only says that the law of the state of the place of arbitration could serve in this regard as a connection point. The rule shall avoid the scenario where an agreement is considered valid in one country and void in another and therefore resemble Art. II (3) NYC, however, on a Community level.<sup>197</sup>

#### *5) Refusal of enforcement of a judgment irreconcilable with the arbitral award*

The Green Paper seeks to provide a solution for the unsatisfying present situation which tolerates recognition and enforcement of a judgment that is irreconcilable with an arbitral award.<sup>198</sup> With the proposal of a rule that would allow the refusal of the enforcement of such judgments the Green Paper goes beyond the suggestions made in the Heidelberg Report. An alternative or even an additional rule could be ‘to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its’ procedural fairness, after which the award would freely circulate in the Community’.<sup>199</sup> Alternatively advantage could be taken of Art. VII NYC to further facilitate at EU level the recognition of arbitral awards by adopting a uniform recognition rule.

### III) European Commission’s Proposal

The European Commission published just recently, on the 14<sup>th</sup> of December 2010, its concrete Proposal for the reform of the Brussels I Regulation. This Proposal was eagerly awaited and

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<sup>196</sup> A Moure ‘The Regulation of International Arbitration by European Law: What does the future hold?’ 4 May 2009 available at <http://kluwerarbitrationblog.com/blog/2009/05/04/the-regulation-of-international-arbitration-by-european-law-what-does-the-future-hold> [accessed 10 January 2011].

<sup>197</sup> Green Paper, p 9.

<sup>198</sup> As described under chapter C) III) 3).

<sup>199</sup> Green Paper, p 9.

will surely trigger animated debate again.<sup>200</sup> In order to find an optimal solution, the European Commission took into account the proposals made in the Report and the Green Paper and the resulting extensive responses from the Member States, institutions, experts and the interested public.<sup>201</sup> The results of several studies on the different aspects of the revision, in particular the Heidelberg Report and a 2006 study on residual jurisdiction<sup>202</sup>, and the opinions proclaimed in expert conferences on the reform were taken into consideration as well.<sup>203</sup> At the end the European Commission analysed the costs and benefits of the main aspects of the proposal in its Impact Assessment and made sure that the benefits outweigh the costs and are therefore proportionate.<sup>204</sup>

Next to many other changes, inter alia the remarkable abolition of the ‘*exequatur*’<sup>205</sup>, the Proposal also made significant modifications for those cases which are related to arbitration. The European Commission states in its explanatory memorandum that it sees a need for the improvement of the interface between arbitration and litigation.<sup>206</sup> It recognises the controversial reactions with regard to the extension of the Brussels I Regulation to arbitration but views it as a necessity to give weight to the parties’ choices to arbitrate and acknowledges that this choice may be undermined by challenging the arbitration agreement before a court. The risk of parallel proceedings and irreconcilable resolutions of the dispute is costly and time consuming, creates incentives for abusive litigation tactics and makes dispute resolution unpredictable.<sup>207</sup>

### *1) Maintenance of the arbitration exclusion*

The highly disputed proposal of the deletion of the arbitration exclusion was not implemented. The abolition was a very radical and hence the most controversial point in the discussion about changes of the Brussels I Regulation with regard to the interface between the

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<sup>200</sup> X Kramer ‘Commission Proposal on the Review of Brussels I’ 14 December 2010 available at <http://conflictoflaws.net/2010/commission-proposal-on-the-revision-of-brussels-i/> [accessed at 03 February 2011].

<sup>201</sup> Which will be delineated and discussed in chapter D).

<sup>202</sup> Conducted by A Nuyts of the University of Brussels, Study JLS/C4/2005/07 available at [http://ec.europa.eu/justice/doc\\_centre/civil/studies/doc/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_residual_jurisdiction_en.pdf) [accessed 17 December 2010].

<sup>203</sup> The Proposal, p 5.

<sup>204</sup> See the Proposal, p 6, 12; see also Summary of the Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, SEC(2010) 1548 final.

<sup>205</sup> See chapter C) III) 3).

<sup>206</sup> The Proposal, p 5.

<sup>207</sup> The Proposal, p 5.

latter and arbitration.<sup>208</sup> Art. 1 (2) (d) still says that the ‘*Regulation shall not apply to arbitration*’, however, with the addition ‘*save as provided for in Articles 29, paragraph 4 and 33, paragraph 3*’. A new recital shall underline the general inapplicability of the Regulation with regard to arbitration. No. (11) of the proposed new recital provides a clear statement by saying: ‘*This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.*’ However, the amendment must nevertheless be described as a partial deletion of the exclusion of arbitration.

## 2) *Lis pendens* rule taking arbitration into account

The *lis pendens* rules, now regulated in section 10 of the Brussels I Regulation, are extensively amended in the Proposal. Especially the former Art. 27, now Art. 29, is considerably extended. The new subsection 4 contains a specific rule on the relation between arbitration and court proceedings, which deals directly with the problem that became apparent due to the *West Tanker* decision. The proposed **Art. 29 (4)** states:

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

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

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

Therefore, it strengthens the parties’ choice to settle their dispute by arbitration by obliging a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement. It gives priority to the courts of the Member State of the seat of arbitration where court proceedings relating to the arbitration agreement have been commenced *and* to the arbitral tribunal that has been seised of the case. This is a significant

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<sup>208</sup> S Garvey ‘Update on reform of the Brussels Regulation’ 30 June 2010 available at <http://dispute.practicallaw.com/8-502-6595> [accessed 21 February 2011].

difference to the proposal made in the Heidelberg Report which only gives preference to the courts of the place of arbitration. Furthermore it is expressively stated that both, proceedings which determine the existence, validity or effects of the arbitration agreements as their main and also as an incidental question are included, which leads to a very broad application of this rule. The paragraph shall according to the last sentence in Art. 29 (4) not apply in disputes concerning matters referred to in section 3, 4 and 5 of chapter II, namely matters relating to insurance, consumer contracts and individual contracts of employment.

The aim and purpose of the suggested amendments is explicitly quoted in a new No. (20) of the recital – the prevention of parallel proceedings and the avoidance of abusive litigation. Moreover it is defined what one has to understand by the reference made in Art. 29 (4) to the ‘seat of the arbitration’. No. (20) states: *‘The effectiveness of arbitration agreements should also be improved in order to give full effect to the will of the parties. This should be the case, in particular, where the agreed or designated seat of an arbitration is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. The seat of the arbitration should refer to the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution or by any other authority directly or indirectly chosen by the parties.’* Compared to the proposed recital in the Heidelberg Report it sticks out that no uniform criteria for determining the place of arbitration are set out for the case that the seat was not designated.

The current Art. 30 which stipulates the times at which a court for the purpose of the section dealing with *lis pendens* is deemed to be seised, is modified as well and could in the future be found under Art. 33. Due to the fact that arbitration is included in the *lis pendens* rules, the time at which an arbitral tribunal should be seen as being seised has to be specified too. According to **Art. 33(3)** of the proposals, *‘an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal’s constitution.’*

To what extent the expressed criticism in reaction to the Green Paper was taken into account or disregarded and what problems could be resolved should the Proposal be adopted or whether even new obstacles might occur shall be subject of the next chapter.

## E) Critical evaluation

Three official proposals were made. Three different statements on how to amend the Brussels I Regulation with regard to its interface with arbitration have been offered. All of them launched each time a vivid and inspiring debate which led to even more different suggestions for improvement. But how can the perfect solution be found?

Central question of all potential proposals is whether or not to delete the arbitration exclusion embedded in Art. 1 (2) (d). A deletion would have far-reaching consequences as it were to bring all judgments on the validity of the arbitration clause and also judgments rendered in support of arbitration under the regime of the Brussels I Regulation. Many institutions opposed a deletion of the arbitration exception or any changes of the Brussels I Regulation in that regard only with reference to the good functioning of the New York Convention but without concrete statements to the specific proposals.<sup>209</sup> Others are with similar few arguments at least 'not opposed' to the proposed amendments.<sup>210</sup> However, many other voices from academia and practice have been intensively involved with the topic and presented many arguments in favour and against certain proposals.

As one can see the proposals in the Green Paper and those submitted by the European Commission in its recent Proposal differ quite significantly. This can surely be attributed to the many responses on the Green Paper.<sup>211</sup> Although the comments made on question No. 7 vary broadly, main tendencies in certain areas can be detected.

Agreement seems to exist on one point: arbitration has become a matter of great importance to international commerce. Therefore a swift arbitration process is desirable based on clear and concise rules and a clear and non-conflictual enforcement system internationally. However, it is important to underline that the objective of any amendments to the Brussels I Regulation is not to regulate arbitration but to prevent parallel proceedings and to ensure a close coordination of court and arbitration proceedings.<sup>212</sup>

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<sup>209</sup> See e.g. response of the Zentralverband des deutschen Handwerks, p 5; response of the German Insurance Association, p 3.

<sup>210</sup> See e.g. response of the government of Estonia, p 4; response of the Ministero della Giustizia Italia, p 4.

<sup>211</sup> Many of them are available for the public at [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm).

<sup>212</sup> As expressed in the Green Paper, p 8; as an example for many of the responses to the Green Paper, response of the Association of International Arbitration, p 1.; response of the Ministero della Giustizia of Italy, p 4.

In the discussion two main points have emerged that should be taken into account whilst thinking of any changes. The first is the well functioning of the current form of the Brussels I Regulation and the New York Convention.<sup>213</sup> The second is the great importance of arbitration and the danger of ill-considered changes. Any changes should be made in consideration of its key elements: party autonomy and the expressed wish to solve the dispute outside of the court.<sup>214</sup> With regard to these points all envisaged changes have to be evaluated carefully and their effectiveness has to be balanced with the new difficulties they might cause in practise.

Before engaging with the question whether to delete or to keep the arbitration exclusion this paper will have a look at the individual provisions that were proposed. These provisions are suggested either to solve the current problems without opening the scope of the Regulation or as necessary additional rules in case of a deletion of the arbitration exception. This is due to the fact that arbitration differs from its basic idea from certain criteria applicable to litigation and that the rules stipulated in the Brussels I Regulation are not automatically appropriate for arbitration. Deleting Art, 1 (2) (d) would necessarily call for further regulation.

#### D) Exclusive jurisdiction for ancillary supportive proceedings

The Green Paper and the Heidelberg Report suggested contrary to the Proposal an exclusive jurisdiction rule for ‘ancillary proceedings concerned with the support of arbitration’.<sup>215</sup> The idea behind the suggested Art. 22 (6) which gives courts of the place of arbitration this exclusive jurisdiction was to exclude competition between different state courts in relation to the same arbitration proceedings.<sup>216</sup> Indeed, such a rule could avoid costly and time intensive jurisdiction problems<sup>217</sup> and the interference by courts where another is already engaged with the subject.<sup>218</sup> The provision was described as having the advantage of being clear and unambiguous.<sup>219</sup> Moreover, assigning exclusive jurisdiction to the courts of the place of

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<sup>213</sup> Conclusion of the Heidelberg Report, see at paras 1, 115, 131.

<sup>214</sup> See e.g. response of Allen & Overy at para 93.

<sup>215</sup> Green Paper, p 9; Heidelberg Report at para 127.

<sup>216</sup> Heidelberg Report at para 125.

<sup>217</sup> Response of the Deutsche Anwaltsverein, p 11.

<sup>218</sup> Response of U Magnus and P Mankowski at para 7.3.

<sup>219</sup> Response of the Slovak Republic at question 7; response of the German Bundesrat at para 7; response of the German Bundesrechtsanwaltskammer, p 8, which is, however, in conclusion not in favour of the proposed rule.

arbitration seems reasonable since the place of arbitration is an essential element of nearly all arbitration systems and the parties choose this place for this reason intentionally.<sup>220</sup>

### *1) Problematic aspects*

Nevertheless, the Proposal did well not to adopt the proposed Art. 22 (6). As clear and unambiguous as it may seem at first glance, it raises a lot of new questions after having had a closer look.

For a start it should be clarified that a one-size-fits-all approach for proceedings in support of arbitration, which include an enormous variety of different measures, is not possible. Whereas allocating jurisdiction to the country of the seat of arbitration is - at least generally - in limited cases such as the appointment of arbitrators appropriate, it is equally inappropriate in other cases as e.g. for proceedings of taking evidence.<sup>221</sup>

#### a) Taking of evidence

State court support in the latter field should be granted in the country where the evidence is located and where the respective measure is to be enforced.<sup>222</sup> This is most often in the countries where the parties are domiciled. However, in international arbitration this place is generally not the place of the seat of arbitration due to the fact that parties to arbitration tend to choose a neutral place of a third country.<sup>223</sup> As a consequence, the proposed exclusive jurisdiction would prevent courts from the parties' home countries to assist the tribunal in the taking of evidence. In this regard the provision would not bring any improvement but lead to a cumbersome procedure which would make it necessary to apply to the court of the seat of arbitration to issue an official request for judicial cross-border assistance.<sup>224</sup> This alone could in turn already lead to a loss of attractiveness of EU countries as a seat of arbitration.

There are two possibilities to amend the provision in order to avoid this time and money consuming process. The first is simply to exclude evidentiary measures entirely from such

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<sup>220</sup> Response of the Dutch Government at para 28.

<sup>221</sup> The government of Greece, however, is of the view that legal certainty requires that evidence taking procedures are not excluded from the proposed exclusive jurisdiction although it admits that the court of the Member State where the evidence is located, is the most proximate one and that it would be easier for this court to collect the necessary evidence, see in its response at p 21.

<sup>222</sup> See also the response of the Chamber of National and International Arbitration of Milan at para 4, response of U Magnus and P Mankowski at para 7.3.

<sup>223</sup> N Blackaby; C Partasides, *op cit* (note 10) at para 7.40.

<sup>224</sup> Response of the Max-Planck-Institute for Comparative and International Private Law at para 8.

exclusive jurisdiction.<sup>225</sup> With that solution this field would still be dealt with by national arbitration laws. The second option is an additional special regulation for supportive measures in the field of taking evidence and other judicial acts<sup>226</sup> that assigns jurisdiction to the courts of the country where these measures are required.<sup>227</sup> Such a rule could foster the interaction between arbitral tribunals and courts in other countries on a Community level. Though, it is questionable whether the Brussels I Regulation is the right instrument to embed such a rule. As the German §§ 1025, 1050 II ZPO<sup>228</sup> show, such regulations already exist at the level of national arbitration laws. The German provisions were very progressive and unique at the beginning.<sup>229</sup> Yet, the UNCITRAL Model Law, after being amended in 2006, now also contains a provision providing for assistance rendered by courts of a country different to that where the arbitration takes place.<sup>230</sup> This shows a development towards awareness of the efficiency of such a rule. It is meant as an incentive to the national arbitration laws to implement the possibility of assisting an arbitral tribunal although being located in another country.<sup>231</sup> Such a far-reaching provision that interferes with the respective national laws, which partly do not provide for such regulation yet, should not be dealt with on a Community level. If at all, one could think about implementing a special jurisdiction rule for the taking of evidence in the European Evidence Regulation.<sup>232</sup> Yet, this Regulation exists in order to facilitate judicial cooperation and does not regulate jurisdictions. Its aim is it to smooth the process of taking evidence in another Member State by enabling courts to communicate directly without recourse to diplomatic channels.<sup>233</sup> The Regulation therefore only addresses the interaction of courts and is silent about possible communications between courts and

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<sup>225</sup> Response of the Chamber of National and International Arbitration of Milan at para 4.

<sup>226</sup> The addition of 'other judicial acts' is adopted from the German § 1050 ZPO.

<sup>227</sup> Response of the German Institution of Arbitration, which refers in its' proposal to § 1062 IV ZPO in connection with §§ 1025 II, 1050 ZPO at para 7.2.

<sup>228</sup> These rules allow an arbitral tribunal, which has its' seat in a foreign country, to request the assistance of German courts with taking evidence directly without the interconnection of an international legal assistance proceeding.

<sup>229</sup> T Rauscher; P Wax; J Wenzel *Münchener ZPO Kommentar* – Münch, § 1025 ZPO, at para 19; M Wirth; U Hoffmann-Nowotny 'Rechtshilfe deutscher Gerichte zugunsten ausländischer Schiedsgerichte bei der Beweisaufnahme – ein Erfahrungsbericht' (2005) *SchiedsVZ* 68.

<sup>230</sup> Whereas Art. I (2) in its original version of 1985 stated that 'the provision of this Law [...] apply only if the place of arbitration is in the territory of this state. '; the revised provision the rule now says: 'The provisions of this Law, except articles [...] 17 J [...] apply only if the place of arbitration is in the territory of this State.' Art. 17 J in turn regulates court-ordered interim measures.

<sup>231</sup> English and Austrian arbitration laws also provide for such support in the meantime and the US courts are currently in the progress of enabling for such cross-border assistance. See Response of the Max-Planck-Institute for Comparative and International Private Law at para 9.

<sup>232</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1[hereafter Evidence Regulation].

<sup>233</sup> It enables a court of a Member State either to request the competent court of another Member State to take evidence or even to request that evidence be taken directly in another Member State, see Art. 1.

arbitral tribunals in different Member States. In what way changes to this Regulation might nevertheless be reasonable requires a detailed engagement with the Evidence Regulation which shall not be subject to this paper.

However, with regard to the Brussels I Regulation, the exclusion of evidentiary measures and other judicial acts is in any case preferable. Excluding these measures would as well as including them in a special rule require a precise and unambiguous definition of what measures are covered from the exclusion. Especially the exclusion of ‘other judicial acts’ would most probably lead to different interpretations on an international level.

#### b) Establishment of the arbitral tribunal

In the case of appointing arbitrators respectively the establishment of the arbitral tribunal, the suggested provision looks more appropriate since it is useful if the court with the closest connection, namely the court of the place of arbitration, has jurisdiction. But again this should remain within the competence of the national legislators which largely fulfilled their obligation in this field already. Since most of national arbitration laws in the EU provide for comprehensive court assistance at the seat of arbitration there is no need for such a rule.<sup>234</sup>

Furthermore there were cases where due to exceptional circumstances courts of a foreign Member State were asked to assist in the establishment of foreign arbitral tribunals.<sup>235</sup> In such constellations an exclusive jurisdiction rule would prevent those courts from providing assistance even if the respective national laws would allow doing so. Following from that an exclusive jurisdiction rule that is not even needed since most of the national laws provide for court assistance for arbitral proceedings would also take away the possibility to react flexibly in exceptional situations.

#### c) Wording ‘ancillary’

Moreover the rule in the proposed wording is predetermined to lead to problems. By using the word ‘ancillary’ the distinction to ‘parallel’ proceedings made in *van Uden* would be picked up again. Following from that, the latter would not be covered by the new exclusive

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<sup>234</sup> J Lew, L Mistelis, S Kröll *Comparative International Commercial Arbitration* at para 15 et seq.; see also the remarks on the *lex arbitri* at chapter B) II) 2).

<sup>235</sup> See *National Iranian Oil Company v Israel* [2005] Rev. Arb. 693 and Beschluß des BayObLG 5. October 2004 [2004] SchiedsVZ 316.

jurisdiction. However, this would result in the known demarcation problems<sup>236</sup> already becoming apparent in the different responses to the Green Paper. While some criticise that the proposed exclusive jurisdiction is for the same reasons as in the matter of the taking of evidence inappropriate in cases of interim relief,<sup>237</sup> others do not even see Art. 22 (6) applicable.<sup>238</sup> The latter view should be given preference since it is based on the gained insights from the judgments in *Marc Rich* and *van Uden*. According to these decisions interim measures can be seen as ancillary only if the subject matter of the provisional measure is not concerned with the contractual obligation but with the arbitration proceedings itself.<sup>239</sup> Hence, interim injunctions cannot be seen as ‘ancillary’ supportive measures since they do not serve the arbitration as such but protect the substantive right of the cause of action.

The different opinions show that the wording did already trigger misjudgments and surely would do so in the future as well. Hence, courts of Member States where interim relief is sought but which are not located at the place of arbitration as is commonly the case might decline jurisdiction with reference to Art. 22 (6) although the rule is not applicable.

## 2) *Résumé*

As one can see an exclusive jurisdiction rule would not solve half the problems it creates. Even if evidentiary measures are excluded from such a provision it would still lead to demarcation problems and not create the unambiguous legal situation that was strived for. Especially against the background that national laws regulate this situation satisfactorily a need for a change is unnecessary and should therefore be refrained from.

## II) Lis pendens rule

The one big amendment made in the Proposal concerning arbitration is the introduction of a new Art. 29 (4). This provision obliges courts in a Member State ‘whose jurisdiction is contested on the basis of an arbitration agreement to stay proceedings once the courts of the Member State where the seat of arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement’.

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<sup>236</sup> Pointed out in chapter C) I) 2).

<sup>237</sup> Response of Allen & Overy LLP at para 109.2.

<sup>238</sup> Response of the Max-Planck-Institute for Comparative and International Private Law at para 11; response of the Österreichischer Rechtsanwaltskammertag at para 7. a).

<sup>239</sup> See chapter B) I) 1) c).

This rule is supposed to approach the problem of parallel proceedings and the unsatisfying situation made clear by the *West Tanker* decision. In order to avoid the situation that one court decides on the merits, considering the objection of an arbitration agreement as unfounded, while an arbitral tribunal is of the opposite opinion and continues proceedings as well, this rule determines who has priority to decide on the existence<sup>240</sup> of the arbitration agreement. Such a priority rule was already suggested in the Heidelberg Report and the Green Paper, however, in a different version. It is called the ‘anti-torpedo torpedo’<sup>241</sup> alluding to the abusive tactics by torpedoing proceedings<sup>242</sup> the provision is meant to eliminate.

### 1) Priority to the courts of the seat of arbitration and to the arbitral tribunal

The recent Proposal differs from that made in the Green Paper<sup>243</sup> by demanding a stay of proceedings not only in favour of the court of the seat of arbitration but *also of the arbitral tribunal*. In this regard the Proposal makes a significant and absolutely necessary change as a means of reacting to the broadly voiced critique.<sup>244</sup> As mentioned above all changes made in this field of the Brussels I Regulation must take the key elements underpinning arbitration into account, one of which is party autonomy and the free choice based thereon to have the dispute settled outside the courts. The well-known principle in international arbitration of competence-competence, which states that the arbitral tribunal has the power to decide on its own jurisdiction, takes this aim into account.<sup>245</sup> However, giving only the courts of the seat of arbitration priority to determine the question of jurisdiction would undermine this principle since it ignores the role of the tribunal.<sup>246</sup> A party having bargained for arbitration would have to go to a court in order to paralyse a suit brought before another court in breach of the arbitration agreement.<sup>247</sup> Concerns have been expressed that the weakening of the

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<sup>240</sup> And validity or effects.

<sup>241</sup> See B Hess cited in Unknown ‘Segment on ‘anti-torpedo torpedo’ proves bittersweet for its inventor’ *GAR* Vol.4 Iss.4.

<sup>242</sup> See detailed explanation of this problem in chapter C) II).

<sup>243</sup> Which referred to the proposed Art. 27 A in the Heidelberg Report.

<sup>244</sup> See criticism expressed e.g. at the Green Paper Round table at 30.06.2009 in Brussels, see Unknown ‘Segment on ‘anti-torpedo torpedo’ proves bittersweet for its inventor’ (2009) *GAR* Vol.4 Iss.4; in the response of Allen & Overy at para 114-119; response of the International Bar Association - Arbitration Committee at para 25-28; response of the Comité français de l’arbitrage, p 3, 4; response of the Association of International Arbitration, p 4, 5; response of U Magnus and P Mankowski at para 7.3; response of the Chamber of National and International Arbitration of Milan at para 5; response of Herbert Smith LLP at para 7) a); response of E Gaillard, p 1,2; response of Lovells LLP, question 7.

<sup>245</sup> See chapter B) II) 2).

<sup>246</sup> Expressed critique at the Green Paper Roundtable, see Unknown ‘Improving ‘new’ Art. 27: how could it be done?’ (2009) *GAR* Vol.4 Iss.4.

<sup>247</sup> Response of the International Bar Association - Arbitration Committee at para 26.

competence-competence principle could as a consequence make the EU-Member States less attractive as seats of arbitration.<sup>248</sup>

Although the provision was apparently not intended to frustrate the respective national laws<sup>249</sup> the formulation chosen by the European Commission made an important change. It does not leave any space for misunderstandings anymore and gives the arbitral tribunal and the parties' will the importance it ought to have. The second sentence of Art. 29 (4) explicitly responds to the doctrine of negative competence-competence, clarifying that the court whose jurisdiction is contested may decline jurisdiction if its national law so prescribes.<sup>250</sup> Hence the current proposed rule takes the different national laws into consideration. Since not all national laws empower their courts to grant declaratory relief on the existence and validity of an arbitration agreement it is important to force another court in a different Member State to stay proceedings also when declaratory relief is required from the tribunal.<sup>251</sup>

## 2) Arbitration as a main or incidental question

Moreover, by explicitly formulating that courts have to stay proceedings once the court of the seat or the tribunal have been seised to determine the existence of the arbitration agreement 'as their main object or as an incidental question' the new Art. 29 (4) also clarifies the unsatisfying situation resulting from the ECJ's case law in *Marc Rich, van Uden* and *West Tankers*. Choosing this wording has as a consequence that the courts of the seat of arbitration have priority to decide on the existence of an arbitration agreement and clarifies that this is independent from the fact whether arbitration is the subject matter in this claim or not. As soon as the existence of an arbitration agreement is brought forward the jurisdiction rules of the Brussels I Regulation cannot be relied on. This is contrary to the current situation. If arbitration is the main object of the claim the Brussels I Regulation is not applicable due to Art. 1 (2) (d) with the result that national laws determine whether the court or the arbitral

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<sup>248</sup> Response of Allen & Overy at para 117.

<sup>249</sup> Relatively late at the Green Paper Roundtable on 5.8.2009 in Brussels it turned out that the intention behind Art. 27 A was not the one how everyone understood it. Prof. B. Hess explained that the doctrine of (negative) competence-competence should definitively not be suspended by the proposal. It should read that the parties do have to go to the court of the seat, but that it then still depends on the arbitral law of that seat whether they go first to the arbitral tribunal or whether the matter stays with the court itself to decide on the validity of the clause. Nobody of the other participants has understood the proposal that way. Hence, Prof. B. Hess admitted in the end that the article could be redrafted and clarified. See Unknown 'Segment on 'anti-torpedo torpedo' proves bittersweet for its inventor' (2009) *GAR* Vol.4 Iss.4.

<sup>250</sup> Unknown 'IBA Arbitration Committee addresses proposed changes to Brussels Regulation, Changes to Brussels Regulation - Dec 2010 update' *IBA e-news*, available at [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx#brussels](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#brussels) [accessed 01.02.2011].

<sup>251</sup> This point was also criticised by A Moure, who therefore suggested already in 2009 to give priority to the courts of the seat *or the arbitral tribunal*, see *ibid* (note 196).

tribunal shall decide on the existence and validity of the arbitration agreement. However, where proceedings are brought on the merits of the dispute and the question of arbitration is only brought forward incidentally as an objection, the arbitration exclusion is not applicable and the decision on that objection also falls within the scope of the Brussels I Regulation.<sup>252</sup> Consequently under these circumstances the court competent under the Regulation may nevertheless decide on the existence and validity of the arbitration agreement.

The intention to avoid this and to exclude arbitration comprehensively is underlined in the proposed recital (11) which explicitly points out that the Regulation and its rules of jurisdiction do not apply to the form, existence, validity or effects of arbitration agreements. This development is positive and reacts correctly to the expressed critique that these two types of judgments on the validity, depending on whether arbitration was the main or only an incidental issue, are treated differently at the moment.<sup>253</sup> In order to avoid last doubts, the phrase *'regardless whether raised as a main object or incidental question'* should be included in the recital too. It would read as follows then: *'This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements 'regardless whether raised as a main object or incidental question', the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.'*

### 3) Remaining concerns

However, giving the arbitral tribunal priority could on the other hand lead to practical problems. It was raised that the risk of unenforceable arbitral awards would be imminent if the tribunal were to decide on its jurisdiction.<sup>254</sup> This is because of Art. V (1) (a) NYC, which provides for non-recognition if the court enforcing the award regards the arbitration agreement as non-existent, void or not covering the dispute in question. Hence, even though a tribunal may have found the arbitration agreement valid, a court might at the enforcement stage still decide differently since it is not bound by the tribunal's decision. The argumentation is therefore that in the end it is always a state court which has the final say. In view of this fact it would be preferable to get a binding decision of a Member State court right

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<sup>252</sup> Assumed that the proceedings on the merits fall within the scope of the Brussels I Regulation.

<sup>253</sup> Criticised in the response of Allen & Overy at paras 97-101.

<sup>254</sup> Response of the Max-Planck-Institute for Comparative and International Private Law at para 21.

at the beginning in order to avoid a time and money consuming arbitration of which the result might ultimately not be enforceable.<sup>255</sup>

This argument is not convincing though. First, the primary aim and purpose of the rule is to address the problem of parallel proceedings, usually caused by a party that wants to delay proceedings on purpose. This is achieved through going to a court in a country where such proceedings normally take very long. However, at an enforcement stage the possibility of choosing a slow court does not exist anymore since the country of enforcement is determined by the winning party due to the presence of the assets. Besides, in such delaying processes the grounds for refusing the existence or validity of an arbitration agreement are usually spurious and therefore not helpful in the enforcing procedure. Here the party, against whom enforcement is invoked, has to prove the invalidity and threadbare grounds cannot delay the process for long. Summarising this means, the initial intention of delaying proceedings at the beginning would be deprived by the proposed Art. 29 (4) due to the fact that every court other than that of the seat of arbitration had to stay proceedings if its jurisdiction was contested. The possibility that a party contest the validity of the arbitration agreement for abusive tactic reasons when the award is going to be enforced is very unlikely to happen.

In case the objections against the validity of the arbitration agreement are indeed earnest, they would already have been raised and properly recognised during the arbitration. Only if the party contests the validity at the enforcement stage again although the tribunal affirmed the existence of a valid arbitration agreement and presumed that the court would in fact decide differently and deny the existence if a valid agreement, time and money for the arbitration was admittedly in vain. However, when weighing this unlikely situation against the advantage of the rule, namely that it recognises the parties' original will to exclude court interference, the latter definitively prevails. Moreover, the rule leaves a certain scope. The party who contests the jurisdiction of another court on the basis of an arbitration agreement has the choice either to go to the tribunal or to the court of the seat of arbitration in order to get a decision on the existence of an arbitration agreement. If this party fears that the other party will if necessary contest the validity of the arbitration agreement at the enforcement stage again, it has according to Art. 29 (4) the possibility to get a binding decision from the court of the seat of arbitration right at the beginning.

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<sup>255</sup> Response of the Max-Planck-Institute for Comparative and International Private Law at para 21.

Nevertheless the rule would not preclude any abuse – this time commenced by the defendant. He could at first participate in the proceedings the other party has commenced at a court which would have jurisdiction if there was no arbitration agreement. Only after some time has passed the defendant could decide to go to the court of the seat or to the arbitral tribunal raising the objection of the existence of an arbitration agreement. The court first seised had to stay proceedings and the process could also be delayed in this way. This theoretical potential for highly unlikely abuse must be accepted though with regard to the fact that such cases do only rarely or never occur.<sup>256</sup>

#### 4) *Résumé*

The problem of parallel proceedings is indisputably apparent and a solution has to be found to stop abusive delaying tactics. The suggested Art. 29 (4) seems to address this problem in a much appreciated manner. Most of the expressed doubts in reaction to the proposal in the Green Paper could be removed. The rule is formulated in a way that serves all different types of national arbitration laws.<sup>257</sup> Moreover the party invoking the validity of the arbitration agreement while the other party already commenced court proceedings on the merits of the dispute can decide on its own if he wants to have the question decided by the court of the seat of arbitration or by the tribunal itself.

A further argument in favour of implementing such a rule in the Brussels I Regulation is that it is impossible to handle this situation on a national level. Member States cannot by themselves ensure that arbitration proceedings in their country are properly coordinated with court proceedings going on in another Member State because the effect of national legislation is limited by the territoriality principle.<sup>258</sup>

If one is balancing the possible problems that might occur with the problems that are going to be solved by such a rule, the latter point definitely predominates. Hence, the rule should be adopted in a revised Brussels I Regulation.

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<sup>256</sup> Response of the German Bundesministerium der Justiz, question 7 with reference to question 3.

<sup>257</sup> For example the French doctrine of negative competence-competence, see above in this chapter.

<sup>258</sup> See the Proposal, Explanatory Memorandum at para 1.5.

### III) Uniform criteria for determining the seat of arbitration

The Green Paper proposed criteria for determining the seat of arbitration based on the suggested new recital in the Heidelberg Report for the purpose of the envisioned exclusive jurisdiction rule and the priority rule. Although an exclusive jurisdiction for supportive measures is not existent in the Proposal and also not recommended in this paper<sup>259</sup> such criteria should still be established for the purpose of Art. 29 (4).

#### *1) Who should designate the place of the seat?*

Whereas the Green Paper and the Heidelberg Report only take the parties' agreement or the arbitral tribunal's determination into account when it comes to the identification of the place of arbitration<sup>260</sup>, the Proposal added that the seat might also be designated 'by an arbitral institution or any other authority directly or indirectly chosen by the parties'.<sup>261</sup> This amendment was important since it leaves less or even no space for the necessity of a default rule. Even if the place of arbitration is not determined by the parties yet they have opted for an arbitral institution that provides for rules allocating the seat of jurisdiction in the absence of an explicit choice.<sup>262</sup> Practice has shown that the use of arbitral institutions is in fact very common, especially because these institutions provide for rules in various situations the parties might not have thought of in the beginning. Due to the resulting applicability of national arbitration laws the seat of arbitration is always a legal and hence an important choice as well, which should be recognised to the widest possible extent – even if it is just an indirect one through an arbitral institution. Allowing to determine the seat moreover by 'any other authority directly or indirectly chosen by the parties' seems to have no real practical meaning since it is hard to imagine what kind of authority it should be to which parties transfer their choice if not an arbitral institution. On the other hand this provision does no harm and might be useful for some seldom constellations.

The suggestion which assigned the power of the seat's determination in second instance to the court of the Capital of the designated Member State Deleted was already in the Green Paper. Apart from the fact that this rule would be completely superfluous it is not even clear what is actually meant with the Capital of the 'designated' Member State.

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<sup>259</sup> See E) I) 2).

<sup>260</sup> Proposed recital: '*The place of arbitration shall depend on the agreement of the parties or determined by the arbitral tribunal. [...].*'

<sup>261</sup> (20) recital of the Proposal; such an amendment was already mentioned in the response of the Dutch Government at para 29 and the response of Herbert Smith LLP at para 7 b).

<sup>262</sup> Response of the International Bar Association – Arbitration Committee at para 20 a).

## 2) *Default rule*

Ceased from the earlier proposals for modification is also the default rule, namely the rule allocating the seat of arbitration in the absence of a direct or indirect choice. Originally it was suggested to consider the *court* as competent ‘which would have *general jurisdiction* over the dispute under the Regulation if there was no arbitration agreement’<sup>263</sup> or even the ‘*courts* of the Member States which would have *jurisdiction*’<sup>264</sup>. Having a default rule seems principally useful. For this reason it should be scrutinised whether it is reasonable to adopt neither the proposed provisions nor an alternative one as is currently the case in the Proposal.

Aim and purpose of the default rule is to find a solution for determining the seat of arbitration in absence of a choice which is compatible with the general intention of the parties involved. Parties to international arbitration usually choose the seat of arbitration due its neutrality, the quality of the national arbitration law and the court’s support with regard to arbitration.<sup>265</sup> A rule referring to the jurisdiction rules of the Brussels I Regulation in order to allocate the seat of arbitration would mean that one party would most probably have to litigate in its counterparty’s home courts. However, this is precisely what the parties to arbitration want to avoid – the loss of neutrality of having their dispute settled in a forum independent from all parties’ legal orders.<sup>266</sup> The jurisdiction rules of the Brussels I Regulation do fit the purpose of litigation but not that of arbitration which is *inter alia* specifically chosen because of the independence of the rigid litigation system and its neutrality. Hence, a rule with reference to a neutral connecting factor would be more in the interest of the basic ideas underlying arbitration.<sup>267</sup>

Furthermore the formulation chosen by the Green Paper, i.e. to connect to the ‘courts of the Member State which would have jurisdiction’ and not only to the one court with general jurisdiction, induces additional problems. The Brussels I Regulation sometimes grants jurisdiction to a number of Member States. For instance the courts at the place where the defendant is domiciled could have jurisdiction according to Art. 2 Brussels I Regulation at the same time as those at the place of performance of the obligation, Art. 5 (1) (a) Brussels I Regulation. Which rule shall be applicable then? According to the Brussels I Regulation this

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<sup>263</sup> Proposed new recital in the Heidelberg Report, see at para 136.

<sup>264</sup> Green Paper, fn 14.

<sup>265</sup> Response of the International Bar Association – Arbitration Committee at para 20 c).

<sup>266</sup> Response of E Gaillard at p 2; response of the Bar Council of England and Wales at para 7.6 III; response of the Comité Française de l’arbitrage, p 3.

<sup>267</sup> See also the response of the International Bar Association – Arbitration Committee at para 20 c).

decision depends on the claimant. Accordingly, this would in practice allow the plaintiff on its own instance to place the seat of arbitration in a state most preferential to him.<sup>268</sup> Such a possibility is unjust, inappropriate and would undoubtedly encourage forum shopping.<sup>269</sup>

If a default rule is implemented, such a provision must be predictable and unequivocal and should make reference to a neutral connection point although the practical implementation, respectively the determination of the basis for such a connection point seems difficult. Maybe precisely because of this problem it might be preferable to entirely omit such a default rule. This should to a large extent be conditional to the frequency of situations in which the need for a default rule appears. It is to say that the implementation of a new provision is only advisable if its benefit outweighs the problems it involves.

The rule would have been mainly needed for an exclusive jurisdiction for supportive measures. Especially at the stage where the support of national courts is needed in arbitration, the seat of arbitration has often not been determined by the parties yet.<sup>270</sup> But even in such a situation the possibility that no other authority is entitled to determine the seat might only occur in the rare situation of ad hoc arbitration without adopted rules, such as the UNCITRAL Arbitration Rules, which address the issue of the place of arbitration.

However, following the recent Proposal and the suggestion in this paper a default rule would only apply to the new *lis pendens* rule. By the time proceedings have already started it is even harder to imagine that the seat of arbitration had not been determined either directly or indirectly. For the vanishing possibility that this might nevertheless occur whatsoever the *lis pendens* rule is simply not applicable due to the fact that there is no ‘agreed or designated seat of arbitration’.<sup>271</sup> This solution is acceptable and certainly better than providing for a rule incompatible with the idea of arbitration. Further to that it is for the parties to avoid this scenario by simply defining the seat of arbitration in time and hence creating a certain degree of legal certainty. It cannot be the legislator’s duty to have the ideal solution for every situation the parties themselves could have easily avoided.

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<sup>268</sup> Response of the Chamber of National and International Arbitration of Milan at para 5; response of the International Bar Association – Arbitration Committee at para 20 b).

<sup>269</sup> Response of the Bundesministerium für Justiz der Republik Österreich, question 7; response of E Gaillard at p 2; response of A Dickinson at para 42; response of the Council of Bars and Law Societies of Europe at para 7.4.

<sup>270</sup> Response of the Bundesministerium für Justiz der Republik Österreich, question 7.

<sup>271</sup> See wording of the proposed Art. 29 (4) in the Proposal.

#### IV) Determination of ‘valid arbitration agreement’

The Green Paper proposes a uniform rule specifying the determination of the validity of an arbitration agreement without further explaining how such a rule could look like in detail. It only suggests the law of the state of the place of arbitration as a possible connecting point. Again, such a provision cannot be found in the current Proposal.

The idea behind such a rule is simple. In order to avoid inconsistent decisions amongst the Member States the requirements for a valid arbitration agreement shall be regulated or at least the law under which the question has to be decided shall be determined uniformly. Among the responses to the Green Paper the suggestion definitely found supporters.<sup>272</sup> Indeed, a uniform rule seems desirable; however, the Brussels I Regulation does not seem to be the appropriate place for it.<sup>273</sup>

Creating a rule that stipulates requirements for the validity of an arbitration agreement, e.g. whether the agreement has to be in writing, whether fax and email are sufficient and so on,<sup>274</sup> completely disregards that the objective of the reform is not to regulate arbitration but to prevent parallel proceedings and to ensure a close coordination of court and arbitration proceedings.<sup>275</sup> One should by all means refrain from regulating questions in the Brussels I Regulation which are the inherent task of arbitration laws themselves.

A uniform rule determining the law which shall be applicable in deciding about the validity of the arbitration agreement does not fit in the Brussels I Regulation either since the latter is concerned with questions of jurisdiction and not with the determination of the applicable law. Following from that a uniform conflict rule would unbalance the present system.<sup>276</sup>

Regard must also be had to the provisions of the NYC. Art. II (3) NYC sets certain criteria for the validity of an arbitration agreement and so does Art. V (1) (a) which lists as a ground for refusal of enforcement the invalidity of the arbitration agreement. This has to be examined according to the law to which the parties have subjected it or, failing such indication, under

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<sup>272</sup> Response of the Council of Bars and Law Societies of Europe at para 7.6; response of the Commercial Bar Association of the Bar of England and Wales at para 12; response of the German Bundesrat at para 7.

<sup>273</sup> See Heidelberg Report at para 126; see also response of Allen & Overy at para 122; response of the Ministry of Justice of Finland, question 7; response of the Bar Council of England and Wales at para 7.6 (VI).

<sup>274</sup> As demanded by the Wirtschaftskammer Österreich, see its response, p 7.

<sup>275</sup> Green Paper, p 8.

<sup>276</sup> Response of U Magnus and P Mankowski at para 7.4.

the law of the country where the award was made. In the end it is the NYC anyway that sets the standards for determining the validity of an arbitration agreement. A rule referring only to the law of the place of arbitration would, however, clash with Art. V (1) (a) NYC which refers to the law the parties have chosen in the first place.<sup>277</sup> Apart from all that not even a uniform conflict rule would be able to protect from different interpretations in the concrete cases.

Putting all these explanations aside for a moment, the decisive argument for not implementing such a rule is simply because it is not needed anymore if Art. 29 (4) is put into operation. The constellation that a court decides about the validity of an arbitration agreement while at the same time another court or the tribunal judges about the same question and reaches a different outcome would no longer occur. It is the court of the seat or the tribunal itself that has exclusive power to decide this question if the defendant does not agree with a court of another Member State that has been seised. Instead of reaching a potentially different result the latter court has to stay its proceedings which prevent inconsistent outcomes right away.

However, besides this admittedly strong argument, the concerns mentioned above show by themselves that the implementation of a conflict rule into the Brussels I Regulation would certainly not be a suitable way to cope with the current problems.

#### V) How to avoid the enforcement of judgments in disregard of arbitration?

At the current level of European law the possibility of parallel court and arbitral proceedings can result in the enforcement of a judgment in breach of an arbitration agreement.<sup>278</sup> This unpleasant situation was also an issue in the discussion for amendments of the Brussels I Regulation. A rule addressing that problem directly cannot be found in the Proposal. The Green Paper in contrast proposes to establish a provision that allows for refusal of such judgments. For this purpose it incites to grant the courts of the Member State where the award was rendered exclusive competence to certify the enforceability of the award. After having done so, the award could through the Brussels I Regulation freely circulate in the Community.<sup>279</sup>

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<sup>277</sup> See objection of U Magnus and P Mankowski at para 7.4.

<sup>278</sup> See chapter C) III).

<sup>279</sup> Green Paper, p 9.

*1) Exclusive competence to certify enforceability of arbitral awards*

However, at least that part of the proposal which suggests an exclusive competence for attesting the enforceability of an award generated a lot of opposition.<sup>280</sup> Recognition and enforcement of arbitral awards is the subject-matter of the New York Convention and it was continually emphasised that amendments to the Brussels I Regulation shall not conflict with this successful instrument.<sup>281</sup> It is one of its outstanding characteristics that the so called ‘double exequatur’ in arbitration was abolished which resulted in the practical fact that no leave for enforcement in the country of origin was needed anymore.<sup>282</sup> The proposed rule is criticised as a reintroduction of the ‘double exequatur’.<sup>283</sup> This statement is not entirely correct since the ‘double exequatur’ requires also recognition from the courts of the country where the award shall be enforced, which would not be the case according to the Green Paper’s proposal. Nevertheless such a rule would be contrary to those of the New York Convention, i.e. Art. III NYC. According to the New York Convention all Contracting States shall recognise arbitral awards as binding and it is the right of the courts of the place of enforcement to refuse recognition under the enumerated grounds of Art. V NYC. Following the proposal of an exclusive competence, however, the courts of a Member State other than that of the seat would be prohibited from enforcing an award without prior certification. This is also dubious from the perspective that the Member States have different legal principles on enforcement of awards. Whilst on the one hand the New York Convention provides a certain degree of conformity it refrains to eliminate all these differences on the other hand. However, the proposal would force a court to enforce an award even if it is contrary to the public policy of that country. In order to be in line with the New York Convention, the power to decide about possible grounds of refusal must remain with the courts of the Member States where the award is to be enforced. However, this would indeed mean a reintroduction of the ‘double exequatur’ by introducing an extra layer of national court involvement, which is entirely inappropriate and would make the EU an arbitration-unfriendly place.<sup>284</sup>

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<sup>280</sup> Unknown ‘Special edition: roundtable on EU Green Paper’ (2009) *GAR* Vol.4 Iss.4; refused inter alia by Council of Bars and Law Societies of Europe, see its response at para 7.5; response of the Bundesministerium für Justiz der Republik Österreich, question 7; response of the Ministry of Justice of Finland, question 7; response of the Bar Council of England and Wales at para 7.8; response of Allen & Overy at para 124.

<sup>281</sup> Heidelberg Report at para 116; e.g. response of the Association for International Arbitration, p 3.

<sup>282</sup> A J van den Berg ‘The New York Convention of 1958: An Overview’ (2008) 17, available at [http://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf) [accessed 04. February 2010].

<sup>283</sup> Response of Allen & Overy at para 124.2.

<sup>284</sup> See also response of Bar Council of England and Wales at para 7.8.

## 2) *Judgment in disregard of arbitration as an additional ground for refusal*

Yet, even without such a procedure the proposal of a refusal of the enforcement of a judgment which is irreconcilable with an arbitral award raises problems, too.<sup>285</sup> Suggested was an additional ground for refusal in Art. 35 Brussels I Regulation.<sup>286</sup> A certain degree of attractiveness is certainly inherent in this suggestion. However, it was criticised that the solidary community among the Member States cannot in any event be given up in favour of an arbitral award. The existence of a judgment irreconcilable with an arbitral award shows that the jurisdiction of the respective court was not or not successfully challenged. In the latter case the court's decision should be recognised especially in terms of mutual trust.<sup>287</sup> This approach is somehow comprehensible. After all, besides the importance of arbitration the relevance of state court proceedings should not be forgotten. However, this approach does not solve the problem of two parties showing up with two different decisions that they want to have enforced.

Notwithstanding this, an amendment of Art. 35 would disregard the other changes that are sought to be achieved by the improvement of the Brussels I Regulation beyond the single point of the interface with arbitration. One big amendment strived for in the course on the review of the Brussels I Regulation is the abolition of *exequatur*.<sup>288</sup> Following that, an enforceability declaration from the enforcing court would not be needed anymore and only a very limited number of safeguards for the defendant shall remain available.<sup>289</sup> Suggesting a new ground for refusal is in total contrast to that aimed change. If the abolition of *exequatur* is adopted, there would be no stage anymore at which this ground could be considered.

Yet, an extension of Art. 35 does not even seem necessary because here too the suggested Art. 29 (4) proves to be advantageous. If a court of a Member State other than that of the seat is obliged to stay proceedings till the arbitral tribunal or the court of the seat decided that the arbitration agreement is void or non-existent, the situation in which a judgment in non-recognition of an arbitration agreement or award is rendered can no longer occur. The potential that a court is seised once the arbitration has started already and that in this way clashing decisions might be produced is prevented by the third sentence of Art. 29 (4). It says

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<sup>285</sup> However many are in favour of such a proposal, e.g. response of International Bar Association – Arbitration Committee at para 39; response of the Council of Bars and Law Societies of Europe at para 7.5; response of R Gay at para 7.15.

<sup>286</sup> Response of U Magnus and P Mankowski at para 7.5.

<sup>287</sup> Response of Bundesministerium für Justiz der Republik Österreich, question 7.

<sup>288</sup> See chapter C) III) 3).

<sup>289</sup> See suggested Art. 38-46 in the Proposal.

that a court shall decline jurisdiction where the existence, validity or effects of the arbitration agreement are established. Thus, a decision cannot be rendered in this case either.

However, it was suggested to underpin at least the duty under Art. 29 (4) by an additional ground for refusal. According to that enforcement of a decision by the court first seised disregarding the mandatory stay should be refused.<sup>290</sup> This proposal would also contradict the intention to abolish *exequatur* though. Moreover, mutual trust is a basic principle of the Brussels I Regulation.<sup>291</sup> Courts of one Member State have to trust that courts of other Member States apply the Regulation correctly. A safeguard in form of a control of the Regulation's right application would replace this trust by a system which nullifies this principle and is therefore to be rejected emphatically.

#### VI) The arbitration exception – keep it or delete it?

After having scrutinised all these different proposals one shall be referred back to the central question whether to retain or delete the arbitration exclusion. The elucidations have shown that every change that introduces arbitration into the system of the Brussels I Regulation is likely to cause as many new problems as it tries to solve.

##### *1) Deletion*

For this reason, one should refrain from the idea of a complete deletion of Art. 1 (2) (d), which seems to reflect the majority opinion too.<sup>292</sup> The deletion of the arbitration exclusion would be a radical proposal with far-reaching and not in all and every respect foreseeable consequences.<sup>293</sup> Because of that and due to the good functioning of the NYC, with which a new Brussels I Regulation without the arbitration exclusion is likely to conflict, should every amendment only be done after careful evaluation and greatest possible restraint.<sup>294</sup> Consequently, every intervention should be omitted as long as it does not involve significant improvements. Possible disadvantages accompanying any amendments shall only be excepted

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<sup>290</sup> Response of the Max-Planck-Institute for Comparative and International Private Law at para 25; considered already in the Heidelberg Report as well at para 128.

<sup>291</sup> See case law of the ECJ, explained in chapter C).

<sup>292</sup> Heidelberg Report at paras 115, 131; response of the Chamber of National and International Arbitration of Milan at para 1; response of the Comité Française de l'arbitrage, p. 2; response of the International Bar Association – Arbitration Committee at para 10; response of the Danish Government at para 2.7.

<sup>293</sup> Unknown '1.2(d). or not 1.2(d)?' (2009) Vol.4 Iss.4 GAR.

<sup>294</sup> See as an example for many responses those of the German Bundesministerium für Justiz, p 2 and of the Ministry of Justice of Sweden, p 2.

if they outweigh the existing difficulties. However, this is not the case here. Since the first consultation on this topic the overwhelming majority of the respondents is of the opinion that a far-reaching change in the law cannot be justified due to the very manageable number of occasions in which the interfaces between arbitration and the Brussels I Regulation have led to serious difficulties.<sup>295</sup> The deletion of the exclusion is therefore refused in fear that the extension of the Brussels I Regulation would give rise to even more difficulties.<sup>296</sup> This fear is not unjustified. The suggestion to delete the arbitration exception altogether would bring all arbitration-related court proceedings within the scope of the Regulation. As a consequence all rules of jurisdiction would apply to these proceedings. For cases related to the wholly different system of arbitration this is not necessarily suitable though<sup>297</sup> and results in turn in a need for additional rules in order to correct this situation. Yet, the establishment of new rules also entails the potential for new contradictions as this chapter has shown.<sup>298</sup>

In view of the fact that the Heidelberg Report already acknowledges that the present regime has generally proven satisfactory for parties and practitioners and with regard to the responses to the Green Paper, the Proposal did good not to stick to the proposed deletion of Art. 1 (2) (d).

## 2) *Retention*

The other possibility is to keep the arbitration exclusion. Yet, this paper and the vivid debate on this topic have shown that the retention of the current legal situation is not satisfactory either. However, sticking on the arbitration exclusion does not automatically have to lead to a complete adherence to the present rules. It is also possible to keep arbitration in general outside the Brussels I Regulation but to address certain problems positively by adding specific rules. This is what the proposal did. It retained the arbitration exclusion with only a few exceptions or - in order to describe it differently - it partially deleted the exclusion.

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<sup>295</sup> See e.g. response of the Chamber of National and International Arbitration of Milan at para 1; response of the Comité Française de l'arbitrage, p 2; response of the International Bar Association – Arbitration Committee at para 10; response of the Danish Government at para 2.7; Heidelberg Report at paras 115, 131;

<sup>296</sup> Response of the government of Poland, p. 8.

<sup>297</sup> Especially the general jurisdiction at the place of the defendant's domicile is contrary to the common intention in international arbitration having the dispute settled in a forum independent from all parties' legal orders.

<sup>298</sup> See this chapter, i.e. I) 2), III) and IV).

In detail, arbitration is still excluded from the scope of the Brussels I Regulation ‘*save as provided for in Articles 29, paragraph 4 and 33, paragraph 3.*’<sup>299</sup> The suggested new recital No (11) emphasises the exclusion by saying that the regulation, save in the limited case therein, does not apply ‘to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals and the validity, annulment and recognition and enforcement of arbitral awards’. With regard to the proposed Art. 29 (4) 1. sentence it can be assumed that the exclusion shall apply regardless whether a court hearing deals with these questions as a main or incidental object.<sup>300</sup> A corresponding addition is therefore advisable.<sup>301</sup>

The consequence of retaining the arbitration exclusion is that judgments deciding on the existence or validity of an arbitration agreement do principally not fall within the scope of the Brussels I Regulation and are not automatically recognised in the EU. With regard to a judgment establishing the existence or validity of an arbitration agreement this is not desirable though, since it opens the floodgate for parallel proceedings and inconceivable decisions.<sup>302</sup> This is exactly why Art. 29 (4) stipulates that ‘*[w]here the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.*’ This provision in connection with the obligation of a mandatory stay of proceedings of a court in a Member State other than the one of the seat, demanded for in the 1. sentence, avoids the occurrence of parallel proceedings. Priority is given to the arbitral tribunal or the court of the seat of the arbitration to decide on the existence and validity of the arbitration agreement. As soon as this is established every other court is prohibited from deciding in the same case again.

However, a judgment invalidating an arbitration agreement would not automatically be recognised by the other Member States due to the comprehensive exclusion of arbitration and a lack of a special rule. Both parties could still try to establish the validity in front of another court again if the court of the seat declines the existence of an arbitration agreement. Yet, this case is not likely to happen. The party invoking the arbitration agreement would rather go directly to the tribunal, in which case all other courts still had to stay proceedings according to Art. 29 (4). This is the forum the party actually opted for and a positive decision is more

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<sup>299</sup> Amended Art.1 (2) (d) of the Proposal.

<sup>300</sup> See this chapter II) 2).

<sup>301</sup> As proposed in this chapter, see II) 2).

<sup>302</sup> See chapter C) I).

likely to be achieved than from a foreign court without any connection to the arbitration. If the tribunal also denies the validity of the agreement, an arbitration will definitely not take place. A party would not gain any advantage by trying to get a different decision from another court again since this is not binding on the tribunal and could therefore not reverse its decision.

Moreover, the exclusion of decisions invalidating an arbitration agreement from an automatic recognition avoids a clash with the NYC. Would such a decision of an EU Member State's court invalidating the arbitration agreement for reasons not admitted in the NYC be automatically recognised in other Member States this could lead to a breach of Art. II NYC.<sup>303</sup> The same applies for the annulling of arbitral awards and Art. VII NYC.

With the suggested amendment arbitration related proceedings are generally still kept outside the Brussels I Regulation. Nevertheless, the problem of abusive litigation tactics and parallel proceedings can be avoided successfully by including the proposed amendments.

## VII) Résumé

The Proposal impressively demonstrates that the problem of parallel proceedings and the demarcation problems regarding arbitration-related court proceedings can be solved by keeping the arbitration exclusion in general and making amendments only to a very limited extent. The convincing advantage of this solution is that it can clearly be controlled where the regulation should apply and where not.<sup>304</sup> The unpredictable consequences of a complete deletion can be avoided in this way. In opposite to the Green Paper, the Proposal took the expressed fear and critique much more into account and is therefore describes as a relief for the arbitration community.<sup>305</sup>

With the recital (11) it clarifies the general exclusion of arbitration. However, in order to avoid last doubts caused by the case law in that field it is suggested to add that the regulation does not apply to 'the form, existence, validity or effects of arbitration agreements' *'regardless whether raised as a main object or incidental question'*. Recital (20) emphasises the aim of improving the effectiveness of arbitration agreements and avoiding parallel

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<sup>303</sup> Example given in the response of the Chamber of National and International Arbitration of Milan at para 3.

<sup>304</sup> See also N Voser cited in Unknown 'Other opinions: how else could the EU fix the West Tankers problem?' (2009) *GAR* Vol.4 Iss.4.

<sup>305</sup> P Kiesselbach 'Brussels Regulation: the Commission's proposals for reform' 26 January 2011 available at <http://plc.practicallaw.com/0-504-5668> [accessed at 04 February 2011].

proceedings. The determination of the seat of arbitration takes the will of the parties and the idea of arbitration successfully into account and renounces wisely a default rule. Art. 29 (4) succeed to address the problem of parallel proceedings and abusive litigation tactics at a very early stage. Therewith it makes an extra ground for refusing judgments in breach of an arbitration agreement obsolete which would ran counter the aim to abolish exequatur. Moreover, the suggestion carefully takes the different national laws into account and avoids all potential conflicts with the New York Convention.

University of Cape Town

## F) Conclusion

Even though cases where the problems that derive from the exclusion of arbitration are in practice limited in number, it is important to change the current situation in the EU. Arbitration, and on this point everyone is in agreement, becomes increasingly important in international commerce and it is therefore advisable to give arbitration agreements and awards the fullest possible effect. The ECJ's case law has shown that the generally well-functioning Brussels I Regulation leads to problems when it comes to the interface with arbitration proceedings. These problems occur in the form of parallel arbitration and litigation proceedings as well as in the indistinct demarcation whether or not arbitration related court proceedings fall under the arbitration exclusion.<sup>306</sup> The recent *West Tanker* case emphasised the problem of abusive litigation tactics and parallel litigation once more.<sup>307</sup> With the prohibition of anti-suit injunctions within the application area of the Brussels I Regulation the ECJ diminished the attractiveness of London as an important European place of arbitration. This also applies to France whose doctrine of negative competence-competence is invalidated by this decision as a logical consequence as well.<sup>308</sup>

The three official documents, namely the Heidelberg Report, the Green Paper and the latest Proposal of the European Commission have shown how different the methods of resolution for the existing problems can be.<sup>309</sup> The reactions of academia and practitioners who are constantly confronted and hence very familiar with the topic, illustrated abundantly that the suspicion of unforeseeable consequences actually outweighs the ambition of improving the present situation. This fear is understandable. Many proposals which sound convincing at first sight turn out to have drastic and negative side effects as the critical evaluation illustrated.<sup>310</sup> This applies particularly to the far-reaching suggestion of a complete deletion of the arbitration exclusion whose effects are not predictable in each and every respect. However, unpredictability in this matter would automatically lead to a restraint or even a complete refusal to choose EU countries as a place of international arbitration which in turn results in commercial damage for the underlying business.

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<sup>306</sup> See Chapter C) I).

<sup>307</sup> See Chapter C) 2) b) and c).

<sup>308</sup> See Chapter C) II) 3).

<sup>309</sup> See Chapter D).

<sup>310</sup> See Chapter E).

The paper has shown that both radicals do not contribute to the popularity of international arbitration in Europe: leaving the situation as it is at the moment as well as fundamental reforms that try to include arbitration as a whole into the system of the Brussels I Regulation which is intended to serve the purpose of litigation rather than arbitration. It is therefore wise to amend the regulation only to a minimum extent in order to react targeted to the present problems regarding the interface of the Brussels I Regulation with arbitration proceedings.

With the Proposal the European Commission presented a very convincing solution. Contrary to the Heidelberg Report and the Green Paper it confines the changes to a minimum. In order to pick up on the often used adage in this context ‘If it ain’t broke, don’t fix it!’<sup>311</sup> the Proposal suggests to fix it only to the extent it is broken. It keeps arbitration generally outside the scope of the Brussels I Regulation but solves the problems of abusive litigation tactics and parallel proceedings with introducing basically just one new article. In doing so it succeeds moreover to take the single national arbitration laws and the NYC into account and not to contravene them, thus respecting both the autonomy of the member states and their international obligations.

It would be desirable that the European Parliament and the Council of Ministers adopt the Proposal, maybe with the slight changes suggested in this paper. This would give the EU countries a solid and arbitration friendly framework and the fundamental requirements in order to prevail as a popular centre of arbitration.

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<sup>311</sup> This phrase became popular through Bert Lance, U.S. Director of the Office of Management and Budget under President Jimmy Carter, cited in the newsletter of the US Chamber of Commerce, *Nation's Business*, May 1977 and is frequently used if it is seen as a mistake to improve a system that actually works well. <http://www.phrases.org.uk/meanings/if-it-aint-broke-dont-fix-it.html> [accessed 20 February 2011].

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University of Cape Town