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## The Interface Between Arbitration And The Brussels Regulation

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# THE INTERFACE BETWEEN ARBITRATION AND THE BRUSSELS REGULATION

DR. FILIP DE LY\*

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## INTRODUCTION

On January 10, 2015, a revised version of the Brussels I Regulation on international jurisdiction and recognition and enforcement of judgments entered into force<sup>1</sup> replacing the original regulation of 2000 (old Brussels Regulation).<sup>2</sup> The new regulation is also referred to as the Brussels Regulation Recast, EEX Ibis or Ibis Brussels. By virtue of article 66, it applies only prospectively *i.e.*, in respect of legal proceedings instituted on or after 10 January 2015. The Brussels I Regulation applies to all Member

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1. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012 O.J. (L 351) (recast) 1-32 (Eur.) [hereinafter Brussels Regulation].

2. Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2001 O.J. (L 12) of January 16, 2001, 1-23 (Eur.) [hereinafter Old Brussels Regulation].

States of the European Union including Denmark.<sup>3</sup>

The amendment to the old Brussels Regulation has not yet led to an adjustment of the Lugano Convention of 2007<sup>4</sup> (also called the Parallel Convention) so that in relations with Norway, Switzerland and Iceland different rules and solutions than those under the Brussels Regulation may apply.

In this article, the Brussels Regulation is discussed and analyzed in its relation to arbitration in view of some relevant amendments and the questions and problems that they raise. During the negotiations on the new regulation, it was precisely this relationship that caused many controversies and heated debate in the arbitration community. For a better understanding of these questions and problems, some fundamental questions also need to be addressed as they are relevant for the discussion on the amendments brought about by the new regulation and the identification of remaining issues.

The basic question is, in this respect, how the exclusion of arbitration in article 1, second paragraph under (d) of the Brussels Regulation is to be interpreted and applied. This contribution, thus, in essence concerns the interpretation of a single word of the Brussels Regulation. This provision reads as follows:

“This Regulation shall not apply to:

...

d) arbitration

...<sup>5</sup>

The legislative history of this provision is discussed first in relation to the earlier versions of the Brussels system as of its original manifestation in 1968. This article then discusses the case law of the Court of Justice (now the Court of Justice of the European Union) concerning this provision. In a

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3. Brussels Regulation, *supra* note 1, at 5. Denmark is not formally bound by the old Brussels Regulation and the Brussels I Regulation. Denmark and the European Union, however, concluded on October 19, 2005 an Agreement in Brussels to the effect that the Brussels I Regulation will also apply for Denmark (O.J. L 299, November 16, 2005, 62-67). By letter dated December 20, 2012, Denmark has indicated its commitment to be bound by the Brussels I Regulation (O.J. L 79 of March 21, 2013, 4).

4. Brussels Regulation, *supra* note 1, at 19; Lugano Convention of September 16, 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of November 25, 1988, O.J. (L 319), 9-48 (Providing that pursuant to entry into force of the old Brussels Regulation, this treaty was revised to align it with the text of the old Brussels Regulation. This led to a new Lugano Convention of October 30, 2007 O.J. (L 146) of June 10, 2009) which, as of May 1, 2011, applies to all Member States of the European Union (including Denmark), Norway, Switzerland and Iceland. For the explanatory report on the revised Lugano Convention of professor Pocar, *see* O.J. C 319, December 23, 2009, 1 ff).

5. Brussels Regulation, *supra* note 1, at art.1(2)(d).

third section, the negotiations on the arbitration exception at the occasion of the recasting of the Brussels Regulation will be summarized as well as the various proposals presented leading to the final solution of the new regulation. Finally, this solution is analyzed and a number of problems raised by the Regulation or unsettled by it will be discussed.

## II. FROM THE 1968 BRUSSELS CONVENTION TO THE 2000 BRUSSELS REGULATION

Article 1, second paragraph of subsection (4) of the original 1968 Brussels Convention<sup>6</sup> provided already simply that it did not apply with respect to "arbitration." From this, one could infer that both the jurisdiction and the recognition and enforcement rules of the 1968 Convention were separate from any rules applicable in or in relation to arbitration. The explanatory report to the 1968 Convention of an official of the Belgian Ministry of Foreign Affairs, *Jenard*, in this respect made reference to international conventions on arbitration and to the Uniform Law of the Council of Europe on arbitration.<sup>7</sup> On that basis, the *Jenard* report drew the conclusion that the 1968 Convention did not apply to (1) the recognition and enforcement of arbitral awards; (2) the determination of international jurisdiction of national courts in disputes concerning arbitration such as setting aside procedures; and (3) the recognition of judgments of national courts concerning disputes in relation to arbitration.<sup>8</sup> Outside the arbitration context, the *Jenard* report stated in general terms that the exclusions as to the application of the 1968 Convention were to be determined on the basis of the primary object of the proceedings and the exclusions were, thus, inapplicable if they only related to subsidiary points in the main proceedings or were raised only in preliminary proceedings.

Following the accession of Denmark, Ireland and the United Kingdom to the European Economic Community (EEC), the new Member States also joined the 1968 Convention which was renegotiated and amended.<sup>9</sup>

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6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 Sept. 1968, 1968, O.J. (L 299) Title I 32-45 (Eur.) [hereinafter Brussels Convention] (signed at Brussels on September 27, 1968).

7. Council Report of the Convention on Jurisdiction and the Enforcement of Judgments on Civil and Commercial Matters of 27 Sept. 1968, O.J. (L 59), 13 (Eur.) [hereinafter Brussels Convention Report]; Convention of January 20, 1966, signed in Strasbourg, ETS 1966, 56 (providing the uniform law was only introduced by Belgium in 1972 and substantially modified by the recent 2013 Belgian Arbitration Act (Statute of June 24, 2013, Official Gazette, June 28, 2013)).

8. Brussels Convention Report, *supra* note 7, at 13; P. Jenard, Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, O.J. (C 59), March 5, 1979, 13.

9. Peter Schlosser, Report on the Convention of October 9, 1978, signed in Luxembourg, on the accession of the Kingdom of Denmark, Ireland and the United

However, the arbitration exception was unchanged. The explanatory report to the 1978 Accession Agreement by Professor Schlosser mentions in this respect that in the accession negotiations, a disagreement arose between the original 1968 Convention States and especially the United Kingdom in connection with the interpretation of the arbitration exception: the United Kingdom interpreted the arbitration exclusion as a complete exclusion of whatever dispute concerning arbitration while the original 1968 Convention States read the arbitration exclusion as being limited to disputes concerning pending or closed arbitrations or arbitrations which were to be instituted. Notwithstanding this disagreement, it was decided not to amend the text of the 1968 Convention because, at that time, all States (except Ireland and Luxembourg) had become parties to the New York Convention of June 10, 1958 on the Recognition and Enforcement of arbitral awards ("New York Convention") and Ireland also was considering ratification. On the other hand, the *Schlosser* report considered that the disagreement above essentially only applied to judgments on the merits of national courts rendered in spite of an arbitration agreement. If the British position were accepted, such a judgment would not fall within the ambit of the recognition and enforcement provisions of the 1968 Brussels Convention and the court seized of a request for recognition or enforcement of a foreign judgment would have to assess on the basis of other treaties or its domestic law whether such a judgment might be recognized or enforced and could have account of any arbitral award rendered in relation to the same dispute. If, on the other hand, the continental position were followed and the arbitration exception interpreted more restrictively and applicable only to arbitration proceedings, this would not preclude the jurisdiction of a court in a Brussels Convention State to rule on the validity of an arbitration agreement as a preliminary question with respect to its international jurisdiction as arbitration is then not the object of the main proceedings. From that perspective, a judgment of a national court on the merits also dismissing a jurisdictional challenge based on an arbitration agreement would be susceptible to recognition and enforcement on the basis of the 1968 Convention which, under the system of the 1968 Convention, would imply that full faith and credit is to be given to that judgment (*i.e.*, without the courts in another Contracting State where recognition or enforcement of the judgment is sought being able to review the jurisdiction of the courts of the country of origin of the judgment (including the judgment's decisions as to the arbitration agreement)).<sup>10</sup> To this, the *Schlosser* report adds that in

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Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of Oct. 30, 1978, O.J. 1 (L 304).

10. See Peter Schlosser, Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern

any event – apart from the aforementioned controversy – judgments as to jurisdiction only of the courts concerning the validity of an arbitration agreement or judgments where the parties are ordered to terminate the arbitration proceedings because the arbitration agreement – in its opinion – is void, do not fall under the 1968 Convention<sup>11</sup> as their main object is arbitration.

In any case, under the *Schlosser* report, incidental proceedings before national courts concerning arbitration such as the appointment or dismissal of arbitrators, the determination of the place of arbitration or the extension of deadlines for rendering an arbitral award, fall under the arbitration exception. Similarly, the 1968 Convention does not apply to setting aside, revocation or recognition and enforcement proceedings relating to arbitral awards and to the English practice of an arbitration award converted into a judgment of national courts. On the other hand, the 1968 Convention applies to a judgment of a court in which – after setting aside or revocation – it rules on the merits of the case.<sup>12</sup>

Finally, the *Schlosser* report also indicates that the 1968 Convention does not apply to subject matters which cannot be submitted to arbitration (“arbitrability” in the sense used in most countries but not in the United States). Such questions shall be governed by the applicable national law and this law can also permit arbitration regarding disputes where the 1968 Convention provides for an exclusive ground of international jurisdiction (such as certain disputes about real estate or certain corporate disputes under Article 24 of the Brussels Regulation).<sup>13</sup>

The question of the specific position of arbitration under the 1968 Convention arose again following the accession of Greece to the EEC and to the 1968 Convention.<sup>14</sup> Again, the wording of the arbitration exception was not changed. The explanatory report of *Evrigenis* and *Kerameus* to the Greek Accession Convention endorses – without much explanation – the continental conception that the preliminary question as to the validity of an arbitration agreement in proceedings on the merits in national court falls

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Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice of Mar. 5, 1979, O.J. (C 59), 92-93 [hereinafter *Schlosser Report*]; Report on the Convention of Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 5 March 1979, O.J. (L 59) 92-93 (Eur.).

11. *Schlosser Report*, *supra* note 10, at 93.

12. *Id.* at 93.

13. *Schlosser Report*, *supra* note 9, at 93.

14. Luxembourg Convention of October 25, 1982 on the Accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 31 Dec. 1982, 1982 O.J. (L 388), 1-6 (Eur.) [hereinafter *Luxembourg Convention*].

under the 1968 Convention and that the arbitration exception does not apply to a defendant raising a jurisdictional challenge based on the existence of an arbitration agreement.<sup>15</sup>

Also following the Spanish and Portuguese,<sup>16</sup> respectively, the Finnish, Austrian and Swedish<sup>17</sup> accessions to the 1968 Convention, article 1, paragraph 2, sub (4) of the 1968 Convention was not amended either. The explanatory report to the Accession Convention of Spain and Portugal does not even mention the arbitration exception or its interpretation.<sup>18</sup>

Pursuant to the Treaty of Amsterdam of October 2, 1997,<sup>19</sup> authorizing federalization of private international law within the European Union, the 1968 Convention – as amended on four occasions in relation to accession of new Member States – was transformed into a regulation *i.e.* the old Brussels Regulation mentioned above. For the arbitration exception, this had no effect except that the second paragraph of article 1 of the 1968 Convention was converted into a second section of article 1. Also, the preamble to the old Brussels Regulation provides no clues regarding the interpretation of the arbitration exception; recital (7) merely states in general terms that the Regulation has a wide substantive scope of application combined with well-defined exceptions. As indicated above, there was already since at least 1978 controversy over the interpretation of the arbitration exception so one might challenge whether in relation to arbitration there was a well-defined exception.

By way of conclusion, one can say that the interpretation of the arbitration exception – except in the *Schlosser* report – has received little attention in the period between the original 1968 Convention up to and including the implementation of its system in the old Brussels Regulation in 2000.

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15. Demetrios Evrigenis, K. D. Kerameus, Report on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 24 Nov. 1986, 1986 O.J. (C 298), 10 (Eur.) [hereinafter Kerameus Report].

16. Treaty of Donostia-San Sebastian of May 26, 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, May 26, 1989, O.J. (L 285), 1-23. This also applies to the original Lugano Convention, which was concluded one year earlier than the Spanish-Portuguese Accession Convention.

17. Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Jan. 15, 1997, O.J. C 15/10, 1-9.

18. See generally Almeida Cruz, Desantes Real and Paul Jenard, Almeida-Desantes Report 1990, Report on the 1968 Brussels Convention, O.J. C 189/35, 35-56 (1990).

19. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts; with Protocols and Declarations Annex; Amsterdam, Oct. 2, 1997, 1998 I.L.M. 11 [hereinafter Treaty of Amsterdam].

### III. EUROPEAN COURT OF JUSTICE REGARDING THE ARBITRATION EXCEPTION

Also in the case law of the European Court of Justice there have been scant decisions as to the interpretation of the arbitration exception of the 1968 Convention. Although the Court of Justice is the highest court for European Union matters, its jurisdiction under the 1968 Convention was not automatic in view of the fact that the 1968 Convention was not a EU instrument and a Protocol had to be concluded to convey powers to the Court of Justice to give interpretative rulings on the 1968 Convention at the request of national courts in the EU Member States. This Protocol was concluded in 1971 and entered into force in 1975.<sup>20</sup> From 1975 until the entry into force of the old Brussels Regulation in 2002, only two relevant judgments were rendered.<sup>21</sup>

In *Marc Rich*,<sup>22</sup> a judgment of 1991, there was a dispute on the merits regarding the sale of a shipment of oil which the buyer claimed was seriously polluted whereupon the seller brought proceedings in Italy seeking a declaration of non-liability. After the sales contract was closed, the buyer had yet sent a telex with additional contract terms including an arbitration clause providing for arbitration in London.<sup>23</sup> The buyer invoked the arbitration exception before the Italian court to challenge its jurisdiction but also immediately after summons instituted arbitration proceedings in London where it quickly – given the refusal of the Italian seller to appoint an arbitrator – requested an English court to proceed to the appointment of an arbitrator.<sup>24</sup> The seller considered that the English court, on the basis of the 1968 Convention, lacked jurisdiction because it had started earlier proceedings on the merits in Italy.<sup>25</sup> The *High Court* rejected the jurisdictional defense and ruled that the 1968 Convention – having regard

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20. See Luxembourg Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments, June 3, 1971, 4 U.S.T. 1971 [hereinafter Luxembourg Protocol] (concerning the interpretation of the Brussels Convention by the Court of Justice).

21. See generally Information Pursuant to Protocol 2 Annexed to the Lugano Convention, Court of Justice of the European Communities, (1992-2011), [www.curia.europa.eu/common/recdoc/convention/en/index.htm?63,15](http://www.curia.europa.eu/common/recdoc/convention/en/index.htm?63,15) (citing “[r]ecent case-law relating to the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,” however, none of the listed case law is relevant to the topic at hand under the conventions or protocols section regarding the original Lugano Convention.).

22. Case C-190/89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-3854. (noting conclusions of Advocate General Darmon.

23. *Id.* at I-3856.

24. *Id.* at I-3856-57.

25. *Id.* at I-3857.

to the arbitration exception – was not applicable.<sup>26</sup> On appeal, the Court of Appeal referred some preliminary questions to the Court of Justice in Luxembourg about the interpretation of the arbitration exception and some other provisions of the 1968 Convention including the provisions concerning *lis pendens*.<sup>27</sup> The Court of Justice – taking into account the comments of the British, German and French governments, but contrary to the conclusions of the European Commission – concluded that the arbitration exception could be interpreted broadly and that the 1968 Convention in any case could not be applied in respect of proceedings before a court to appoint an arbitrator, even if a preliminary issue concerning the existence or validity of an agreement to arbitrate was raised.<sup>28</sup> The Court quoted the *Jenard* and *Schlosser* reports mentioned above<sup>29</sup> as well as the New York Convention but also considered that – as arbitration is already regulated in international treaties – the Contracting Parties to the 1968 Convention intended to exclude arbitration in its entirety from the scope of the 1968 Convention, including proceedings before national courts even if these are not regulated by the New York Convention, such as a procedure for the appointment of an arbitrator.<sup>30</sup>

In *Marc Rich*, the Court did not explicitly address the reverse question *i.e.* whether the arbitration exception applies in a dispute on the merits before a judge in a State where the defendant pursues an arbitration defense to contest the jurisdiction of the court on the merits and the plaintiff relies on the absence or invalidity of an arbitration agreement.<sup>31</sup> This was exactly at stake in the Italian proceedings but the Court had to rule in relation to the English proceedings to appoint an arbitrator. Advocate General Darmon in

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26. *Id.*

27. *Id.*

28. Case C-190/89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-3854, I-3859-61.

29. Almeida-Desantes Report 1990, *supra* note 18; Schlosser Report, *supra* note 9, at 92-93. It is also striking that both Jenard and Schlosser submitted legal opinions in the proceedings and both came to conclusions opposite to those of the Court of Justice. The contents of these legal opinions are apparent from the abovementioned conclusion of Advocate General Darmon. Schlosser argued in this context – contrary to what he wrote in the Schlosser report – that the arbitration exception was to be reinterpreted to the effect that it was limited to recognition and enforcement of arbitral awards, and that not only disputes concerning the existence or invalidity of the arbitration agreement but also any other decision of a state court regarding arbitration was to fall within the scope of the 1968 Convention. Jenard, on the other hand, argued that parallel proceedings before judges in signatory states were to be avoided and that the court seized first of a dispute concerning the existence or validity of the arbitration agreement, had jurisdiction to assess such dispute.

30. Case C-190/89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-3854, I-3858-64.

31. *Id.* at I-3858-64.

his opinion to the Court, however, takes on this issue and concludes that also in such a hypothetical the arbitration exception of the 1968 Convention applies.<sup>32</sup> He concedes that this may lead to contradictory decisions if arbitrators accept the existence or validity of the arbitration agreement and any such award on jurisdiction is not reversed in setting aside proceedings while a judge in another Member State might conclude to the non-existence or the invalidity of the arbitration agreement. He considers that this risk is just to be taken as applying a strict interpretation of the arbitration exception is at odds with the arbitration laws of the Member States which accept the authority of arbitrators to rule on their own jurisdiction as well as the system of the New York Convention which is based on the exclusive jurisdiction of the courts of the country of the place of arbitration in the context of setting aside proceedings to pass a final judgment on the existence or validity of the arbitration agreement.

A second case in which the arbitration exception is briefly mentioned is *Van Uden / Deco-Line*<sup>33</sup> in which Dutch law on summary interim relief proceedings regarding the collection of receivables and its compatibility with the 1968 Convention was raised and only accepted by the Court of Justice provided strict conditions are met. Pending arbitration in The Netherlands, Van Uden brought collection interim relief proceedings before the President of the Rotterdam District Court requesting an order against Deco-Line for an amount of 837,919.13 German marks corresponding to receivables under four agreements. The application was granted for an amount of 377,625.35 German marks in view of article 1022, paragraph 2 of the Dutch Code of Civil Procedure which provided that an arbitration agreement does not prevent a party from applying for interim relief to the court. The Court of Appeal reversed and, upon an appeal to the Dutch Supreme Court, the latter referred some preliminary questions to the Court of Justice, including the question of the relevance of an arbitration agreement in the contract between the parties, of the place of arbitration designated in the agreement and of the relevance of the pending arbitration proceedings on the merits. The Court answered that question as meaning that provisional measures normally do not relate to the conduct of arbitral proceedings but to the substantive interests of the parties and, therefore, are not covered by the arbitration exception. The preliminary questions received a negative answer to the effect that the arbitration agreement, the place of arbitration and the fact that arbitration proceedings were pending

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32. *Id.* at I-3858.

33. See Case C-391/95, *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another*, 1998 E.C.R. I-7122 (mentioning the arbitration exception briefly and including conclusions of Advocate General G Léger).

were irrelevant factors to the determination of the scope of the 1968 Convention and, thus, that collection interim relief proceedings in court fell within the 1968 Convention and were not covered by the arbitration exception.

Although the arbitration exception was extensively discussed in *Mark Rich*, but could be decided on narrow grounds, it did not lead to a revision of the text of the arbitration exception in the negotiations leading to and the adoption of the old Brussels Regulation in 2000 despite the controversy over its interpretation had existed since the nineteen seventies. Also *Van Uden* did not have an impact on the old Brussels Regulation because it decided only a limited point and questions about existence and validity of the arbitration agreement did not play a role.

After a forty year period of calm, the arbitration exception regarding its relationship to the arbitration agreement was raised to its full extent in the *West Tankers* judgment of the Court of Justice of February 10, 2009<sup>34</sup> as to whether English courts were authorized to issue an anti-suit injunction to protect arbitration proceedings in England. Such an injunction is an order restraining a party to bring or continue court proceedings. The legal question was whether the old Brussels Regulation banned anti-suit injunctions and whether the arbitration exception applied to such injunctions.

*West Tankers* concerned a dispute about the collision in Syracuse, Italy of West Tankers' ship, the *Front Comor* with a jetty owned by Erg Petroli SpA, its charterer.<sup>35</sup> The charter party contained a choice of English law and an arbitration clause providing for arbitration in London. Allianz and Generali who under insurance policies had paid Erg part of its damages, then brought proceedings against West Tankers in Syracuse seeking repayment of any sums disbursed. West Tankers then asked the High Court in London for a declaration that the dispute with the insurers had to be submitted to arbitration and an anti-suit injunction prohibiting insurers to institute whatever further proceedings other than arbitration and to continue the pending proceedings in Italy. The High Court granted the anti-suit injunction and the House of Lords was also inclined to follow this view but nonetheless decided to request a preliminary ruling from the Court of Justice.

The Court of Justice first held that the object of an anti-suit injunction or the rights such an injunction intended to protect related to arbitration and,

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34. Case C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., 2009, E.C.R. I-663 (citing a case decided by the Grand Chamber and including conclusions of Advocate General Kokott).

35. *Id.*

thus, were excluded from the scope of the old Brussels Regulation.<sup>36</sup> On the other hand, the Court stated that the effectiveness of the regulation implied that the attainment of the objectives pursued by the regulation prevented a court in one Member State to curtail or affect the powers of a court in another Member State to exercise its powers under the regulation. As the Italian court could rule on its jurisdiction under the alleged tort of *West Tankers* and the arbitration clause of the charter agreement was a preliminary question to be addressed in the Italian court's determination of its jurisdiction under the regulation, the Court held that the Italian court could also answer this preliminary question and that the English courts were prohibited to interfere in that determination directly but also indirectly by means of anti-suit injunction to litigants. The Court in this respect made an explicit reference to the aforementioned *Evrigenis/Kerameus* report. Finally, the Court observed that it considered that this solution was in accordance with article II, paragraph 3 of the New York Convention authorizing a domestic court to assess its jurisdiction if an arbitration agreement is invoked before it.<sup>37</sup>

*West Tankers* basically is the convergence of two earlier judgments of the Court of Justice about the interpretation of the Brussels system which were rendered outside an arbitration context. In *Gasser*, the Court held that a (disputed) choice of forum for an Austrian court under the *lis pendens* first in time rule of the 1968 Convention had to lead to a stay of the Austrian proceedings and the continuation of parallel Italian proceedings as the Italian court was seized first and there was no exception in the 1968 Convention to the effect that a forum selection clause had to prevail over the general first in time rule.<sup>38</sup> Thus, the Court refused to create an exception to the *lis pendens* rule in favor of forum selection clauses feeling bound by the text of the Convention.<sup>39</sup> Moreover, the Court noted that the 1968 Convention is based on the mutual trust of the Contracting States in

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36. *Id.*

37. Case C-185/07, *Allianz SpA. and Generali Assicurazioni Generali SpA v. West Tankers Inc.*, 2009 E.C.R. (noting the ban on *anti-suit injunctions* to protect arbitration raises the question whether a claimant in arbitration can institute a breach of contract claim against the defendant or request the arbitral tribunal give declaratory relief establishing that the defendant's action in a domestic court is a breach of the arbitration agreement. The latter was successfully tried in the rest of the *West Tankers* saga in England where the Court of Appeal converted a declaratory arbitral award into a judgment of the court. This enabled *West Tankers*, on the basis of article 34, paragraph 3 of the old Brussels Regulation, to resist the enforcement of any Italian judgment in England *West Tankers Inc./Allianz SpA and Generali Assicurazioni Generali SpA* [2012] WLR (D) 9 [2012] EWCA Civ 27).

38. See Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, 2003 E.C.R., I-14721, ¶¶ 17, 39.

39. Brussels Regulation, *supra* note 1, at art. 31 (Having regard to the undesirable outcome of *Gasser*, article 31 of the new Brussels Regulation has overruled *Gasser*).

each other's legal systems and judicial institutions as reflected in a system of mandatory rules on jurisdiction and limited review in the course of proceedings for recognition and enforcement of judgments. Thus, *Gasser* stands for the principle of *full faith and credit* in relation to the jurisdictional determination of the court first seized.

In its judgment in *Turner*, the Court held that, under the 1968 Convention, the English court could not issue an anti-suit injunction to prohibit Turner's former employer to continue Spanish proceedings against Turner notwithstanding that the English court had already accepted jurisdiction in respect of Turner's prayers for relief and had ruled that the Spanish proceedings had been initiated to pressure Turner to withdraw his suit in England.<sup>40</sup> To ensure the effectiveness of the 1968 Convention, the Court did not permit English anti-suit injunctions to interfere with jurisdictional determinations by courts in another State.

*West Tankers* combines both *Gasser* and *Turner*. Respect for a contractual arrangement (forum selection in *Gasser*, an arbitration clause in *West Tankers*) must give way to the grounds of jurisdiction of the Brussels system and an *anti-suit injunction* is not consistent with full faith in jurisdictional determinations by courts of other Member States. However, the Court seems to have become the prisoner of its own recent case law. *Gasser* is a case that falls completely within the Brussels system while *West Tankers* raises the very issue whether it falls within the scope of the Brussels system given the presence of an arbitration agreement and where the Court pays scant attention to *Mark Rich*. For the same reason, *West Tankers* is clearly distinguishable from *Turner* because also in *West Tankers* the question is first to be answered whether the Brussels system applies after all to an *anti-suit injunction* which aims to protect the arbitration agreement against infringement by one party creating parallel proceedings before a domestic court in a Member State other than the State of the place of arbitration.

From the above, it turns out that there are three competing conceptions regarding the relationship between arbitration and the Brussels system. The first idea which may be called the *sui generis* conception and is mainly followed in England, wishes both contractual and procedural aspects of arbitration to be immunized from Brussels influences and, thus, to be governed by a separate regime of national arbitration law and international conventions. The main disadvantage of this view is that a small risk exists of an enforcement conflict between an arbitral award, when not set aside at the place of arbitration in a EU Member State, and a judgment of a domestic court in another Member State which dismissed a jurisdictional

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40. See generally Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changeoint SA, 2004 E.C.R., I-3570, I-3574.

challenge based on an alleged agreement to arbitrate and comes to a different conclusion than the arbitration award as to the merits of the dispute. The second view which may be referred to as the procedural conception restricts the interpretation of the arbitration exception to procedural aspects. Under this second view, the enforcement conflict also arises as it does not affect the power of arbitrators to rule on their jurisdiction or the setting aside powers of courts in Member States at the place of arbitration while the second view also accepts the power of courts in Member States other than at the place of arbitration to rule on jurisdiction and on the merits even in the presence of an alleged arbitration agreement which can lead to a jurisdictional determination regarding this agreement as it is only a preliminary question as to the jurisdiction of these courts. A third view seems to be that of the recent case law of the European Court of Justice which may be characterized as the institutional view and where – in order to ensure the effectiveness of the Brussels system and starting from the premise of mutual trust and non-interference in jurisdictional determination of courts of Member States, parallel proceedings subsist and also do not solve potential enforcement conflicts.

These three concepts, thus, do not provide an answer to the coordination problem between parallel proceedings between arbitrators and courts at the place of arbitration on the one hand and courts in other Member States on the other hand as to the existence and validity of the arbitration agreement. Moreover, the problem of such parallel proceedings is not confined to questions of existence and validity of arbitration agreements, but they also relate to questions as to subject-matter arbitrability (e.g., arbitration of consumer or employment disputes) where there are different positions in Member States and which have yet been untouched by the case law of the Court of Justice. The question arising at this juncture is whether and how these problems have been tackled under the new Brussels Regulation.

#### IV. FROM THE OLD TO THE NEW BRUSSELS REGULATION

The text of the arbitration exception remained unchanged in the Brussels Regulation except for the fact that the article “the” in the Dutch text of the Regulation has been dropped. This minor change in one of the various languages of the regulation does not seem to have intended any substantive change at all: the English text of the Regulation speaks only of “arbitration” whereas the German and French texts continue to use the article referring respectively to “die Schiedsgerichtsbarkeit” and “l’arbitrage”.<sup>41</sup>

The genesis of the new regulation can be divided into three stages. In a

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41. Brussels Regulation, *supra* note 1.

first phase, the revision of the Regulation was prepared by a report of the German Professors Hess, Pfeiffer and Schlosser (“Heidelberg Report”), which was partly based on national reports from the Member States.<sup>42</sup> Despite the fact that the national reports did not support this, the Heidelberg Report proposed the deletion of the arbitration exception which would imply that all decisions of national courts relating to arbitration would fall under the regulation.<sup>43</sup> This proposal was in line with the legal opinion of Schlosser mentioned above which was submitted in the *Marc Rich* case.<sup>44</sup> This deletion would be mitigated by an exclusive jurisdiction to be added to the regulation in favor of the courts of the place of arbitration regarding ancillary procedures concerning arbitration proceedings (such as an appointment of an arbitrator by the court of the place of arbitration). Moreover, it was proposed to introduce a *lis pendens* rule in favor of an action seeking a declaration on the validity of the arbitration agreement from a court at the place of arbitration which would suspend parallel proceedings before courts in other Member States and have torpedo actions instituted at the latter place stayed. This last proposal would require a claimant in arbitration to seize a court at the place of arbitration to have parallel proceedings in another Member State stayed.

In a second phase, the EU Commission published its own report and Green Paper.<sup>45</sup> The Commission suggested – in line with the Heidelberg Report – to adapt the arbitration exception and grant exclusive jurisdiction to the courts of the place of arbitration. The consultation process that ensued was particularly controversial with many critical comments being made about the whole exercise to change the *status quo*, and many concerns being expressed about how such changes should look like. The Commission was concerned that the controversies regarding arbitration would provide a deal breaker for the whole revision of the Regulation and sought support within the arbitration community by appointing a group of experts to review the matter and to reconsider its proposals.<sup>46</sup> This led to a

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42. Hess, B., Pfeiffer, T., and Schlosser, P., The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States at ¶¶ 105-35 (Study JLS / C4 / 2005/03), final Sept. 2007, [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). [hereinafter The Heidelberg Report].

43. See generally The Heidelberg Report, *supra* note 42.

44. Case C-190/89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-3854, I-3858-64.

45. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee (2009); European Commission, Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM April, 21 2009).

46. European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 9 (COM

new proposal providing that the institution of an arbitration or an arbitration related procedure before a court of the place of arbitration was sufficient to block parallel proceedings before a court in any other Member State provided the international jurisdiction of the court of that other Member State was challenged on the basis of an arbitration agreement.<sup>47</sup>

In a final stage, the European Parliament which had already earlier on voiced its critical views,<sup>48</sup> seized the initiative. Also the most recent Commission proposal continued in a number of Member States, particularly in France and Great Britain, to face significant opposition. The Parliament – therein followed by the Council of Ministers – took over the lead of the revision project and reintroduced the general arbitration exception, with no further amendments or qualifications, which found its way into the new Regulation. However, four paragraphs were inserted in the twelfth recital of the preamble of Brussels Regulation to address the arbitration exception. Given its importance, it deserves to quote these in full:

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

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July 26, 2013).

47. *See generally* European Commission, Impact Assessment Accompanying document to 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 Dec. 14, 2010); European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 9 (COM July 26, 2013)..

48. *See generally* Brussels Regulation, *supra* note 1; European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Eur. Par. Doc. (2009/2104(INA)); *see also* European Parliament Legislative resolution of 20 November 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (P7\_TA (2012) 0412).

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.<sup>49</sup>

From the unamended retainer of the arbitration exception in article 1, paragraph 2, sub (d) Brussels Regulation and the reasons cited in the preamble to the regulation, one can deduce the following principles:

1. The Brussels Regulation does not apply to arbitration. This relates to procedural aspects and ancillary claims before national courts in relation to arbitration such as those concerning the composition of the tribunal, the competence of arbitrators, the course of the arbitral proceedings or any other aspect of the arbitration proceedings or decisions on any means of recourse against arbitration awards or recognition and enforcement of arbitral awards.
2. National law and international instruments – and not the Brussels Regulation – apply to the questions of the existence, the validity and the effectiveness of an arbitration agreement and the procedural consequences a court in a Member State may draw therefrom.
3. National law and international instruments – and not the Brussels Regulation – apply to the recognition and enforcement of judgments of courts in Member States concerning the point 2. above in other Member States.
4. The Brussels Regulation is applicable to the recognition and enforcement of judgments of courts of a Member State in proceedings in which such court has ruled that there is no arbitration agreement, that it is void or voidable or that it has expired, is unenforceable or cannot be applied. Such recognition or enforcement is without prejudice to the jurisdiction of a court in another Member State to recognize or enforce an arbitration award

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49. Brussels Regulation, *supra* note 1, at 2.

under the New York Convention.<sup>50</sup>

These four principles are further discussed and analyzed in the next section of this paper. From a legislative technique, it may be regretted that the interpretation of the arbitration exception essentially is to be derived from four paragraphs of the Regulation's preamble which confirms the complexity of the matter and the fact that a compromise crystallized only at a very late stage of the European legislative process.

#### V. ANALYSIS OF THE ARBITRATION EXCEPTION IN THE BRUSSELS REGULATION

The first principle (the first sentence of the first paragraph and the last paragraph of recital 12) requires scant comment and is largely codifying the *Mark Rich* case law and what was stated in the *Jenard* and *Schlosser* reports regarding procedural aspects of arbitration. The principle can essentially be broken down into two components.

The first component refers to the supportive, complementary and supervisory functions of the courts in relation to arbitration and reaffirms that these fall outside the scope of the Brussels Regulation. But this does not solve all interpretation problems. One may wonder for instance whether the outcome of the *Van Uden* case is still good law because in that case an interim collection order was sought while arbitration was pending. The relief requested before a domestic court was complementary to an arbitration procedure where that same relief could have been requested in arbitration and which often is also governed by specific rules of national arbitration law regarding arbitral interim relief. The Regulation's preamble has not identified this problem and did not refer to interim relief or did not include it in the list of ancillary proceedings or otherwise does not make clear whether *Van Uden* after the arbitration friendly revision of the regulation is still good law. Similarly, there is the question whether *West Tankers* is not overruled by this first principle. At first sight, this is arguable but in doing so, one should take into account that – in the absence of an explicit position in the Brussels Regulation in respect of anti-suit injunctions to protect arbitration or an arbitration agreement – the Court of Justice based *West Tankers* on the effectiveness of the old Brussels Regulation and not on the fact that such a ban fell under the arbitration exception. This does not seem to have changed which implies that, in my opinion, *West Tankers* is still good law.<sup>51</sup>

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50. Brussels Regulation, *supra* note 1, at 6.

51. Case C-536/13, 'Gazprom' OAO, 2014 Respublika, ECLI:EU:C:2015:316. To the contrary, Advocate General Wathelet, conclusions in the *Gazprom* judgment discussed below, nos 132-141; Margaret Moses, Arbitration/Litigation Interface: The European Debate, 35 NW. J. INT'L L. & BUS. 1, 6, 16 (2014) (available at

To this first component, there is a major exception which is covered by the other three principles discussed below. This exception applies as soon as a domestic court is seized of a question relating to the existence, validity and effectiveness of an arbitration agreement. This exception is discussed further below.

The second component of the first principle concerns the arbitral proceedings. The Brussels Regulation deals with problems of distribution of international jurisdiction between courts in different EU Member States as well as with questions of recognition and enforcement in one Member State of judicial decisions from other Member States. It, therefore, in no way regulates the arbitration proceedings before the arbitrators which are governed by national arbitration law, arbitration rules and procedural rules agreed upon by the arbitrating parties. Despite the obviousness of this second component, it must be mentioned here because – with regard to the arbitration agreement – most Member States recognize the *compétence–compétence* principle under which a tribunal has its own prerogative to assess its own jurisdiction and may decide whether there is an arbitration agreement, whether the agreement is valid and effective and whether the dispute submitted to it falls within the scope of the arbitration agreement. This implies that the problems listed below relating to the existence, validity and scope of the arbitration agreement which may lead to parallel proceedings before national courts in different Member States get a third dimension *i.e.*, that relating to the arbitral award of the tribunal. This dimension is important because a positive assessment on jurisdiction by arbitrators which is not or unsuccessfully challenged in the Member State of the place of arbitration is recognizable under the New York Convention in other Member States, including the Member State where a domestic court is asked to accept jurisdiction based on an allegation that there is no arbitration agreement, provided that such court – depending on the applicable law – had not yet been seized of the case or had not ruled on the jurisdictional challenge when the arbitral award was rendered. If that is not the case, the risk of conflicting decisions arises if the outcomes concerning the arbitration agreement are different.

It was well settled law that the Brussels Regulation did not address the arbitral proceedings before an arbitral tribunal which was recently confirmed by the Court of Justice in the *Gazprom* judgment of May 13, 2015.<sup>52</sup> In a dispute under a shareholders' agreement in which an

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<http://ssrn.com/abstract=2433652>). For a further discussion, see also below.

52. Case C-536/13, 'Gazprom' OAO, 2014 Respublika, ECLI:EU:C:2015:316 (citing a case decided by the Grand Chamber and including conclusions of Advocate General Wathelet. The Advocate General approached the preliminary question differently than the Court. According to the Advocate General, the new regulation has an interpretive nature so that it can be applied retroactively. In this respect, it must be

arbitration clause provided for arbitration under the Arbitration Rules of the Stockholm Chamber of Commerce, where Gazprom held 37.1% of the shares in a Lithuanian company and the Republic of Lithuania had 17.7% of the shares, Gazprom requested the arbitral tribunal to order the Republic of Lithuania to withdraw an earlier action brought before the Lithuanian courts seeking an investigation regarding the affairs of the Lithuanian company. The arbitral tribunal ruled that the action before the Lithuanian judge partially constituted a breach of the arbitration agreement and ordered Lithuania to withdraw or reduce certain requests in the Lithuanian proceedings. The arbitral award was a kind of arbitral anti-suit injunction against a party to the arbitration in Stockholm. The court in Lithuania, however, took no notice of the award and ordered an investigation into the affairs of the Lithuanian company which was confirmed on appeal. Gazprom then sought the recognition of the arbitral award in Lithuania, which was initially rejected by the court because the dispute about the investigation into the affairs of the local company was not arbitrable, the arbitral tribunal's award had restricted the power of the Republic of Lithuania to take legal action and had interfered with the jurisdiction of the Lithuanian courts to decide on their own jurisdiction and had, thus, breached international public policy. Gazprom filed recourse against these decisions with the Lithuanian Supreme Court whereupon the Supreme Court asked a preliminary ruling from the Court of Justice as to whether the arbitral award could interfere with the jurisdiction of the Lithuanian courts under the old Brussels Regulation. The Court of Justice reasoned that the preliminary questions essentially concerned the exercise of powers by the arbitral tribunal (*i.e.*, to issue an arbitral anti-suit injunction) and the recognition of such an injunction in a Member State other than that of the place of arbitration and thus – unlike *West Tankers* – implied no inference by a domestic court in the jurisdiction of a court of another Member State. The arbitral anti-suit injunction and its recognition in Lithuania were, thus, not only covered by the arbitration exception and excluded from the scope of the old Brussels Regulation but also did not involve interference by the arbitral tribunal in the jurisdiction of the Lithuanian courts affecting the mutual trust of national courts of Member States in each other's legal systems and judicial institutions and the effectiveness of the Brussels Regulation as mutual trust only applies to the courts of Member States and not to arbitral tribunals sitting within the Union. Sanctions for failure to comply with an arbitral anti-suit injunction would therefore not be imposed by a court of another Member State but only by the arbitral tribunal. The recognition of the award in Lithuania is therefore for the Court not a matter governed by the old Brussels Regulation but only by Lithuanian law and

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noted that *Gazprom* was rendered under the old Brussels Regulation).

the New York Convention.<sup>53</sup>

Under the new regulation, *Gazprom* would not have been decided otherwise as no change as regards recognition and enforcement of arbitral awards was intended; this matter remains excluded under the arbitration exception of the Brussels Regulation. The effectiveness of the Brussels Regulation is also not affected because an arbitral anti-suit injunction is not rendered by a court of a Member State. In this case, the institutional view overlaps with the *sui generis* conception which were referred to above. *Gazprom*, thus, confirms the widely accepted view that the Brussels system is not relevant for the proceedings before arbitrators as long as no court in a Member State is involved.

The second principle (the first paragraph of recital 12 with the exception of the first sentence) states that the arbitration exception does not affect the other jurisdiction rules of the Brussels Regulation so that a court in a Member State other than that of the place of arbitration may be seized of a dispute wherein an arbitration agreement is invoked by a respondent to challenge the jurisdiction of the court. One may think of the courts of the domicile of the defendant, the alternative ground for jurisdiction to that of the defendant's domicile for contracts under article 7, section 1 of the Brussels Regulation or, as in *West Tankers*, the alternative jurisdiction in torts under Article 7, section 2 of the Brussels Regulation. These disputes may relate to a positive or negative declaratory request regarding jurisdiction of a domestic court and non-applicability of an arbitration agreement or to obtain a final judgment on the merits in proceedings despite an arbitration agreement. These proceedings remain possible under the Brussels Regulation notwithstanding attempts in the Heidelberg Report and the successive Commission proposals to limit these opportunities. They are not contrary to the case law of the Court of Justice and are aligned to the *West Tankers* case which is a second reason to assume that *West Tankers* is still good law and has not been implicitly overruled by the Brussels Regulation.<sup>54</sup> They are the expression of the aforementioned *sui generis* theory advocating that arbitration is to be untouched by the Brussels Regulation and accepting that a court in one Member State cannot or should not interfere with the jurisdiction of a court in another Member State.

The result of the application of the second principle is that a court in a

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53. Pursuant to the decision of the Court of Justice, the Lithuanian Supreme Court, on October 23, 2015, recognized the arbitral award by virtue of the New York Convention (Case 3K-7-458-701/2015, available at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)).

54. See also Simon P. Camilleri, *Recital 12 of the Recast Regulation: a New Hope*, ICLQ 899, 906 2013.

Member State other than that of the place of arbitration can render a judgment regarding the basis of the jurisdiction of arbitrators in another Member State and may, thus, threaten the very foundation of such arbitration. The question is then as to the legal effects of such a judgment for arbitration being conducted elsewhere. The answer to this question is governed by the third and fourth principles which form the counterpart to the second principle.

The third principle (the second paragraph of recital 12) states that the judicial determination of a court of a Member State other than that of the place of arbitration concerning the arbitration agreement falls outside the scope of the recognition and enforcement section of the Brussels Regulation. That is a remarkable principle for a mere recital in a preamble as it means that the substantive scope of the jurisdiction title of the Brussels Regulation (the arbitration exception does not preclude the jurisdiction of a court in a Member State other than that of the place of arbitration) is defined differently than the substantive scope of the enforcement title (the arbitration exception precludes application to the enforcement of judgments from Member States other than that of the place of arbitration concerning the arbitration agreement).<sup>55</sup> Nevertheless, the principle is clear: judges in other Member States are not bound by a jurisdictional determination of a judge in a Member State other than the State of the place of arbitration, about the arbitration agreement. Moreover, this applies both to a judgment on the merits or to a judgment on an incidental question such as jurisdiction. The English text of the preamble is in this respect clear (*"regardless of whether the court decided on this as a principal issue or as an incidental question."*).<sup>56</sup> If, for example, negative declaratory relief is sought and obtained that there is no arbitration agreement, any such judgment will not be recognized under the Brussels Regulation. If positive declaratory relief is requested and obtained that the court has jurisdiction and a challenge to the court's jurisdiction based on an arbitration agreement is rejected, then the ruling on the arbitration defense is equally not to be recognized. In my opinion, the third principle does not address the substantive proceedings on the merits in which an arbitration defense is rejected as to jurisdiction since then the fourth principle applies. The third principle primarily looks at negative declaratory judgments about the arbitration agreement (*i.e.*, where the outcome is that there is no arbitration agreement, that it is void or unenforceable, that it is not effective or that the dispute is outside the scope of the agreement arbitration) but logic seems to indicate that this should also apply to judgments on jurisdiction where the

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55. *Id.* at 905.

56. See also the French text: "*à titre principal ou incident*" or the German text: "*in der Hauptsache oder als Vorfrage*".

court declares that it has no jurisdiction considering the existence of an arbitration agreement.<sup>57</sup> Negative judgments, however, are more common and threatening to the arbitration process while a positive verdict also might result in a conflict with an arbitral award if the arbitral tribunal were to rule that it does not have jurisdiction regarding all or part of the dispute. If all these judgments fall outside the scope of the Brussels Regulation with respect to their recognition in other Member States, there is still the question whether they are still recognizable under other treaties or arrangements or based on domestic law. The answer to this question is beyond the scope of this article except to observe that the non-application of the Brussels Regulation renders application of other recognition rules not easier. In any event, the Brussels Regulation has in this respect not achieved decisional harmony with respect to the interface between arbitration and judgments in Member States other than that of the place of arbitration.

Finally, the fourth principle (the third paragraph of recital 12) envisages a court decision on the merits in a Member State other than that of the place of arbitration encompassing a jurisdictional determination that there is no arbitration agreement so that the court passes judgment on the merits. Full faith and credit implying respect for jurisdictional determinations in sister states at first glance seems to indicate that any judgment on the merits is to be recognized and enforced in other Member States including incidental decisions to the effect that there is no arbitration agreement.<sup>58</sup> The fourth principle solves this problem. On the one hand, judgments on the merits

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57. See Court of Arnhem-Leeuwarden, November 26, 2013, ECLI:NL:GHARL:2013:9004 where the Court recognized a positive response from the Luxembourg court regarding an arbitration agreement under the old Brussels Regulation and rejected setting aside of arbitral awards rendered in The Netherlands because the Court considered itself bound by the judgment on jurisdiction by the Luxembourg court.

58. *National Navigation Co., v. Endesa Generacion SA* 2009 EWCA Civ. 1397 (2010) (England and Wales); *Gothaer Allgemeine Versicherung AG v. Samskip GmbH*, ECLI:EU:C:2012:719. A difficult question is whether an interlocutory judgment on jurisdiction that accepts jurisdiction in defiance of an arbitration agreement is recognizable under the Brussels Regulation in the Member State of the place of arbitration with possible implications for the arbitral proceedings and for any disputes before the domestic court at such place. It seems to follow from the decision of the Court of Justice of November 15, 2012 (Case C-456/11, *Gothaer Allgemeine Versicherung AG and Others / Samskip GmbH*, ECLI:EU:C:2012:719) that this is the case in respect of disputes before the court. The scope of Preamble 12 of the Brussels Regulation seems, however, to point in the opposite direction. If a judgment on the merits must yield to the New York Convention in a third Member State and an arbitral award on the merits prevails over a contradicting judgment on the merits (as analyzed below), it seems to me that this must be applied by analogy to the State of the place of arbitration (for a similar case under the old Brussels Regulation where – because of *West Tankers* – the court came to the opposite conclusion, see *National Navigation Co / Endesa Generacion SA*, [2010] 1 Lloyd's Rep 193, [2009] EWCA Civ 1397 (Court of Appeal, December 17, 2009)).

from other Member States are subject to recognition and enforcement under the Brussels Regulation as the major requirement is that they emanate from a court of another Member State, even if jurisdiction of the court of origin is not based on the Brussels Regulation. However, this provides for the aforementioned risk that the judgment conflicts with an arbitral award which is not solved by the ground for refusal of recognition or enforcement of article 45, paragraph 1c. and d. of the Brussels Regulation regarding conflicting judgments as this does not apply to an arbitral award as this is not a judgment for the purposes of this article. The fourth principle solves this by stating that the court before which the recognition or enforcement of the judgment from another Member State is invoked, should solve this conflict by giving priority to the New York Convention<sup>59</sup> and, thus, recognize and enforce the arbitral award and refuse the recognition and enforcement of the sister state judgment. It is remarkable to read such a provision in a preamble but the intention and effect are clear. Enforcement in a third Member State (not the State of the place of arbitration or the Member State where the judgment was rendered) will be governed by the New York Convention. Under article V, paragraph 1, sub a of the New York Convention, the court in a third Member State can test whether there is an arbitration agreement. Regardless of the jurisdictional determinations by the arbitral tribunal or the court of another Member States in merits proceedings, this provision authorizes the enforcement court in a third Member States to independently test whether there was an arbitration agreement and to permit enforcement if it comes to the conclusion that there is an arbitration agreement, even if a court in another Member State in proceedings on the merits came to the opposite conclusion. Any such enforcement decision may entail a negative assessment of the incidental jurisdictional decision of the court of another Member State in its proceedings on the merits. This implies that the fourth principle in fact provides an additional ground for refusal in article 45 Brussels Regulation under which a judgment from another Member State may be refused recognition and enforcement if it is incompatible with an arbitral award which can be recognized and enforced under the New York Convention. Thus, the Brussels Regulation provides an answer to the main problem of parallel procedures *i.e.*, the question of how to deal with potentially contradictory decisions arising from an arbitral award which is not set aside at the place of arbitration on the one hand and a judgment on the merits rendered in another Member State in which the judge comes to

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59. Brussels Regulation, *supra* note 1, at art. 73(2). (confirming that the Brussels Regulation does not affect the application of the New York Convention. Such an explicit reference to the New York Convention was absent from article 71 the old Brussels Regulation).

the conclusion that there is no arbitration agreement.<sup>60</sup>

Apart from the lack of elegance in addressing the interface between arbitration and the Brussels Regulation in a preamble, the solution put forward by the European Parliament and adopted by the Regulation is to be endorsed for a number of reasons. First, the problem of possible conflicting judgments regarding an arbitration agreement between an arbitral award and a judgment of a court in another Member State does not frequently arise and there is the legislative political question whether it should have been regulated at all. Ultimately, the Brussels Regulation comes to a lite solution which is preferable to the complicated arrangements of the Heidelberg Report and the Commission proposals. Unlike the Heidelberg Report, the claimant in arbitration should seek no protection to a court at the place of arbitration to defend itself against a torpedo action in another Member State; it is sufficient to defend himself in that other Member State and a judgment that there is no arbitration agreement may then not block the enforcement of an arbitral award in another Member State under the New York Convention. The arrangements of the preamble to the Regulation also sufficiently protect the respondent in the arbitration who can have a legitimate interest in challenging the jurisdiction of the arbitral tribunal. If there are grounds for reasonable doubt regarding the arbitral tribunal's jurisdiction, the Brussels Regulation still enables the respondent in the arbitration to submit the dispute to an otherwise competent court, although a judgment on jurisdiction does not automatically prevail in other Member States and ultimately the setting aside judge in the State of the place of arbitration and the enforcement court in a third State may have the last word. The Heidelberg Report and the Commission proposals also had another problem. They tried to find a procedural solution through a *lis pendens* rule for what is essentially a contractual problem *i.e.*, whether there is an arbitration agreement and whether the dispute falls under this agreement.<sup>61</sup> In the absence of harmonization of substantive and conflict rules governing the arbitration agreement, a procedural solution is insufficient because it unduly restricts the powers of an otherwise competent court in a Member State to assess under its substantive and

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60. New York Convention on the Recognition and Enforcement of Arbitral Awards, art. 5, ¶ 1. Two other situations must be distinguished from the one discussed in the main text. The first is the effects in the Member State of the place of arbitration. The New York Convention, then, does not apply but it can be argued that the solution of the preamble is applicable by analogy (*i.e.*, the priority of the arbitral award). The second situation is the effects in the Member State where the court has already ruled that there was no arbitration agreement. In that case, the arbitral award is likely to be refused recognition and enforcement under article V, paragraph 1, sub (1) of the New York Convention for the same reasons as retained by the court deciding on the merits (compare Moses, M., *l.c.*, 14).

61. The Heidelberg Report, *supra* note 42.

conflict rules whether there is an arbitration agreement. For that reason, I have argued in a previous publication that the proposals of the Heidelberg Report and the Commission did not go far enough and had to deal with these substantive and conflict rules, provided one is in favor of a federalization of arbitration law within the European Union at all.<sup>62</sup> The Brussels Regulation does not raise these problems as it readily accepts that conflicting decisions might arise, provides a pragmatic answer to this problem and does not purport to achieve decisional harmony at all costs.

Notwithstanding the positive appreciation of the solution to the interface between arbitration and court judgments in the Brussels Regulation, still two interpretation questions catch the eye. First, the preamble speaks constantly about the arbitration agreement being null and void, inoperative or incapable of being performed. The equally authentic French and Spanish texts refer to “*la convention est caduque, inopérante ou non susceptible d’être appliquée*” and “*el convenio de arbitraje es nulo de pleno derecho, ineficaz o inaplicable*”. In particular the English and French texts indicate that the Regulation regarding the arbitration agreement and the question whether a dispute under such an agreement may be subject to arbitration intended to be aligned with the identical wording of article II, paragraph 3 of the New York Convention<sup>63</sup> so that in the interpretation of the Regulation the New York Convention may serve as persuasive authority.<sup>64</sup>

A second question concerns subject-matter arbitrability which is nowhere mentioned in the Regulation and where conflicting decisions within the European Union can occur if arbitrators and setting aside judges in the State of the place of arbitration accept that a dispute is in full or partially subject to arbitration (e.g., a dispute concerning an employment contract that is subject to arbitration under Dutch law) but a court in another Member State accepts jurisdiction under the Brussels Regulation because the arbitration agreement covers a dispute which is not capable of arbitration. Unfortunately, the Brussels Regulation does not settle this question explicitly. Analogous application of the Regulation might be considered but is not obvious because the problem has not been a topic of

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62. De Ly, F., Conflict of Laws in International Arbitration - an Overview, in Conflict of laws in international commercial arbitration, Verona Conference March 18-20, 2010, Ferrari, F. and Kroll, S. (ed.), Munich, Sellier, 2010, 14-16, with further references.

63. Brussels Regulation, *supra* note 1, The Spanish text of the preamble added the words “*de pleno derecho*” which do not appear in the Spanish version of the New York Convention.

64. See Albert Jan van den Berg, The New York Arbitration Convention of 1958, (1981) (thesis), Rotterdam, The Hague, TMC Asser Instituut, 1981, 154-161; UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/CN.814 (Jan. 13, 2014)

debate in the drafting of the Regulation and the issue relating to subject-matter arbitrability – much more than regarding the arbitration agreement – raises important policy questions with respect to the protection of private and public interests. Thus, it seems advisable to keep these issues entirely outside the Regulation and leave it to the enforcement court in a third Member State to deal with possible conflicting judgments.<sup>65</sup>

### CONCLUSION

In a clear and concise way, the Brussels Regulation has dealt with the interface between arbitration and court judgments in Member States and solved a problem that does not frequently arise in practice. However, this does not apply to issues of subject-matter arbitrability. With this solution, it allows free rein for arbitral tribunals sitting inside the European Union to assess their jurisdiction without interference from judgments of national courts of Member States other than that of the place of arbitration. Moreover torpedo actions are curtailed since the New York Convention takes precedence over the Brussels Regulation if they were to lead to jurisdictional judgments or judgments on the merits. It seems that English style *anti-suit injunctions* continue to be prohibited if they are intended to interfere with a jurisdictional determination regarding an arbitration agreement by a court in another Member State. The new scheme of the Brussels Regulation is still limited to the European Union as long as the Lugano Convention is not again aligned with the Brussels Regulation which implies that in particular Swiss arbitrations and proceedings before the Swiss courts are still governed by rules other than those of the Brussels Regulation.

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65. New York Convention, *supra* note 64. Enforcement of the arbitral award in the State of the place of arbitration does not raise substantial arbitrability issues as the arbitral tribunal will settle these under the control of the setting aside judge and the Brussels Regulation is then not applicable by virtue of the arbitration exception. Enforcement of the arbitral award in the Member State where the courts proceeded to the merits because the dispute was not capable of being referred to arbitration may be refused on the basis of article V, paragraph 2 sub (a) of the New York Convention.