Guest Editorial: Hess, Should Arbitration and European Procedural Law be Separated or Coordinated?

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Should arbitration and European procedural law be separated or coordinated? Some remarks on a recurrent debate of European lawmaking

The idea of separating arbitration entirely from European (procedural) law is an illusion, since recent case law demonstrates growing frictions and inconsistencies. The proposals of the Heidelberg Report which are severely criticised by parts of the "arbitration community" should be regarded as a (preferable) alternative to a comprehensive action of the European Union in the field of arbitration. The article describes the political background and contributes to the current discussion on the reform of the Regulation Brussels I with regard to arbitration.

I. Introduction

During the last 40 years, the relationship between arbitration and European law has often been difficult, marked by misunderstandings and sometimes by overt distrust. Two communities – the arbitration world on the one side, "European regulators" on the other side ((For the sake of clarity, the following paper describes the different positions in a rather acuminate way.)) – address

arbitration and litigation from distinctively different perspectives. One current example is the ongoing discussion about the Heidelberg Report ((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 105 – 135.)) which proposes to replace the so-called arbitration exception of Article 1 (2)(d) of the Brussels I Regulation (JR) by two new articles which shall address positively the interfaces between arbitration and the Regulation and strengthen arbitration within the European Judicial Area. ((This discussion was triggered by the West Tankers decision, ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.))*

The following article first delineates the background of the present discussion (II), than it briefly presents the proposals of the Heidelberg Report (III) and the Commission's Green Paper ((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 of April, 21st,2009, COM (2009)175 final.)) as well as the reactions to the Green Paper – including the current lobbying efforts in Brussels (IV). ((All references to "submissions" in this paper refer to the submissions of Member States and other stakeholders to the EU Commission with regard to the Green Paper of April, 21st,2009, COM (2009)174fina, available at: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm.)) The last part of the paper deals with possible solutions which could be acceptable for both sides and would be in the interests of all of the parties involved.

II. Mutual trust and distrust in litigation and in arbitration

The functions of arbitration in the European Judicial Area are regarded differently, depending on the respective perspectives. The perspective of arbitration is global. Based on the New York Convention of 1958, arbitration has been accepted almost worldwide as a valuable alternative to litigation. ((*Steinbrück*, Schiedsrecht, staatliches, in: Basedow/Zimmermann (ed), Handwörterbuch des Europäischen Privatrechts vol. II (2009), p. 1353 – 1355. For (impressive) figures on the increasing use of arbitration see *Born*, International Commercial Arbitration, vol I (2009), p. 68 – 71.)) At present, the trend towards

liberalisation of arbitration and towards empowerment of arbitral tribunals continues to gain acceptance – denoted by the keywords of *kompetenz-kompetenz* of the arbitral tribunal and of the delocalisation of arbitral awards. ((*McLaughlin*, Lis pendens in International Litigation, 336 RdC, 200, 346 et seq (2008).)) This concept is aimed at detaching arbitration as an autonomous system of dispute resolution entirely from national jurisdictions. According to the underlying "philosophy" ((*Gaillard*, Aspects philosophiques du droit de l'arbitrage international (2008). Different concepts on the foundation of international arbitration are explained by *Born*, International commercial arbitration, vol. I, p. 184 – 189.)) party autonomy and the choice of arbitration instead of litigation must be fully respected. This thinking is based on the assumption that parties which derogated the jurisdiction of state courts do not want to re-litigate their dispute there. ((However, a party contesting the validity of the arbitration clause may for good reason prefer to litigate this issue at a civil court, see *Schlosser*, SchiedsVZ 2009, 119, 121 et seq.)) Any intervention of state authorities in the realm of arbitration is considered to be an intrusion. ((For a wider perspective see *Radicati di Brozolo*, Interference of national courts with arbitration, in: Müller/Rigozzi (ed.), New Departments in International Commercial Arbitration 2009, p. 1, 3 et seq.)) Basically, this system is rooted in a deep distrust of state intervention in arbitration proceedings. One reason is the limited degree of uniformity created by the New York Convention which does not entirely eliminate differences between the national jurisdictions (especially in the context of arbitrability and public policy). ((International Bar Association Arbitration Committee, Working Group on the reform of the Regulation Brussels I, Submission to the European Commission of June 15, 2009 (ref no 733814/1) no 23.))

The perspective of European law is different. It mainly focuses on cross border litigation which is considered to be closely related to the proper functioning of the Internal Market. In 1958, only a few months after the ratification of the Rome Treaty by the six founding Member States, the EC Commission stressed the need of a Convention on jurisdiction and recognition of judgments. It argued that the swift and efficient cross border movement of persons, goods and services required a judicial framework for the cross border recovery of debts. ((Letter of the EC-Commission to the Member States of 10/22/1958, see *Hess*, Europäisches Zivilprozessrecht (2010), § 1 I, no. 2.)) In 1973, the Brussels Convention entered into force and became a successful and popular instrument.

((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 59.)) Since 1999, the system has been considerably improved. Essentially, the European litigation system is based on mutual trust which relies on the expectation that the courts of all Member States will apply European law in the same way and respect fundamental rights of the parties to the same extent. ((The system is based on two safeguards: On the one hand, all Member States are bound by the ECHR and by the CFR; on the other hand the ECJ supervises and controls the coherent application of Union law by the courts of the Member States.)) In the near future, judgments coming from other Member States shall be recognised and enforced without any further review. ((*Hess*, Europäisches Zivilprozessrecht (2010), § 3 II, no 18 – 36. The abolition of exequatur is currently discussed in the context of the reforms of the Regulation Brussels I.))

Within the European Judicial Area, litigation and arbitration are considered as two equal alternatives of dispute resolution. ((Accordingly, Article 220 of the Rome Treaty and Article 293 of the Amsterdam Treaty (1999) explicitly provided for the elaboration of an EU-Convention on arbitration.)) However, the Community's explicit competence in arbitration has been never implemented, because for a long time the New York Convention of 1958 was considered as sufficient. Nevertheless, since the enactment of the Brussels Convention in 1973 the legal situation has changed considerably. In the present European law, arbitration plays a considerable role in supporting cross-border commercial transactions in the Internal Market. In this context, arbitral tribunals must apply (mandatory) EU law, i.e. in cartel law, like state courts. ((ECJ, 6.1.1999, case C-126/97, *Eco Swiss China Time Ltd./.Benetton International NV,* ECR 1999 I-3055, no 37 et seq.; see *Giannopoulos*, Einfluss des EuGH auf die Rechtsprechung der Mitgliedstaaten (2006), p. 149 et seq.; *Komninos*, EC Private Antitrust Enforcement (2007), p. 224 et seq.)) According to the case law of the ECJ, state courts must verify whether the arbitral award implements the applicable European Union law correctly. This control shall take place when arbitral awards are challenged in the Member State of origin or when arbitral awards are recognised in other EU Member States. ((See Article V (2)(b) New York Convention, *Illmer*, Schiedsverfahren, internationales, in: Basedow/Zimmermann (ed), Handwörterbuch des Europäischen Privatrechts vol. II (2009), p. 1358, 1360.))

Unsurprisingly, the different concepts underlying litigation and arbitration entail

diverging results in similar constellations. At present, several problems have arisen in this respect. The most compelling constellation concerned the recognition of arbitral awards. Recently, French courts recognised a Belgian award which had been annulled in Brussels because it was not in line with mandatory EU law. ((C.Cass., 6.4.2008, *Soc. SNP v. Soc. Cytec Industries BV,* Rev. arb. 2008, 473; for a similar constellation (not directly involving EU law) see [lbrxID883] C.Cass., 29.6.2007, *Société PT Putrabali v. Société Rena Holding et al.,* Rev. arb. 2007, 507 = Clunet 2007, 1236.)) The French courts had only verified that the award did not violate EU law in a flagrant way and, consequently, had permitted its recognition. ((See Tribunal de Grande Instance de Bruxelles, 3/8/2007, *Soc. SNP SAS v. Soc. Cytec Industries BV,* Rev. arb. 2007, 303; the judgment was set aside by the Court of Appeal, 6/22/2009, Rev. arb. 2009, 554.)) As a result, diverging judicial decisions on the application of mandatory European law occurred in the Internal Market. ((A second, recent example (equally not mentioned in the Heidelberg Report) is the *Ficantieri* case*: Legal Department du Ministère de la Justice de la Républiue d'Irak v. Sociétés Ficantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerispazio*, Paris Court of Appeal, 6/15/2006, Rev. arb. 2007, 90. In this case, the Genoa court of Appeal had held that the arbitration was invalid. Despite this judgment the award was recognised in France, because the French courts applied the French autonomous law on arbitration. They held that the French doctrine of negative kompetenz-kompetenz excluded the recognition of the Italian judgment.)) With regard to judgments, European procedural law clearly precludes such constellation: A judgments which has been set aside in the Member State of origin cannot be recognised and enforced in other Member States. ((Accordingly, from the perspective of European law, the basic concept of international arbitration (which permits simply to ignore judgments of the courts of other Member States) does not correspond to basic needs of a coordinated dispute resolution within the European Judicial Area (see Article 32 JR).)) From the perspective of European law the question arises which compelling reasons justify the different treatment of arbitral awards in the Internal Market.

Finally, in *West Tankers* the European Court of Justice was asked to rule on an anti-suit injunction issued by English courts in order to prevent Italian courts from proceeding with an action in disregard of an arbitration clause. ((ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.; Schlosser*, SchiedsVZ 2009, 129 et seq; *Steinbrück/Illmer*,

SchiedsVZ 2009, 188 et seq.)) The Grand Chamber held that an anti suit injunction in support of an arbitration clause was irreconcilable with the principle of mutual trust and that the Italian courts were deemed to apply the Brussels I Regulation and Article II of the New York Convention appropriately. ((See ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.*, no 33 where the ECJ (indirectly) expressed the view that the courts of the Member States must apply Article II (3) of the NYC in an appropriate manner.)) From the perspective of European procedural law, the outcome of West Tankers came as no real surprise. However, in the arbitration world it was considered an unwelcome intrusion into the autonomous system of dispute resolution. ((See the comment of *A. Briggs* on the Front Comor/West Tankers [2009] LMCLQ 161, 166.))

Against this background, the reconciliation of the different perceptions related to arbitration and litigation in Europe is a demanding task. However, it seems appropriate to highlight two basic assumptions which form the basis of this paper: First, the idea of separating arbitration entirely from European procedural law is an illusion. ((Contrary opinion: International Bar Association Arbitration Committee, Working Group on [the reform of the Regulation Brussels I], Submission to the European Commission (ref. no 733814/1 of July 2009), no 18 asserts "the absence of significant problems in the interface between arbitration and the Regulation". However, the Working Group itself carefully described recent case-law (*Putrabali, Cytec* and *Ficantieri*) which demonstrates considerable problems with regard to arbitration and EU law.)) Arbitration in Europe is strongly involved in the application of mandatory European law. Therefore, the courts of the Member States must apply the New York Convention (and their national laws on arbitration) in a way which conforms to EU law. As recent case law demonstrates the issue is becoming more and more compelling. ((*Herbert Smith*, Response to the Green Paper on the Review of the Brussels Regulation of June 30, 2009, p. 7-8; *House of Lords*, European Union Committee, Report on the Green Paper on the Brussels I Regulation of July 27, 2009, nos. 86 – 96.)) It is predictable that instances will occur in which the ECJ again will be concerned with matters related to arbitration. ((It should be noted that the recent case law of the French courts occurred within the short period of two years (2007-2008). Recently, the competence for concluding investment protection treaties of the Member States under Articles 69 and 307 EC-Treaty (which is closely related to arbitration) was reviewed by the ECJ, 11/19/2009, Case

C-118/07, *Commission v. Finland*.)) The existing (and the future) case law may trigger specific legislative activity of the European Union in this field. ((This option is expressly mentioned in the Green Paper on the Reform of the Regulation Brussels I, COM (2009) 174 final, p. 9 (with specific reference to Article VII of the NYC).)) Second, as the exclusion of arbitration from European law is not an expedient option, it seems preferable to address the interfaces with European procedural law in the new Regulation Brussels I explicitly and positively instead of awaiting the proposals for a comprehensive EU-instrument on arbitration in a close future. ((See *Bollée*, Annotation to ECJ, *Allianz SpA./.West Tankers*, Rev. arb. 2009, 413, 427.)) The proposals of the Heidelberg Report on the reform of the Regulation Brussels I must be seen in this context.

III. The proposals of the Heidelberg Report

1. The objectives of the Heidelberg Report

When the Report was prepared, its authors were fully aware of the pending reference of the House of Lords to the ECJ in *West Tankers* and expected the outcome of the case. Therefore, the main objective of the proposals is to avoid a West Tankers' situation and to preserve the prevalence of arbitration agreements in a constellation where a party initiates litigation in a (foreign) civil court although it is bound by an arbitration clause. ((*Schlosser*, SchiedsVZ 2009, 129, 130 et seq.; *Hess*, in: Global Arbitration Review 4/2009, p. 12, 16 – Round Table on the EU Green Paper (Brussels 6/29/2009).)) The proposals aim to reduce the uncoordinated competition of parallel proceedings in different Member States and to prevent torpedo actions. Court proceedings shall be concentrated in the Member State where the arbitration takes place. Accordingly, the proposals provide for an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States and the corresponding obligation of the courts in all other Member States to transfer parallel litigation to the courts of the Member State where the arbitration takes place.

In response to some of the criticisms, it seems to be appropriate to clarify a major point which the proposals neither intend nor contain: First, they do not intend to increase satellite or parallel litigation in cases where the arbitration clause is

undisputed. ((This criticism – unfortunately based on a misreading of the proposal – was expressed by the International Bar Association Arbitration Committee, Working Group on the reform of the Regulation Brussels I, Submission to the European Commission of June 15, 2009 (ref no 733814/1) no 26. According to this reading, parties of an arbitration agreement "would be forced to sue in a court instead of initiating arbitration proceedings". This misunderstanding was clarified during a round table in Brussels, 6/29/2009, but it is still present in many submissions, see Global Arbitration Review 4/2009, p. 20.)) Since the Regulation only addresses the coordination of conflicting litigation between state courts, it does not address the relationship between state courts and arbitration – this issue is left to the New York Convention and the procedural laws of EU-Member States. ((*McLaughlin*, 336 RdC, 203, 374 et seq (2008) criticizes the Heidelberg Report, because it does not ensure that the courts of the Member State where the arbitration takes place directly send the parties to arbitration. However, this solution would implement the French doctrine of the negative kompetenz-kompetenz at the European level although it has not been accepted by most of the EU Member States. In addition, the proposal of *McLaughlin* would directly include arbitration in the framework of the Regulation and enlarge its scope considerably. The Heidelberg Report clearly distinguishes between court proceedings and arbitration proceedings.)) Accordingly, when the arbitration agreement is undisputed, parties may immediately initiate arbitration proceedings without any recourse to State courts. ((The opposite assertion by *E. Gaillard*, Letter to (former) EU-Commissioner *Barrot* of June 29, 2010, is not correct: "It means that applying to courts at the seat of arbitration will become a prerequisite to arbitration proceedings conducted within the European Union". This assertion is obviously based on a misreading of the proposal which only addresses parallel proceedings (on the validity of the arbitration clause) in different EU-Member States.)) Even if the clause is disputed, Member States shall be free to provide a system of negative competence-competence where the arbitral tribunal decides on the validity of the clause or Member States ((*Radicato di Brozolo*, IPRax 2/2010, criticises the proposal as "courting disaster, as the … proceeding may end up … before a national court." However, according to Article V (1) (a) NYC, the validity of the arbitration clause will finally be verified by a "national court". However, the advantage of the proposed Article 22 no. 6 JR is that this decision will come up at a very early stage of the proceedings. Accordingly, the parties will save money if the clause is deemed to be invalid or they will get increased legal certainty, as they will be certain that the award will

not be annulled because the arbitration clause is deemed void.)) may provide a system where the competent state court may decide on the validity of clause.

2. The main proposals of the Heidelberg Report

The starting point of the Heidelberg Report was the *West Tankers* decision of the ECJ. ((ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc* ECR 2009 I-)) As a result of this judgment, a party bound by an arbitration cause may institute parallel litigation in a civil court in order to circumvent the arbitration clause. According to the case law of the ECJ civil courts in the Member State where the arbitration takes place are not allowed to grant anti-suit injunctions against parallel civil litigation. Accordingly, torpedo actions aimed at delaying or even destructing arbitral proceedings may be easily initiated by an obstructing party. ((*Briggs*, [2009] LMCLQ, 161, 165 – 166.))

For this reason, the Heidelberg Report proposed to replace the anti-suit injunction by a similar device (declaratory relief) aimed at securing the priority of arbitral proceedings. To achieve this objective, the report proposed the incorporation of two new articles in the Judgments Regulation which should read as follows:

New Article 22 no.6: *"The following courts shall have exclusive jurisdiction, (…) (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place."*

New Article 27A: *"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 of the existence, the validity, and/or scope of that arbitration agreement".*

These provisions shall concentrate the proceedings on the validity of the arbitration agreement in the courts of the Member State where the arbitration takes place. ((As the parties usually agree on the seat of arbitration, the proposal fully respects the principle of party autonomy.)) In this respect, the proposal is not entirely new. In several Member States, the courts may assist arbitration proceedings at a very early stage and give judgment on the validity of the

arbitration clause. ((It corresponds to the legal situation in many Member States, as England (sections 32 and 72 of the Arbitration Act), Germany (section 1032 (2) ZPO) and Italy (article 819b (3) CCP), *Steinbrück/Illmer*, SchiedsVZ 2009, 188, 191.))

If applied to the facts in *West Tankers*, the proposed articles would oblige the Italian courts to stay the proceedings and transfer the case to the English courts. According to Sec. 32 and 72 of the Arbitration Act, the High Court is competent to decide on the validity of the arbitration agreement. However, the arbitral tribunal will decide on the validity of the clause after its constitution (kompetenz-kompetenz). The tribunal may render an interim award on its jurisdiction which can be challenged (immediately) in the State court. The judgment of the competent court of the Member State on the validity (or annulment) of the award will be recognised in all EU-Member States pursuant to Article 32 JR. Thus, a uniform regime for the recognition of decisions on the validity of arbitral agreements supports the coherent application of Article II NYC in all EU Member States. In addition, the recognition of an arbitral award under Article V (1) (a) NYC will equally be improved considerably. ((If arbitral proceedings take place in Paris, French courts will help the parties to constitute the arbitral tribunal. The arbitral tribunal will decide on the validity of the clause (*negative competence-competence*). Thereafter, the French courts endorse the (partial) award on the validity of the clause. This decision will be recognised in all EU-Member States pursuant to Article 32 JR. Thus, a uniform regime for the recognition of decisions on the validity of arbitral agreements supports the coherent application of Article II NYC in all EU Member States.))

In respect of the proposed Articles 22 no 6 and 27 A JR, three points shall be clarified: First, the notion of ancillary measures to arbitral proceedings is strictly limited to supportive measures of civil courts. This relates to measures such as the decision on the validity of the arbitration clause, the nomination of an arbitrator or the expansion of time limits. ((Supportive measures aimed at the preservation and the taking of evidence shall not be included; in this respect the author endorses the criticism of *Steinbrück* and *Illmer*, SchiedsVZ 2009, 188, 192.)) It does not include provisional measures in terms of Article 31 JR related to the substance of the disputes at issue in the arbitral proceedings. ((In this respect, the concerns expressed in the submission of the International Bar Association Arbitration Committee, Working Group on [the reform of the

Regulation Brussels I] to the EU Commission, (ref. no 733814/1 of July 2009), no 20 d) are not endorsed by the Heidelberg Report, see *Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 740.)) Accordingly, the case law of the ECJ in *van Uden* (([lbrxID185] ECJ, 11.17.1998, Case C-391/95*, Van Uden ./. Deco Line*, ECR 198 I-7091.)) will be retained; provisional measures will still be available in all EU Member States. Second, the proposed article will overturn the case law of the ECJ in the *Marc Rich* case, (([lbrxID185] ECJ, 7.25.1991, case 190/89, *Marc Rich./.Società Italiana Impianti,* ECR 1991, 3855, no 28.)) since the Regulation will address supporting measures of civil courts for arbitral proceedings. Third and most importantly, the proposal will establish an exclusive competence for proceedings challenging the validity of the arbitration agreement. These proceedings shall be concentrated in the Member State in which the arbitration takes place. ((The exclusive head of jurisdiction is reinforced by the proposed Article 27A which obliges the courts of other Member States to transfer parallel or satellite proceedings to the Member State where the arbitration takes place.))

Finally, it should be stated that the proposed articles fully respect party autonomy, since the parties usually designate the place of arbitration (even if parties wish to delocalise arbitration proceedings). According to the proposal, the designation of the place of arbitration does not only determine the lex arbitri, but also fixes the jurisdiction of the state courts for a (potential) setting aside of the award and for supportive measures. However, for parties engaged in arbitration the proposed framework also entails a certain burden: They must carefully draft arbitration clauses with regard to the lex arbitri and the location of the proceedings. In case the place of arbitration has not been sufficiently determined, the report proposes to introduce a new recital containing a definition of the place of arbitration to support Article 22 (6) JR. The new recital shall constitute a fall-back provision. ((The proposed recital reads as follows: “the place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.” The second sentence of the proposal is criticised as too wide and too imprecise. As an alternative, it seems to be possible to delete the second sentence. However, if the arbitral tribunal does not reach an agreement on the place of arbitration, the proposed regime under the Regulation Brussels I will not apply.))

3. Should the arbitration exception of the JR be deleted?

The most controversial proposal of the Heidelberg Report is the deletion of the "arbitration exception" in Article 1 (2) (d) JR. This deletion would entail a close connection between the New York Convention and the Judgment Regulation: the prevalence of the New York Convention would be ensured by Article 71 JR, guaranteeing the New York Convention's priority as a so-called 'special convention'. ((Surprisingly, the submission of the IBA Working Party to the EU Commission does not mention Article 71 JR and its impact of maintaining the priority of the NYC. In this respect, the critique forwarded seems to be incomplete.)) Yet, arbitral proceedings could still not be qualified as proceedings pending in a "court" of a Member State and arbitral awards could still not be referred to as "judgments". However, court proceedings supporting arbitration in civil and commercial matters would be covered by the scope of the Judgment Regulation. In addition, a judgment on the validity of the arbitration agreement (given by the court competent under Article 22 paragraph 6 JR) will be recognised in all other Member States under Article 32 JR, thereby excluding the risk of diverging judgments on the validity of the arbitration agreement in the European Judicial Area. The coordinated operation of the JR and the NYC in this respect will improve the position of parties to arbitration considerably. ((If a party seeks the recognition of an arbitral award under Article V NYC, he or she can rely on the judgment of the court in the Member State of the arbitration proceedings which confirmed the validity of the arbitration clause: As this judgment will be recognised under Article 32 et seq. JR, the validity of the arbitration agreement cannot be challenged in other EU-Member States under Article V (1) (a) NYC.))

The proposed deletion of the arbitration exception has been widely criticized by the arbitration world. To some extent, this critique seems to be understandable since the proposal will visibly reduce the "psychological gap" between European civil litigation and global arbitration under the New York Convention. However, in practice, the implications of the proposal will be rather limited, because the prevalence of the NYC shall be fully guaranteed by Article 71 JR. ((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 130.)) Pursuant to this provision, the Regulation Brussels I fully guarantees the prevalence of special conventions. ((This principle was confirmed recently in the opinion of GA *Kokott* in the case C-533/08, *TNT Express Nederland B.V. v. Axa Versicherungs AG*, para.

31 et seq.)) Further, the arbitral proceedings as such are not addressed by the Judgments Regulation. Only the supportive functions shall be included in the framework of the Regulation. As a result, the present state of affairs will largely remain unchanged.

However, two arguments have been raised in the current discussion, which deserve closer attention. The first argument relates to Article II NYC. According to the Heidelberg Report, a (declaratory) judgment on the validity of an arbitration agreement could be recognised in other Member States under Article 32 JR. Some critics of the proposal argued that this result would violate Article II NYC which obliges each contracting party to apply this provision independently. ((IBA Arbitration Committee Working Group Submission, no. 22.)) Yet, this critique does not correspond to public international law. As the New York Convention provides for a uniform law, there is a general assumption that the courts of its contracting parties will apply its provisions equally. ((The very reason for implementing uniform laws is to set up a uniform regime which is interpreted and applied by the courts in a uniform way. Accordingly, a genuine obligation of applying uniform laws independently from the case law of other Contracting parties clearly contradicts the objectives of uniform laws, see generally *Gruber*, Methoden des internationalen Einheitsrechts (2004), p. 336 et seq.)) Seen from this perspective, there is no reason to oblige the courts of contracting party in a regional framework to verify the validity of the agreement individually, as long as the courts in the regional framework are deemed to apply the New York Convention correctly. ((Same opinion *Illmer/Steinbrück*, SchiedsVZ 2009, 188, 193.))

A second argument has been raised recently by the government of the U.K. ((Submission of the UK government to the European Commission, nos. 35 – 37.)) which expressed concerns that the proposed articles would entail conferring the external competence on arbitration on the Community. ((Obviously, this concern was triggered by the ECJ's opinion on the external competences of the European Union with regard to the Lugano Convention, ECJ 2/7/2006, ECR 2006 I-1145, see *Hess*, Europäisches Zivilprozessrecht (2010), § 2 III, nos 68 et seq.)) As a consequence, the UK government proposed to enlarge the arbitration exception of Article 1 (2) (d) of the Regulation and to clarify that it applies to all aspects of the arbitration process. As a result, arbitration (according to the NYC and national laws) would generally prevail over European procedural law. ((Such a provision

would severely obstruct the coherent application of the Brussels I Regulation since it would exclude the application of the Regulation in all (incidental) matters related to arbitration. It is doubtful that such a concept corresponds to the fundamental principle of the supremacy of the Union law.))

With all respect, this proposal does not correspond to the present state of arbitration in the Internal Market. As has been demonstrated above, ((Supra at footnote 19 et seq.)) arbitral awards implement (mandatory) European law and, according to the case law of the ECJ, they cannot be detached from European law. Further, the concern of the U.K. Government does not seem to be justified. As the proposed changes to the Regulation only address the concurrence of supporting measures of State courts with regard to arbitration, the whole arbitration process is not included. In addition, the prevalence of the New York Convention shall be fully observed. However, to avoid any unnecessary "transfer" of competences to the Union, it may be advisable to maintain the arbitration exception but to clarify that the Regulation applies to declaratory relief under Articles 22 (6) and 27 (A) as well as to supportive measures under Articles 22 (6) and 31. A reformulated Article 1(2) (d) could read as follows:

"Arbitration, save supportive measures and declaratory relief proceedings as provided for under Articles 22(6), Article 27A and Article 31."

This reformulation of Article 1 (2) (d) JR would certainly equally (and hopefully) reassure the arbitration community. However, the basic proposal to realign arbitration and litigation will remain untouched.

IV. The EU Commission's Green Paper on the Reform of the Brussels I Regulation

1. The Green Paper

The Green Paper addresses the relationship to arbitration in an open-ended manner. Its 7th section starts by describing the present state of arbitration as a "matter of great importance to international commerce." ((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 of April,

21st,2009, COM (2009)175 final, p. 9.)) It also clearly emphasises the prevalence of the New York Convention which shall remain untouched by the legislative efforts. However, the Paper seeks to obtain the opinion of Member States and stakeholders in the field about the interfaces between arbitration and the Regulation. Among other things, the Commission asks about appropriate actions at the Community level with regard to the strengthening of arbitration agreements, the ensuring of a better coordination between court and arbitration proceedings and the improvement of the effectiveness of arbitral awards.

As the Green Paper contains a questionnaire, it would be premature to conclude that the EU Commission intends to include arbitration into the scope of the Regulation. In addition, it should be noted that the EU Commission did not endorse the proposals of the Heidelberg Report comprehensively, but presented several alternative legislative options. However, the existence of the 7th question in the Green Paper clearly manifests that the Commission is considering proposing legal action in this field.

2. The reactions to the Green Paper

By June 30, 2009, the Commission received many reactions, 21 from the EU Member States and 1 from Switzerland (a third state); in addition many reactions from the bar, the industry, consumers' protection associations, universities and individual citizens have been submitted. ((The submissions are available here.)) Many stakeholders in arbitration, especially law firms, arbitration associations and arbitration institutions also submitted their (diverging) views. As far as arbitration is concerned, the opinions differ: 5 Member States expressed (cautiously) support for the proposal to address the interfaces between arbitration and litigation, ((Belgium, Sweden, Slovenia and Spain (and – cautiously: Germany).)) while 3 Member States expressed concerns. ((Austria, France and the United Kingdom. Switzerland (as a third state, but a contracting party of the Lugano Convention) expressed satisfaction with the judgment of the ECJ in *West Tankers* and denied any need for changes.)) Especially the French arbitration scene strongly disagreed with the proposal of addressing the interfaces between arbitration and litigation in the Regulation. ((See the submissions presented by AIA; Allen and Overy LLP (presenting an own proposal); Barreaux de France; Centre belge d'arbitrage et de mediation; Chamber of national and international Arbitration of Milan; Chambre de commerce et d'industrie de Paris; Comité

français de l'arbitrage; Comite national Français de la Chambre de Commerce Internationale; Deutscher Industrie- und Handelskammertag ; International Bar Association Arbitration Committee ; Mr. E. *Gaillard* ; Paris, The Home of International Arbitration (A. *Mourre*); Lovells LLP. It must be reiterated, however, that some of these critics obviously misunderstood the proposed solution of the Heidelberg Report; see supra footnotes 33 – 35.)) However, other stakeholders in arbitration supported the idea. ((See inter alia the submissions presented by Bundesrechtsanwaltskammer; City of London Law Society; Civil Justice Council (cautiously); Clifford Chance LLP ("may be beneficial"); Commercial Bar Association; Council of Bars and Law Societies of Europe; Deutscher Anwaltsverein; German Institution of Arbitration; Herbert Smith LLP; Mr. A. *Dickinson*; Siemens AG; Spanish Arbitration Club.)) All in all, it must be noted that a clear tendency for or against the proposals cannot be ascertained.

The Green Paper is currently discussed in the European Parliament, accompanied by an intense lobbying of the "arbitration scene". In December 2009, the Reporter of the Parliament, *Tadeusz Zwiefka*, issued a first statement on the matter which evinced great reluctance toward a fundamental reform of the Regulation. ((See here.)) According to this pre-paper, the Reporter intends to adopt the position of the UK government which strives for a comprehensive re-nationalisation of arbitration. ((See supra text at footnote 59.)) However, as has been demonstrated above, such a solution is not in accordance with the role and the function of arbitration in the Internal Market. ((See supra text at footnotes 19 et seq.)) Further, since the interfaces between arbitration and European procedural law have become a recurrent issue in the case law of the ECJ and the Member States, the issue will reappear on the agenda of the European legislator in the near future. Against this background, it is recommended to address the interfaces by the Brussels Regulation now – in a positive, yet prudent way. ((A regional, supporting regime is not inconsistent with the New York Convention as the Geneva Convention of 1961 clearly demonstrates.))

VI. Concluding Remark

Will it be possible to reconcile the diverging perspectives of the arbitration world and European procedural law? From today's perspective, a clear answer to this question may appear premature. However, as has been shown in this contribution, much of the criticism forwarded against the proposals of the

Heidelberg Report is still based on misunderstandings. Moreover, a solution which promotes that arbitration shall take blind precedence over the Brussels Regulation would entail a re-nationalisation and fragmentation of European procedural law. This, however, contravenes the requirements of a coordinated dispute resolution in the Internal Market.

On the other hand, the proposal of the Heidelberg Report to delete the arbitration exception entirely maybe goes too far. Therefore, it may be advisable not to delete the arbitration exception, but rather to reduce and to clarify its scope. ((See supra text at footnote 59.)) However, the inclusion of the new Articles 22 no 6 and 27A in the Judgments Regulation is still strongly recommended. The critics expressed against this proposal seem not to be convincing. Nevertheless, the proposed regime should only apply if the parties choose an EU Member State as the place of arbitration. Third state relations should be excluded – in this respect Member States should be free to adapt their national arbitration laws to the international framework.

One final objection against the inclusion of arbitration in the framework of Brussels I remains: Many critics expressed the concern that parties would not select Europe as a place of arbitration since the autonomy of arbitration would not be respected. However, this concern does not seem to be realistic. The aim of the proposed Articles 22 no 6 and 27 A JR is to avoid obstructive tactics against arbitration, especially torpedo-actions. In this respect, the position of arbitration in Europe will be improved considerably. Further, the decision on the validity of an arbitration clause will be recognised in all Member States. Thus, legal certainty for the parties with regard to arbitration will be improved considerably. Against this background, it seems very unlikely that the proposed “regional regime” will unleash an exodus of arbitration from Europe to other places in the world.