US Supreme Court Enforces No-Class-Action Arbitration (Again): DIRECTV, Inc. v. Imburgia

By Verity Winship (University of Illinois College of Law).

In *DIRECTV, Inc. v. Imburgia* – decided on December 14, 2015 – the US Supreme Court enforced a no-class-action arbitration clause, shutting down a consumer class action.

The consumer contract at issue provided that "if the law of your state" did not allow waiver of class arbitration, the agreement to arbitrate as a whole was invalid. At the time DIRECTV drafted the contract, California law made class-arbitration waivers unenforceable. But the US Supreme Court later undid this in *AT&T Mobility LLC v. Concepcion*, which required California to enforce these waivers under US federal law – the Federal Arbitration Act (FAA).

Against this backdrop, the *DIRECTV* majority opinion navigates choice of law and the interplay between US state and federal law in a few discrete steps.

First, the parties could elect invalid California law as their choice of governing law. "In principle," Justice Breyer indicates, writing for the majority, parties "might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California … irrespective of that rule's invalidation in *Concepcion*".

Second, the state court held that the parties had elected invalid California law. The state court has the final word on the interpretation of state law, and contract law is at the heart of this subnational prerogative. So the Supreme Court must live with the California state court's holding that the contractual selection of "law of your state" included now-invalid California law (the last on Justice Breyer's list above).

But, *third*, the state court's interpretation singled out arbitration contracts, so was pre-empted by the Federal Arbitration Act.

The Supreme Court reasoned that the California state court decision must not

conflict with the FAA. In particular, it must put arbitration contracts on “equal footing” with all other contracts. According to the Supreme Court, the California court singled out arbitration when interpreting the phrase “law of your state”. Federal law accordingly pre-empted its decision and the arbitration agreement must be enforced.

The two dissenting opinions make very different points.

Justice Thomas would restrict the reach of the FAA so that it does not reach state courts.

A separate dissent by Justices Ginsburg and Sotomayor highlighted the underlying dynamics that have made this area of the law so controversial in the US and that perhaps have pushed the Supreme Court to revisit these questions repeatedly in recent years. In particular, the dissent decried the majority’s reading of the FAA to “deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts.” The dissent would not “disarm consumers, leaving them without effective access to justice”.

Essay Contest: Nappert Prize in International Arbitration

Thanks to the generosity of Sophie Nappert (BCL’86, LLB’86), the Nappert Prize in International Arbitration will be awarded for the second time in 2016 after an enormously successful inaugural competition in 2014. The Nappert Competition is open to all students, junior scholars and junior practitioners from around the world. To be eligible for the prize, authors must be either currently enrolled in a B.C.L, LL.B., J.D., LL.M., D.C.L., or Ph.D. program (or their local equivalents). Those who are no longer in school must have taken their most recent degree within the last three years, or have been admitted to the bar (or the local equivalent) for no more than three years (whichever is later).

Prizes: First place: Can $4,000; Second place: Can. $2,000; Third place: Can $1,000. Winning one of the awards will also carry with it the presentation of the paper at a symposium to be held at McGill in autumn 2016 (the expenses of the winners for attending the symposium will be covered). The precise date of the symposium will be fixed in the coming months. The best oralist will receive an award of Can. $1,000.

Deadline: April 30, 2016.

The essay:
• must relate to commercial or investment arbitration;
• must be unpublished (not yet submitted for publication) as of April 30;
• must be a maximum of 15, 000 words (including footnotes);
• can be written in English or in French;
• should use OSCOLA or some other well-established legal citation guide (e.g. McGill Red Book; Bluebook);
• must be in MS Word format.

Jurors for the 2016 competition will be:
• Sébastien Besson, Partner, Lévy Kaufmann-Kohler, Geneva
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• Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes, Washington, DC
• Cesar Pereira, Partner, Justen, Pereira, Oliveira, and Talamini, São Paolo
• Abby Cohen Smutny, Partner, White & Case LLP, Washington, DC

Submissions are to be emailed to Camille Marceau, Camille.Marceau@mail.mcgill.ca, as an attached file before April 30, 2016. Submissions should be accompanied by a statement affirming the author's eligibility for the competition, confirmation that the work is original to the author, and confirmation of the unpublished status of the paper. Review of the papers will start after April 30. For more information, kindly email Mlle. Marceau, Camille.Marceau@mail.mcgill.ca, or Professor Andrea K. Bjorklund, andrea.bjorklund@mcgill.ca, Faculty of Law, McGill University.

The Protection of Arbitration Agreements within the EU after West Tankers, Gazprom, and the Brussels I Recast

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The ECJ's recent decision in *Gazprom* (Case C-536/13) is the latest addition to a series of judgments by the Court that have considerably reduced the remedies available to claimants who seek to enforce the negative dimension of an arbitration agreement, i.e. the other party's obligation not to initiate court proceedings. They have created a coherent framework for the protection of arbitration agreements within the EU, which has been sanctioned and complemented by the recast of the Brussels I Regulation. Yet, a number of questions still remain open – some of which are unlikely to be answered any time soon.

The current status quo

Traditionally, four types of remedies are available to parties seeking enforcement of the negative dimension of an arbitration agreement from a court. First, they may ask the court seised by the other party to stay or dismiss the proceedings. Second, they may ask another court to issue an injunction against the party in breach in order to restrain the latter from initiating or continuing litigation (so-called 'anti-suit injunctions'). Third, they may bring an action for damages to recover the loss incurred due to the litigation. Fourth, they may apply for the foreign judgment not to be recognized and enforced.

While courts in all member states of the EU regularly dismiss or stay proceedings brought in violation of an arbitration agreement, and refuse to recognize and

enforce judgments obtained in breach of such an agreement, only English courts have granted anti-suit injunctions and awarded damages for breach of an arbitration agreement in the past. Yet, as far as litigation in the courts of EU member states is concerned, all of these remedies have been affected by the harmonized regime of jurisdiction and recognition and enforcement of judgments in civil and commercial matters that has been established by the Brussels Convention and its successor regulations.

It is true, though, that regarding the **first remedy**, i.e. a dismissal or stay of local proceedings, there has never been much doubt that the European instruments do not require the courts of a member state to adjudicate if this would violate a valid arbitration agreement; instead, they have to send the case to arbitration, as required by Art. II(3) of the New York Convention. The ECJ's decision in *Gazprom* and the first paragraph of the new recital (12) of the Brussels I Recast merely confirm that this is still the case.

Access to the **second remedy**, i.e. anti-suit injunctions issued by English courts to prevent a party from litigating in breach of an arbitration agreement, has however been radically restricted by the ECJ's case law. Consistently with its reasoning in *Gasser* (Case C-116/02) and *Turner v Grovit* (Case C-259/02), the Court held in *West Tankers* that "even though proceedings [to enforce an arbitration agreement via an anti-suit injunction] do not come within the scope of [the Brussels I Regulation], they may nevertheless have consequences which undermine its effectiveness", if they "prevent a court of another Member State from exercising the jurisdiction conferred on it by [the Regulation]", which includes the decision on the jurisdictional defence based on an arbitration agreement. Accordingly, "it is incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

While the new recital (12) tries to clarify the scope of the exclusion of arbitration in Art. 1(2)(d) of the Regulation, nothing in the legislative history of the Recast, which left the actual text of the regulation otherwise unchanged, suggests that it was supposed to reverse the decision of the Grand Chamber in *West Tankers*. Thus, it was to the surprise of many that Advocate General Wathelet, in his opinion on *Gazprom*, argued that "the EU legislature intended to correct the boundary which the Court [in *West Tankers*] had traced between the application

of the Brussels I Regulation and arbitration" with the Recast. He opined that para. 2 of recital (12), which excludes decisions "as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed" from the rules on recognition and enforcement, should be understood as excluding "the verification, as an incidental question, of the validity of an arbitration agreement [entirely!] from the scope of the Brussels I Regulation". Consequently, "the fact that the Tribunale di Siracusa [in *West Tankers*] had been seised of an action the subject-matter of which fell within the scope of the Brussels I Regulation would not have affected the English courts' power to issue anti-suit injunctions in support of the arbitration because […] the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of that regulation."

But as the question submitted to the ECJ concerned the pre-recast regulation (No. 44/2001), the Court – while implicitly rejecting the Advocate General's proposition that recital (12) "in the manner of a retroactive interpretative law, explains how that exclusion must be and *always should have been* interpreted" – did not need to (and did not) discuss this proposition; instead, the Court simply distinguished the present question of recognition and enforcement of "an arbitral award prohibiting a party from bringing certain claims before a court of that Member State from the question of the court issuing itself "an injunction […] requiring a party to arbitration proceedings not to continue proceedings before a court of another Member State", only the latter type of injunction being "contrary to the general principle which emerges from the case-law of the Court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it". Yet, the fact that the Court deemed such a distinction necessary and referred repeatedly to its decision in *West Tankers* may be seen as an indication that it does not consider this decision to be already overruled by the Recast.

Against this background, it certainly is surprising that the **third remedy**, i.e. damages for the breach of an arbitration agreement, has yet to be subject to a decision of the ECJ – and has neither been affected by any paragraph of the new recital (12). As English courts may no longer issue anti-suit injunctions – a remedy expressly admitted to prevent that "the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy" (Lord Millett in *The Angelic Grace* [1995] 1 Lloyd's Rep 87) – it seems very likely

that damage awards will become much more prevalent in English courts. They have thus been allowed by the High Court after the ECJ's decision in *West Tankers* ([2012] EWHC 854 (Comm)) and awarded by the Court of Appeal in *The Alexandros T* [2014] EWCA Civ 1010.

Regarding the **fourth remedy**, i.e. the refusal to recognize and enforce a judgment obtained in breach of an arbitration agreement, recital (12) now provides a clear solution, which seems to limit the ECJ's decision in *Gothaer* (Case C-456/11) and to reverse recent English case law (cf *The Wadi Sudr* [2009] EWCA Civ 1397). According to its paras 2 and 3, decisions as to the validity of an arbitration agreement are excluded from the provisions on recognition and enforcement, while decisions as to the substance of the dispute are subject to these provisions unless this would require a member state to violate its obligations (i.e. to enforce a valid arbitral award) under the New York Convention. This is not only a welcome step towards the legal certainty that the difficult relationship between the Regulation and the Convention indubitably requires but should also be understood as an attempt to counter-balance the absence of anti-suit injunctions within the Brussels I framework.

Open Questions

The case law of the ECJ and recital (12) of the Recast seem to provide a coherent and workable framework for the protection of arbitration agreements; they put a strong emphasis on the principle of mutual trust between the member states, but balance it out with their obligations under the New York Convention. Still, some questions remain open.

First, and foremost, the ECJ has held in *Gazprom* that the Regulation does not preclude the courts of a member state "from recognising and enforcing […] an arbitral award prohibiting a party from bringing certain claims before a court *of that Member State*". But does the same apply to an arbitral anti-suit injunction restricting proceedings before a court *of another member state*? Several of the Court's arguments – which are all carefully limited to the question of recognition and enforcement in the state where the relevant proceedings are brought – indicate that this might not be the case: while enforcing an arbitral award by ordering a party to stop or limit local proceedings raises "no question of an […] interference of a court of one Member State in the jurisdiction of the court of another Member State", enforcing an award by ordering a party to stop or limit

proceedings elsewhere might indeed amount to such an interference. While there is no risk "to bar an applicant who considers that an arbitration agreement is void, inoperative or incapable of being performed from access to the court before which he nevertheless brought proceedings" if they can contest recognition and enforcement in this very court, the defendant will indeed be denied access to that court if the courts of another member state enforce an arbitral award by ordering him to stay these proceedings. And while failure to comply with an arbitral anti-suit injunction "is not capable of resulting in penalties being imposed upon it by a court of another Member State", the enforcement of such an injunction in another member state would attach to the award that exact kind of penalty. Thus, while the recognition of such an arbitral award in the member state where the proceedings are brought is no more contrary to the Brussels I Regulation than the court's power to stay proceedings of its own motion in order to give effect to an arbitration clause, the enforcement of such an award by the courts of another member state would be much more similar to the situation which the ECJ ruled out in *West Tankers*.

Second, the ECJ has not yet decided on the admissibility of damage awards in view of its restrictive approach to anti-suit injunctions. English courts seem to distinguish the one from the other by treating anti-suit injunctions as a remedy for the *jurisdictional* dimension of arbitration agreements while considering damages as a remedy for their *contractual* dimension. Yet, one may argue that the practical effects of both remedies are still very similar, especially if damages are granted, as in *The Alexandros T*, by way of an indemnity even before litigation has finished. But although it is hard to see why the ECJ would not consider damage awards to be contrary to "the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it" as formulated in *West Tankers*, it is indeed not very likely that the Court will get a chance to make such a decision after the English courts – the only courts that actually grant such awards – saw no need to submit the question in *The Alexandros T*.

Finally, it has been noted (by Hartley [2014] ICLQ 843, 866) that the new rules on recognition and enforcement of decisions that have been obtained in violation of an arbitration agreement in paras 2 and 3 of recital (12) leave open one particular case, namely the situation where a court is asked to recognize and enforce both an arbitral award made within the jurisdiction (and thus not creating an

obligation under the New York Convention) and a conflicting judgment on the merits from another member state. While the wording of recital (12) indicates that the court has to give effect to the judgment, this would give the arbitral award the weakest effect in its "home jurisdiction". The better approach therefore seems to be to consider arbitral awards made within the jurisdiction as a "judgment given between the same parties in the Member state addressed" and apply Art. 45(1)(c) of Brussels I by analogy.

Parallel Proceedings and Contradictory Decisions in International Arbitration

Bruylant, in its Arbitration collection, has just published the speakers' contributions to the conference on *Parallel Proceedings and Contradictory Decisions in International Arbitration* hosted by ICC on this sensitive topic. The conference was organized by the students and alumni of International Law programs of the University Panthéon-Assas, Paris II. A detailed report was published by the ICC at the time. The book dedicated its first section to Investment Arbitration and a second section to Commercial Arbitration. The book, in French, can be ordered on Bruylant's website.

Summary:

Première partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage d'investissement

- Développement des procédures parallèles et facteurs de désordres procéduraux dans l'arbitrage d'investissement, par *Walid Ben Hamida*
- La contrariété de décisions dans l'arbitrage d'investissement : risques et conséquences, par *Fernando Mantilla-Serrano*
- Procédures parallèles : aspects procéduraux et solutions institutionnelles, par *Éloïse Obadia*

Seconde partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage commercial international

- Propos introductifs relatifs aux Problématiques spécifiques à l'arbitrage commercial international, par *Philippe Leboulanger*
- La prévention des contrariétés de décisions arbitrales et étatiques, par *Claire Debourg*
- L'exclusion de l'arbitrage dans la refonte du règlement Bruxelles I, par *Laurence Usunier*
- Les contrariétés de décisions dans le contrôle des sentences arbitrales, par *Sylvain Bollée*
- Une illustration récente : l'affaire Planor Afrique, par *Alexandre Reynaud et Héloïse Meur*
- La jonction de procédures arbitrales dans le règlement de la Chambre de commerce internationale, par *Thomas Granier*
- Un remède : la concentration du contentieux devant l'arbitre, par *Jean-Pierre Ancel*

Conclusion

Procédures parallèles et contrariété de décisions dans l'arbitrage international : essai de synthèse, par *Daniel Cohen*

ArbitralWomen/TDM Special Issue and Event on Diversity in International Arbitration

ArbitralWomen, Transnational Dispute Management and Ashurst are hosting an event in London on 2 July 2015 for the launch of the TDM Special Issue on "Dealing with Diversity in International Arbitration." The event will be followed by a drinks reception.

This Special Issue will analyse discrimination and diversity in international arbitration. It will examine new trends, developments, and challenges in the use of practitioners from different geographical, ethnic/racial, religious backgrounds as well as of different genders in international arbitration, whether as counsel or tribunal members. The launch of the Special Issue will be followed by the launch of the AW New Website.

Download the brochure here.

Claudia Pechstein and SV Wilhelmshaven: Two German Higher Regional Courts Challenge the Court of Arbitration for Sport

By Professor *Burkhard Hess* (Director) and *Franz Kaps* (Research Fellow), *Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*

In a decision of January 15, 2015, the Munich Court of Appeal (OLG) addressed dispute resolution practices common to sports law. The case concerns the well-known German speed skater Claudia Pechstein. In February 2009, Ms. Pechstein was imposed a two year ban by the International Skating Union (ISU) for blood doping. As she had signed an arbitration clause, she challenged the ban before the Court of Arbitration for Sport (CAS). However, an arbitral tribunal of the CAS confirmed the ISU suspension in November 2009. Ms Pechstein challenged the award before the Swiss Federal Tribunal (case no. 4A 612/2009 and 4A 144/2010), but without success. On December 31, 2012, Ms. Pechstein started litigation before the German courts contesting the lawfulness of the ban. She has always asserted that the doping results are due to an illness she has inherited from her father. According to recent (innovative) expert testimonies her allegation is correct.

In its judgment of 15 January, the OLG Munich addressed the validity of the CAS arbitration agreement and the recognition of the arbitral award. Relying on German cartel law the Court concluded that the arbitration agreement was void (a) and the arbitral award could not be recognized (b).

(a) First, the Court held that no valid arbitration agreement had been concluded between Ms. Pechstein and the ISU, as Ms. Pechstein had no choice but to agree to the arbitration clause in favor of the CAS in order to participate to the "World Speed Skating Championship" organized by the ISU. According to the Munich court, the organization of professional sports by international sports federations like the ISU corresponds to a dominant position in the (sports) market, and the ISU had abused this dominant position by imposing the arbitration clause on the athlete. In addition, the Court held that the CAS appeal dispute resolution procedures do not correspond to the required minimum standards of a fair trial as the parties are not treated equally. In this respect the court relies on two arguments: First, parties to the CAS arbitration proceedings must select the arbitrators from a closed list; but only the sports federations (i.e., not the athletes) participate in its drawing up. Furthermore, the Court criticizes the nomination of the president of the arbitration tribunal, made by the CAS and not by the party-appointed arbitrators. Again, the Court denounces the influence of the sports' federation on the process, which entails an unequal treatment of the parties. In light of these arguments it is clear that the judgment is much more about the independence of sports arbitration than about German cartel law. Hence it may prove to be much further-reaching than appears at first sight.

(b) With regard to the recognition of the CAS arbitral award confirming the validity of the ban for doping, the Munich Court applied Art. V (2) (b) NY Convention to hold that the CAS award violated German cartel law pertaining to the German "public policy", and refused to grant recognition. In this respect, the court referred again to the lacking independence of the CAS from the international sports federations.

It must be noted that the "Pechstein-story" has not yet come to an end. A second appeal was filed with the German Federal Supreme Civil Court; a decision is expected in the next months. Moreover, this spring the European Court of Human Rights (pending case 67474/10, *Claudia Pechstein ./. la Suisse*) will decided on a complaint brought by Ms. Pechstein against Switzerland for an allegedly unsufficient review of the CAS by the Federal Tribunal.

In addition, a recent decision of the Court of Appeal Bremen of 30 December 2014 is also worth mentioning here. In the case under consideration a local football club, SV Wilhelmshaven, challenged a ban of the Regional Football Association, imposed on the local football club for the non-payment of a so-called "training compensation". This compensation corresponds to a payment due to a football club by another upon the transfer of an athlete; in the case at hand SV Wilhelmshaven had recruited an Italian football player from Argentina. The FIFA ordered the German club to pay to the Argentinian club the amount of 157.000 € "training compensation". The order was contested by the addressee but confirmed by an arbitral tribunal of the CAS. When the German club failed to pay the sum, the FIFA decreed the German club's relegation to a lower league. Once again, the club challenged this decision before the CAS, once again to no avail. Finally, the German Regional Football Association, being under the statutory obligation to enforce the FIFA decision, implemented the sanction. The SV Wilhelmshaven challenged the relegation before the Bremen Court of Appeal relying on the *Bosman* decision of the CJEU (Case C-415/93) and arguing the incompatibility of the "training compensation" with article 45 TFEU. The Bremen court held that the relegation was indeed incompatible with European Union law, hence it was void. Again, an arbitral award of the CAS was not recognized, this time for non-compliance with mandatory European Union law.

The *SV Wilhelmshaven* litigation may still be appealed before the German Federal Supreme Court. As with the *Pechstein* case it remains to be seen whether the Supreme Court will uphold the decision of the lower court. At any rate, the two controversies clearly demonstrate that arbitration in sports law must, like all arbitration proceedings, abide by minimum standards of procedural fairness (*Pechstein*) and apply mandatory law (*SV Wilhelmshaven*). Otherwise, the awards will be successfully challenged in state courts, and the *de facto* immunity of sports law from state court interference (which is based on arbitration) will find its limits.

Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views

Prof. Dr. Burkhard Hess, Director of the MPI Luxembourg, has very kindly accepted to have his view on two recent AG's opinions published in CoL. Comments are welcome.

Two recent opinions, the one rendered by AG Wathelet on December 8, 2014, in *Gazprom* (Case C-536/13), and the other one given by AG Jääskinen, on December 11, 2014, in *CDC* (Case C-352/13) address the interplay between arbitration and EU law, especially in the context of the Brussels I Regulation. Interestingly, the two opinions adopted different perspectives and, therefore, propose different solutions. Moreover, both cases relate to similar issues on the merits: the enforcement of mandatory Union law in the areas of cartel and of energy law. Accordingly, it appears that the two opinions are also based on diverging conceptions on the role of arbitration *vis-à-vis* mandatory Union law. Therefore, I would like to compare the opinions in order see how EU-law and arbitration should be delineated. As the two cases are currently pending in the CJEU, it is finally up to the Court to decide which direction should be taken.

The opinion in Gazprom: Giving preference to arbitration proceedings

Gazprom is about the admissibility of anti-suit injunctions rendered by an arbitral tribunal (seated in a EU Member State) against civil proceedings pending in civil courts within the European Judicial Area. On the merits, the case is of a highly political significance: it relates to the long-term supply of gas to 90% of the population of Lithuania by the Russian energy giant. According to a framework agreement of 1999 a Lithuanian company (Lietuvos dujos) whose majority was held by Gazprom and the minority by the government was in charge of buying gas from Gazprom and distributing it in Lithuania. In spring 2011, the Lithuanian Ministry of Energy initiated an investigation on price manipulation against Lieutuvos and its directors and tried to change the management. Under Lithuanian company law, it brought an action in the Lithuanian civil courts in order to secure the investigations against the company. As the shareholder

agreement provided for arbitration under the Stockholm Chamber of Commerce, Gazprom initiated arbitration proceedings there. On 31 July 2012, the arbitral tribunal made a "final award" and ordered the Ministry of Energy to withdraw parts of its requests in the Lithuanian court. Finally, the Lithuanian court asked the ECJ whether these orders (which amounted to anti-suit injunctions) were compatible with its empowerment to decide on its jurisdiction under the Regulation Brussels I.

As a starting point, it should be mentioned that the case-law of the CJEU regarding anti-suit injunctions seems to be well settled: In cases C-159/02 *Turner* and C-185/07 *Allianz* (*West Tankers*), the CJEU held that anti-suit injunctions rendered by a court of a EU-Member State against the proceedings pending in another EU-Member State are incompatible with two fundamental principles of EU procedural law. According to the first principle each court has to assess freely whether it has jurisdiction under the Regulation. Furthermore, anti-suit injunctions are incompatible with the principle of mutual trust according to which each court in the European Judicial Area relies, as a matter of principle, on the appropriateness of the judicial systems in other EU-Member States (on this principle, see recently, the Opinion 2/13 of the ECJ of December 18, 2014, on the Accession of the Union to the European Convention of Human Rights, at paras 181 – 195). However, the issue of whether anti-suit injunctions of an arbitral tribunal may impede the proper functioning of European procedural law has not been addressed so far.

In his opinion, AG Wathelet proposed to interpret the Regulation Brussels I in a different way. The Advocate General came to the conclusion that any proceeding where the validity of an arbitration agreement is contested is excluded from the scope of the Brussels I Regulation (para 125). In this respect, the AG proposed to qualify an anti-suit injunction a decision on the validity of the arbitration clause and, consequently, to exclude it from the realm of the Brussels I Regulation. Furthermore, the opinion proposes to reverse the decision of the Grand Chamber in case C-185/07 *Allianz/West Tankers* (paras 126 – 135). According to the Opinion of AG Wathelet, anti-suit injunctions issued by an arbitral tribunals do not create any problem of compatibility with EU law (para 140).

This result is based on the following arguments: Firstly, the AG denies any legal impact of an anti-suit injunction, being an instrument of English law (para 64), on the Lithuanian government because it could only enforced in England (para 65).

Secondly, the Opinion refers to the new Brussels I Regulation 1215/2012 (although temporarily not applicable in the present case, see its Article 66 (1), at para 88). However, the Opinion proposes to apply the (old) Regulation Brussels I as to "be taken into account" (para 89). The AG refers to paragraph 2 of the Recital 12 of the Recast, according to which Art. 1 (2) lit d) of the Brussels I Regulation should be interpreted as excluding "that a ruling regarding the existence and the validity of an arbitration agreement could circulate under the (new) Regulation." According to AG Wathelet, the new Recital should be interpreted as a reinforcement of the arbitration exclusion, in light of which an anti-suit injunction should no longer give rise to the problems of compatibility which had been highlighted by the CJEU in case C-185/07 *Alliance*. Accordingly, under the Recast, anti-suit injunctions by state courts are generally permitted (at para 140). Furthermore, the Opinion proposes that the courts of EU Member States have to refrain from any decision-making when an arbitration clause is invoked unless the clause is considered as obviously void (at para 142). In this respect, it comes close to the French doctrine of the positive competence-competence of arbitral tribunals (paras 149, 151 ff.). Finally, the conclusions deny any application of the principle of mutual trust to arbitral tribunals – even to arbitral tribunal seated in the European union and applying mandatory EU law – because arbitral tribunal are not bound by the Brussels I Regulation (paras 153 ff). Eventually, the AG states that an anti-suit injunction cannot be qualified as a ground of non-recognition for a violation of public policy under article V (2)(b) NYC (paras 160 ff).

If this line of reasoning was endorsed by the Grand Chamber, the case law of the CJEU regarding arbitration would change significantly. However, the conclusions are more directed towards the new Regulation 1215/2012 (temporarily not applicable) than to the case under consideration. Although I do not want to criticize the line of reasoning here in its entirety, I would briefly express the following doubts: First, the origins of anti-suit injunctions in English law do not say anything about their cross-border effects. However, the fact that they are more and more often used in international arbitration tells a lot about their impact on litigation (and there are cases where they had been enforced). Second, the legal value of a Recital should not be over-estimated. They are not part of the operative provisions of a Regulation and cannot be interpreted in a way that impedes the efficiency of the Regulation (see in this respect case C-43/13, *Pantherwerke*, para 20). Furthermore, in the legislative process, there was a

consensus that the Recitals are not intended to change the status quo (see e.g. *Pohl*, IPRax 2013, 110; *Hartley*, ICLQ 2014, 861). In addition, Recital 12, 2nd paragraph itself does not address proceedings of a court confronted with an arbitration clause (and an injunction prohibiting a party from continuing litigation in its court room), but with the recognition of decisions on the validity of arbitration clauses. Finally, Recital 12 does not endorse the French concept of positive competence-competence. Quite to the contrary, the original proposal of the EU-Commission (elaborated by an expert group) providing for an explicit solution of this issue and designed to comply with specifics of French law was rejected by the Parliament and by the Council in the legislative process.

Yet, it remains to be seen whether the CJEU will endorse this "separation" of arbitration from litigation under the Brussels I Regulation. As a result, it may entail a considerable limitation of the effectiveness of the Brussels I system. The opinion mainly addresses the effectiveness of arbitration (paras 98, 148), the effectiveness of the Brussels I Regulation is only considered to the extent that it corresponds to the NYC (see para 142).

The opinion in CDC: Preserving efficient enforcement of EU-law in front of an arbitration clause

Only three days later, in case CDC, AG Jääskinen addressed the interpretation of an arbitration agreement (or of a jurisdiction agreement falling outside of the scope of Article 23 of Brussels I). "CDC" is about the decentralized enforcement of EU-cartel law by actions for damages in the civil courts of EU-Member States. CDC SA is a Belgian corporation which bought claims from 32 pulp and paper companies which had sustained damages by buying hydrogen peroxyde from a Europe wide cartel between 1994 and 2000. CDC brought legal action against six members of the former cartel in the District Court of Dortmund; the jurisdiction of the court is based on articles 5 no 3 and 6 no 1 of the Brussels' I Regulation (2001). The damage claimed amounts of more than EUR 475 million (plus interests).

The defendants contest the jurisdiction of the Dortmund court inter alia by relying on jurisdiction and arbitration clauses found in the general terms of sales contracts on hydrogen peroxide. They assert that these clauses include action for cartel damages and apply to CDC which had acquired the damage claims by assignments. The German court asked the CJEU whether these clauses included

damage claims for infringements of Article 101 TFEU.

To this question, AG Jääskinen gave the following answer: First, he explicitly held that the Dortmund court may interpret the scope of the arbitration clauses (para 98). Second, he stated that party autonomy includes the right to agree jurisdiction and arbitration clauses (para 119). This consideration applies especially when parties are aware of the claims which are included into these agreements. Furthermore, the scope of each clause has to be determined according to its wording. However, the Advocate General concluded that jurisdiction and arbitration clauses should not be interpreted in a way to impede the full effectiveness and the enforcement of mandatory cartel law (para 126). As a result, arbitration and jurisdiction clauses should be interpreted in a way that delictual claims for breaches of article 101 TFEU are excluded.

Again, I do not want to criticize these conclusions in detail (as I have to disclose my involvement in this case). However, the approach of AG Jääskinen seems to differ considerably from the views of AG Wathelet as the former is mainly addressing the efficiency of mandatory EU law (to be implemented by the national courts) and the latter is mainly concerned about the efficiency of arbitration. It remains to be seen what the CJEU will decide. It is to be hoped that the court will draw a fair line between arbitration and litigation bringing both in a balanced situation which permits the efficient enforcement of EU law in dispute resolution.

Dealing with Diversity in International Arbitration

We are pleased to announce a forthcoming TDM special issue on "***Dealing with Diversity in International Arbitration***." This Special Issue will analyse discrimination and diversity in international arbitration. It will examine new trends, developments, and challenges in the use of practitioners from different geographical, ethnic/racial, religious backgrounds as well as of different genders in international arbitration, whether as counsel or tribunal members.

International arbitration has experienced substantial growth in the past two decades. The ascendance of international arbitration as a preferred method of resolving disputes between international parties is the product of the growth of world economies and the increased participation in global commerce of emerging markets. The rise of many states as major investment destinations and the expansion of multinational corporations into new markets have increased business opportunities, and thus the numbers of business disputes worldwide.

The high demand for arbitration (and other forms of ADR) services, in turn, has driven many governments to cultivate a pro-arbitration environment through new arbitration legislation and other mechanisms, and has led to the proliferation of international arbitral centres throughout the world but particularly in Asia (including in Singapore, Hong Kong and elsewhere). Likewise, many global law firms have also responded to this increased demand by aggressively entering new markets and deploying significant resources to those emerging regions.

The expansion of international arbitration into new regions as well as steady growth in more established markets has not, however, been reflected in the greater participation of a greater variety of practitioner whether female or non-European/American or from different ethnic and religious backgrounds. Women are not getting the same opportunities as men, regardless of background. Of equal concern is the fact that practitioners from non-European/American backgrounds or in regions such as Africa and Asia are not getting the same opportunities as their European and American counterparts. In that regard, Islamic Finance Arbitration is a growing field where regional and religious backgrounds may play a role. Only time will tell if that area will be over represented by a homogenous type of arbitrator and counsel.

Statistics published by arbitral institutions indicate quite strongly that, more generally, there is a severe imbalance in the vast number of appointments whether by parties or by the institution concerned. The appointment of European and American arbitrators usually account for a large chunk of the pie chart with the thinnest, barely visible slivers representing arbitrators from other regions or ethnicity. Further analysis of the numbers indicates that things are not really improving.

This TDM Special Issue will provide international practitioners and academics with an overview of the overall position of diversity in international arbitration.

Possible topics for submission to the special issue might include:

- Why an increase in work in the international arbitration area of practice has not lead to the commensurate growth in participation by a more diverse group of practitioners – this might include not only the male/female divide but also the African / Asian / European / American divide;
- Does limiting the field of international arbitration players mean that the scope of the decisions made at all levels are also being limited?
- Are legal sector reforms necessary to improve the diversity; are quotas a good thing?
- How can the pro-arbitration culture be replicated in a pro-diversity argument;
- Prospect of a fairer representation of participants covering gender, ethnicity, regions and religion in international arbitration;
- Obstacles for the discriminated groups preventing them from getting on in the international arbitration area of practice and how they can be overcome;
- Nature of and empirical study of geographical/regional, ethnic/racial and male/female diversity in international arbitration;
- The impact of differing levels of participation in international arbitration on business dispute resolution and the effect of cultural norms on the practice of international arbitration; and
- Influence of dispute resolution culture / traditions.

This special issue will be edited by **Professor Rashda Rana SC** (Barrister, Arbitrator at *39 Essex Street Chambers*, President *ArbitralWomen*) and **Louise Barrington** (Independent Arbitrator and Director *Aculex Transnational Inc*) with the assistance of the Edition Committee including **Karen Mills** (Partner *Karim Syah Indonesia*) and **Gabrielle Nater Bass** (Partner *Homburger Switzerland*).

For further information click here.

22nd Croatian Arbitration Days

An annual international arbitration conference with long tradition will gather for the 22nd time some of the leading arbitration experts from Croatia and abroad. This year's topics deal with damages and expert vitnesses in arbitration, in addition to the overview of the recent arbitration developments in the South East Europe. Among presenations which are mostly arbitration-orented, there are some which also have private International law character. The program of the conference is available here: 22nd CAD – Conference Program.

The conference is scheduled for 4-5 December 2014 and will take place in Zagreb at the Croatian Chamber of Economy. Further details may be found on the Chamber's webpage.

TDM Call for Papers: "Arbitration in the Middle East – Expectations and Challenges for the Future"

The volume of international business either in the Middle East or with a Middle Eastern element is increasing and many of the contracts being used provide for arbitration. While arbitration ("tahkim" in Arabic) has long-standing religious and cultural roots in the Middle East, there are a number of differences and tensions between the Western perception of arbitration and certain Islamic legal principles.

Craig Shepherd and Mike McClure issue this call for papers seeking contributions for a TDM Special to be published later this year entitled "Arbitration in the Middle East – expectations and challenges for the future". The Special will look at some of the differences between the Western and Middle Eastern perceptions of arbitration, and will also consider expectations for the future. Some potential topics include: (a) the legislative framework to support arbitration, including new

arbitration laws and regional arbitral centres; (b) whether the modern concept of arbitration can resolve Shari'a disputes; (c) the role public policy should play in relation to judicial involvement with the arbitral process and enforcement or arbitral awards; (d) whether arbitral processes or arbitral laws could or should be reformed so that arbitration better suits the needs of today's Middle Eastern users; and (e) claims under international investment treaties arising out of regional regime change, particularly in North Africa. Contributions can focus on one or a number of countries and comparative pieces referencing a number of jurisdictions would be welcome.

Papers should be submitted on or before 30 September 2014 to the editors, with a copy to info@transnational-dispute-management.com when you submit material.

More details are available here.