French Courts Reject Anti-Arbitration Injunctions

The Paris first instance court rejected applications for anti-arbitration injunctions in two different cases in January and March 2010.

A full report of these judgments by Alexis Mourre and Alexandre Vagenheim over at the *Kluwer Arbitration Blog* can be found here.

It is important to notice that these applications were dismissed on grounds which are peculiar to arbitration law, namely the negative effect of the *Kompetenz-Kompetenz* principle. Under French law, this principle gives priority to arbitrators to rule on their own jurisdiction and thus prevents courts from assessing whether arbitrators have jurisdiction (subject to a very narrrow exception). It follows that it is hard to see how a French court could issue an anti-arbitration injunction, since it may not assess whether arbitrators wrongfully retained jurisdiction.

In court proceedings, there is no comparable principle (though the combination of the principle of mutual trust and of the *lis pendens* rule leads to a similar result when the Brussels I Regulation applies). Thus, the power of French court to issue injunctions enjoining a party from suing before a foreign court remains an open issue.

Conference in Oslo – Choice of law on arbitration

A conference followed by a seminar on choice of law clauses and arbitration will take place next week in Oslo on Tuesday 6 and Friday 7 May.

The conference is organised by a research project run by prof. Giuditta Cordero Moss (Oslo) at the Oslo university on the **impact of choice of law on**

arbitration and by the Norwegian committee of the ICC (more information on the project: here).

Here is the program of the conference (Thursday 6 May):

09.00-09.10 Welcome – Professor Kristin Normann, Selmer Lawfi rm, Oslo

Part 1: Arbitration law, its developments and its signifi cance for International disputes

09.10-09.25 Introduction: Why national law for international arbitration? –
Professor Giuditta Cordero, Moss, University of Oslo

09.25-09.45 International Arbitration and the impact of the national law of the place of arbitration –
Professor Luca Radicati di Brozolo, Catholic University, Milan, Partner, Bonelli Erede Pappalardo, Milan

09.45-10.05 International Commercial Arbitration in the Us: The Restatement –
Professor George Bermann, Columbia University, New York, Chief Reporter on the ALI Restatement of the US Law on International Commercial Arbitration

10.05-10.25 New Trends in International Commercial Arbitration in Latin America –
Professor Diego Fernandez Arroyo, Complutense University, Madrid

Part 2: Ad hoc or institutional arbitration?

10.45-11.05 Ad hoc arbitration v. institutional arbitration –
Ms Carita Wallgren-Linholm, Partner, Lindholm Wallgren, Helsinki

11.05-11.25 New Trends in ad hoc international commercial arbitration: the UNCITRAL Arbitration Rules –
Ms Corinne Montineri, Legal Offi cer, UNCITRAL, and Secretary, UNCITRAL Working Group II on Arbitration

11.25-12.15 Discussion on Part 1 and Part 2

12.15-13.15 Lunch

Part 3: Features of selected Arbitration Institutions

13.15-13.35 Arbitration under the Rules of the International Chamber of Commerce
Dr. Anders Ryssdal, Partner, Wiersholm Lawfi rm, Oslo, chairman of the Norwegian Committee,
International Chamber of Commerce

13.35-13.55 Arbitration in London: Features of the London Court of International Arbitration –
Mr Matthew Saunders, Partner, DLAPiper London

13.55-14.15 Arbitration under the Swiss Rules –**Dr. Daniel Wehrli**, Partner, Gloor & Sieger, Zürich,
Member of the Board, Swiss Arbitration Association

14.45-15.05 Arbitration in Sweden: Features of the Stockholm Rules – **Marie Öhrström**,
Associate and Business Development Lawyer, Setterwalls Lawfi rm, Stockholm, and previously Deputy Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

15.05-15.25 Arbitration in Finland: Features of the Central Chamber of Commerce of Finland –
Justice Gustaf Möller, Partner, Krogerus Attroneys Ltd, Chairman of the Board, Arbitration Institute, CCCF

15.25-15.45 Arbitration in Denmark: Features – **Mr Georg Lett**, Partner, Lett Law firm, Copenhagen

15.45-16.05 Arbitration in the Oslo Chamber of Commerce –
Mr Stephen Knudtzon, Partner, Thommessen Law f rm, Oslo, Member of the Board, Arbitration Institute of the Oslo Chamber of Commerce

16.05-16.45 Discussion

16.45-17.00 Final observations – Professor Giuditta Cordero Moss, University of Oslo
The conference will be followed by a seminar on Friday 7 May for the project participants.

Hess and Mourre on the Arbitration Exception

See the rejoinder of Alexis Mourre here.

Kessedjian on Arbitration and Brussels I

Catherine Kessedjian, who teaches at the European College of Paris (University Paris 2), has published in the last issue of the French *Revue de l'arbitrage* an article on Arbitration and the Brussels I Regulation (*Le Règlement 44/2001 et l'arbitrage*).

The English abstract reads:

> *The arbitration exception in Regulation 44/2001 must not be altered in the future amended Regulation, at least until all questions posed by the relation between an arbitral proceeding and a judicial proceeding have been thoroughly reflected upon. This must be done, notably, bearing in mind the role of Europe as a favoured place of arbitration. In addition, the reform of 44/2001 may not be limited to intra-European cases but also deal with relations to Third States, hence an even more cautious approach to the matter is necessary. In that context, Europe should not act unilaterally, unless efforts are undertaken at a universal level and have failed. With this in mind, this paper discusses the questions which occur in practice.*

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

Prof. Burkhard Hess is Professor at the University of Heidelberg and judge at the Court of Appeals in Karlsruhe. All views expressed in this paper are the personal views of the author. An enlarged version of this article is going to be published in the Cahier de l'Arbitrage 2010.

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.

Unfair arbitration clause before the ECJ

In a recent decision of October 6, 2009 (C 40/08 – Asturcom Telecomunicaciones SL v. Maria Cristina Rodríguez Nogueira) the European Court of Justice held that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required to assess *of its own motion* whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair.

As in the Elisa María Mostaza Claro v. Centro Móvil Milenium SL (C-168-05) case, the dispute arose from a subscription contract for a mobile telephone concluded between Asturcom and Mrs Rodríguez Nogueira. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity) ('AEADE'). The seat of that arbitration tribunal, which was not indicated in the contact, was located in Bilbao.

An arbitral award condemned Mrs Rodríguez Nogueira to pay EUR 669,60 to Asturcom. The consumer neither participated into the arbitral proceedings nor did she intend to get the annulment of the award, as permitted by the Spanish Arbitration Law.

Asturcom brought an action before the Juzgado de Primera Instancia No 4 de Bilbao for enforcement of the award.

First, the Spanish Court of First Instance rules that the arbitration clause contained in the subscription contract is unfair. However, the Spanish Law on Arbitration does not allow the arbitrators to examine of their own motion whether unfair arbitration clauses are void and secondly, the Spanish Code of Civil Procedure (Ley 1/2000 de Enjuiciamiento Civil) does not contain any provision dealing with the assessment to be carried by the court or tribunal having jurisdiction as to whether arbitration clauses are unfair when adjudicating on an action for enforcement of an arbitration award that has become final.

In those circumstances, the Juzgado de Primera Instancia decided to stay the

proceedings and to refer to the Court the following question for a preliminary ruling:

"In order that the protection given to consumers by [Directive 93/13] should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?"

The ECJ held that national courts having jurisdiction for the enforcement of arbitral awards made in the absence of the consumer are "required to assess of their own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, *in so far as, under national rules of procedure, they can carry out such an assessment in similar actions of a domestic nature*.

If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause".

In my opinion, the decision is written in a misleading way.

In the first place, it seems to mean that national courts having jurisdiction over the enforcement of arbitral awards should on their own motion raise the nullity of the arbitration clause on the basis of Directive 93/13.

However, they should do so only where their national procedural laws ("*in similar actions of a domestic nature*") authorize them to do so. Which means that in this case (if I understand well), as the provisions on the enforcement of domestic awards of the Spanish Code of Civil Procedure are silent on this matter, Spanish judges are not required to raise on their own motion the unfair arbitration clause… But what should we understand by "*in similar actions of a domestic nature*"? It is quite clear that the ECJ excludes the procedure of the enforcement of international awards from its ambit. But what are these provisions that national judges should look at???

If anyone has a clue on this…

Arbitration of reinsurance disputes in Australia

In Australia, arbitration clauses in most contracts of insurance (other than marine insurance) are rendered void by s 43 of the federal *Insurance Contracts Act 1984*. However, that Act expressly excludes reinsurance contracts. Accordingly, for many years, practitioners assumed that arbitration clauses in reinsurance contracts were enforceable in Australia.

This changed with the decision of the New South Wales Supreme Court in *HIH Casualty & General Insurance Ltd (in liq) v Wallace* [2006] NSWSC 1150; (2006) 68 NSWLR 603. The Court held that s 19 of the New South Wales *Insurance Act 1902*, which provides that arbitration clauses in insurance contracts do not bind the insured, applied to reinsurance contracts, as there was no express exclusion of reinsurance contracts. (There is a good summary of this and other remedial provisions in the NSW Act, and further matters arising from the decision in *Wallace,* in this paper presented by Allens Arthur Robinson partner Michael Quinlan in 2007.)

In light of concerns expressed by practitioners and reinsurers, by the Insurance Regulation 2009, the NSW government has now excluded reinsurance contracts from the remedial provisions of the NSW Act, including s 19.

However, some uncertainty remains. Section 28 of the Victorian *Instruments Act 1958* is an equivalent provision to s 19 of the NSW Act: it allows an insured to institute court proceedings notwithstanding an arbitration clause and reinsurance contracts are not excluded from the provision. There does not appear to be any case law on this provision. However, following *Wallace*, it would apply to reinsurance contracts. Arbitration clauses in reinsurance contracts governed by Victorian law could therefore still be ignored by reinsureds. Moreover, it was stated in *obiter* in *Wallace* that s 19 of the NSW Act is a mandatory law of the forum. If this view is correct and applicable to s 28 of the Victorian Act, whatever the law of the reinsurance contract, a reinsured could institute court proceedings

in Victoria in the face of an otherwise binding arbitration clause.

Brussels I Review – Illmer and Steinbruck on the Interface Between Brussels I and Arbitration

Martin Illmer and Ben Steinbrück are research fellows at the Max Planck Institute for Comparative and International Private Law, Hamburg. They have both published in the area of international arbitration (including their Ph.D. theses).

In our brief discussion of the interface between Regulation (EC) No 44/2001 (Brussels I) and arbitration we will focus on the proposals in the Heidelberg Report to include a new Art. 22(6) and a new Art. 27A.

Exclusive Jurisdiction for State Court Support (Art. 22(6))

1. The suggestion that exclusive jurisdiction for state court proceedings in support of arbitration be granted to the courts of the place (or seat) of the arbitration triggers problems in several areas.

2. An exclusive jurisdiction rule is only appropriate for a limited number of supportive measures, such as the appointment of an arbitrator. In this case, support by one single court is usually sufficient in order to set up the arbitral tribunal. Indeed, any other jurisdictional regime could lead to parallel ancillary proceedings that might produce conflicting decisions. The courts at the arbitral seat are well suited to assist in the establishment of the tribunal at the beginning of the arbitration since in most cases the lex arbitri, governing the arbitral proceedings, will be the law of the arbitral seat. Thus, the appointment procedure

will usually fulfil the requirements set out by Art. V(1)(d) of the New York Convention. It follows that, at least in this respect, the future enforcement of the arbitral award is guaranteed.

3. It appears that most national arbitration laws in the EU provide for this kind of state court support. Thus, a party to an arbitration agreement will usually find its juge d'appui at the seat of the arbitration if the opponent is refusing to cooperate in the establishment of the tribunal. Hence there is no need for a harmonised mandatory rule to this effect in the Brussels I Regulation.

4. An exclusive jurisdiction regime will also lead to major problems regarding other supportive measures. The most serious consequences concern the arbitral tribunal's establishment of the facts and the taking of evidence. State court support in this field has to be granted in the state where the evidence is located. In international disputes this state is usually not the state where the seat of the arbitration is located. Parties tend to choose a neutral place in a third state as the arbitral seat. The crucial evidence is often located in their home countries. If the courts at the seat of the arbitration were to have exclusive jurisdiction to assist the tribunal in the taking of evidence, the parties would not be able to directly request judicial assistance in the state where the evidence is located. They would have to apply to the courts at the seat to issue an official request for cross-border judicial assistance. Even under the Evidence Regulation such a procedure is burdensome and time-consuming. Consequently, it is practically never used in international arbitration.

5. Being sensitive to the problem some national legislators have enacted rules that provide for cross-border court assistance in the taking of evidence. English, German and Austrian arbitration laws, to mention a few, explicitly enable their national courts to support the taking of evidence in aid of foreign arbitrations. These provisions are widely praised as promoting the efficiency of the arbitral process.

6. Other national arbitration laws should therefore adopt similar rules rather than being subjected to an out-dated regime of exclusive court jurisdiction that flies in the face of modern arbitration practice.

7. It seems that the proposed new Art. 22(6) would not affect the state courts' power to grant interim relief in relation to foreign arbitration proceedings. The

need for cross-border interim measures is self-evident in international disputes. When a party is about to dissipate its assets or to create a fait accompli, a state judge will often be the only authority to grant effective relief to the other party. In most cases, these assets will not be located in the state of the arbitral seat but in other jurisdictions.

8. However, the existing case law in this field suggests that some state courts might consider applications for interim relief as "ancillary proceedings concerned with the support of arbitration" within the meaning of Art. 22(6) and thus refuse to grant interim measures to parties to a foreign arbitration. Even in jurisdictions that provide explicitly for cross-border interim relief in arbitration, courts have held that only the courts at the seat of the arbitration were competent to order these measures (OLG Nürnberg, (2005) 3 German Arbitration Journal (SchiedsVZ) 50). These decisions confuse a "neutral" arbitral seat with an "exclusive" forum for ancillary proceedings in support of the arbitral process. There is a serious threat that an enactment of the proposed Art. 22(6) would increase the number of such misconceived decisions.

9. The European Commission should therefore refrain from enacting an exclusive jurisdiction rule for supportive state court measures as proposed in the Heidelberg Report. By effectively ruling out cross-border judicial assistance, an exclusive jurisdiction rule in this field would be contrary to the interests of international arbitration (for a detailed analysis of the topic see Steinbrück, Die Unterstützung ausländischer Schiedsverfahren durch staatliche Gerichte, Mohr Siebeck, forthcoming in July 2009).

Determination of the validity of the arbitration agreement (Art. 27A)

10. We generally support the proposal to include a new Art. 27A that would provide for a mandatory stay of proceedings on the merits before a Member State court once a court in the Member State at the place (or seat) of arbitration is seized for declaratory relief in respect of the existence, validity or scope of the arbitration agreement.

11. If the issue of the existence, validity or scope of the arbitration agreement arises in parallel proceedings, a mechanism for allocating jurisdiction is required.

The issue does not call for the exclusive jurisdiction of one court ab initio but once parallel proceedings arise, one court has to be exclusively competent to decide the issue with res iudicata effect upon any other Member State court. Otherwise there would be no legal certainty for the parties to the alleged arbitration agreement from the very beginning of their dispute up until the enforcement stage. Contradicting decisions would be inevitable – a highly undesirable result.

12. The Heidelberg Report suggests that the courts at the place (i.e. seat) of the arbitration take precedence over the court first seized with binding force upon other Member States' courts achieved by way of recognition of the declaratory judgment pursuant to Art. 32 of the Regulation.

13. In our view this mechanism is superior to the other two possibilities for the allocation of jurisdiction: neither a lis pendens rule giving priority to the foreign court seized in breach of the arbitration agreement nor the French doctrine of the negative effect of Kompetenz-Kompetenz is as effective in protecting the parties' interest in an early binding decision on the existence, validity or scope arbitration agreement.

14. If the foreign court seized in breach of the arbitration agreement were to determine the issue (other courts being barred by the lis pendens-rule of Art. 27(1) of the Regulation), there would be no remedy against torpedo proceedings. After the ECJ has now put an end to practice of anti-suit injunctions in West Tankers if the foreign court seized is a Member State court, the threat of torpedo actions requires a solution.

15. If the arbitral tribunal were to determine the issue (barring any decision on the matter by a state court), the risk of an unenforceable arbitral award is imminent. If the arbitral award is to be enforced in another country, Art. V(1)(a) of the New York Convention provides for non-recognition if the court determining recognition regards the arbitration agreement as non-existent, invalid or as not covering the dispute in question. In the end, it will always be a state court that will have the final say on the existence, validity or scope of the arbitration agreement. Only the moment in time of such final say differs.

16. If the state court's final say is limited to the recognition phase, considerable time and money may have been wasted by the parties in obtaining a practically unenforceable award. Cross-border enforcement requires recognition, such

recognition is only available through a state court and the New York Convention empowers the state court to rule on the existence, validity and scope of the arbitration agreement. Arbitration is not a purely transnational process, somehow detached from national laws. At the enforcement stage at the latest, the state courts enter the field.

17. If in contrast, the state court renders a decision on the existence, validity or scope of the arbitration agreement even before the arbitral process was initiated, legal certainty and procedural economy are fostered. State court intervention is indispensable in the West Tankers scenario – the earlier, the more convenient, faster and cheaper it is for the parties.

18. If the courts at the place of arbitration were to determine the issue exclusively (once seized for declaratory relief) and if this court's decision was to be recognized by the courts of the other Member States under the Regulation's scheme of recognition, as it is suggested by the Heidelberg Report, the torpedo scenario would be addressed very practically and the difficulties and inconvenience of the French doctrine of the negative effect of Kompetenz-Kompetenz would also be avoided.

19. The advantages of the declaratory relief mechanism are numerous: (i) The court first seized in breach of the arbitration agreement has to stay its proceedings (according to the proposed Art. 27A in order to ensure exclusive jurisdiction of the courts at the arbitral seat) so that there is no risk of contradicting decisions. (ii) It is widely accepted internationally that the courts at the seat of the arbitration are the natural forum for supervisory jurisdiction (in contrast to supportive jurisdiction, see under I). (iii) The parties achieve legal certainty at an early stage saving time and costs. (iv) The application will usually be dealt with much faster than an application to set aside the arbitral award afterwards which will often include other grounds for non-recognition prolonging the setting aside proceedings. (v) Excluding an appeal against the state court decision might even speed up the process. (vi) If the proceedings before the foreign court first seized were not initiated as a torpedo in bad faith, this court would still be competent to determine the existence, validity and scope of the arbitration agreement. This is because the scenario of parallel proceedings is unlikely to arise. The other party will usually not seise another court for declaratory relief since it can rely on the foreign court first seized to determine the issue in a reasonable time and with due care. Therefore, he will rather invoke

the defence of the existing arbitration agreement and plead its validity before the foreign court.

20. Approving the suggested solution of the Heidelberg Report one should stress the following point: the proposed Art. 27A does not interfere with the national arbitration laws regarding the power of the national courts to grant declaratory relief. It merely provides for an exclusive jurisdiction if the national law chooses to grant such power and gives binding force to the declaratory judgment. It is entirely and without caveat up to the Member States to determine whether they want to empower their courts to grant such declaratory relief or not (available in England and Germany, not available in France or Austria). This solution respects different systems and peculiarities of the national arbitration laws. In English law, for example, the application to the state court for a preliminary determination of the tribunal's jurisdiction depends on the permission by the other party or the tribunal (sec. 32 Arbitration Act 1996). German law, in contrast, does not provide for such a (sensible) restriction. Leaving the autonomy of national procedural laws and arbitration laws untouched it enables a competition for the best place of arbitration by means which appear to be more in line with most Member States' laws and the Regulation itself than anti-suit injunctions.

The arbitration exception in Art. 1(2)(d) – keep it or delete it?

21. A final, brief remark on the proposed deletion of the arbitration exception in Art. 1(2)(d) by the Heidelberg Report: many commentators on the Heidelberg Report have so far rejected the proposed deletion of the arbitration exception. They mainly go with the adage "If it ain't broke, don't fix it" and fear problems of unintended consequences. However, as indicated above, the system is broken with regard to the issue of parallel proceedings, in particular the West Tankers scenario. Anti-suit injunctions are no longer available; torpedo proceedings are easy to initiate for an obstructing party. Against this background active steps to remedy the situation are required. The solution proposed by the Heidelberg Report in Art. 27A with the duty to recognise a declaratory judgment by the courts at the arbitral seat is such an active step (which we endorse). Moreover, no one has come up with a better solution so far.

22. Including a new Art. 27A does, however, require opening up the arbitration

exception at least to some extent. It appears possible to open only one slot in the arbitration exception with regard to the particular problems identified after five years of operation of Regulation (EC) No 44/2001 while leaving the arbitration exception as such untouched. Taking up the initially mentioned adage, we would suggest to fix it only to the extent it is broken.

Brussels I Review – Interface with Arbitration

The Brussels I Regulation's interface with arbitration vies with choice of court agreements as the topic within the Commission's review having the greatest potential impact on the negotiation and efficient implementation of commercial transactions.

According to the Commission:

> *Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*
>
> *In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such*

proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .

Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award . This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition

of arbitral awards (a question which might also be addressed in a separate Community instrument).

The Commission seeks responses to the following questions:

Question 7:

Which action do you consider appropriate at Community level:

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

The Commission observes, correctly, that "arbitration is a matter of great importance to international commerce" and that "[t]he 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners". Any solution to the problems described in the Report and the Green Paper must, therefore, be without prejudice to the functioning of the New York Convention in the Member States. Further, Art. 71 of the Brussels I Regulation (which, inexplicably, does not presently concern itself with obligations to decline jurisdiction) should be amended to make clear that the Regulation shall not prevent a court from declining jurisdiction, or from recognising or enforcing a judgment or award, where it is required to do so by the New York Convention (or, equally, the Hague Choice of Court Convention).

That said, it is also important that the treatment of arbitration in the Regulation should not give more favourable treatment, or greater protection, to arbitration agreements or to arbitral processes and awards than that given to choice of court agreements or to the judicial determination of disputes in, and the recognition and enforcement of judgments from, Member State courts. Within the EC's "area of justice", private methods of dispute resolution should not be favoured over judicial determination. This proposition is supported, for example, not only by the need for equal and fair access to justice for all at reasonable cost, but also by the important position that national courts hold in the Member States' constitutional orders and the need to protect the vital role those courts play in developing and declaring civil and commercial law. Arbitration tribunals, given their self-

regulatory and confidential character, are not well suited to performing the latter role. One (perhaps the only) positive consequence of the ECJ's decision in the West Tankers case is that it removed the anomaly whereby an anti-suit injunction could be sought to restrain proceedings in another Member State brought contrary to an agreement for arbitration with its seat in a Member State, but not an exclusive jurisdiction agreement designating the courts of a Member State.

Against this background, a strong case can be made for removal of the arbitration exception in Art. 1(2)(d) of the Regulation as the first step in the process of reform. As the Study of Professors Hess, Schlosser and Pfeiffer (Study JLS/C4/2005/03, paras. 106-136) affirms, however, that change alone will not be sufficient to ensure the effective co-ordination of judicial and arbitration proceedings, including regulation of jurisdiction with respect to ancillary court proceedings and the inter-relationship between judgments and arbitral awards, and will indeed create fresh problems.

Accordingly, in addition to the adjustment of Art. 71 to confirm the overriding effect of the New York Convention (above), further adjustments to the Regulation will be necessary. The proposals in the Study, emphasising the key role of the courts of "place of the arbitration" (which must be understood as referring to the seat of the arbitration and not the venue for any hearing) seem as good a starting point for discussion as any. Further work will, however, be required on the detail of the proposals, including the proposed definition of "place of the arbitration", with input from practitioners specialising in arbitration as well as international arbitration bodies such as the ICC and LCIA, and (if possible) UNCITRAL as the custodian of the New York Convention. In particular, it will be necessary to ensure that the existing allocation of competence between national courts and arbitral tribunals (e.g. as to determination of questions of the tribunal's jurisdiction) is not upset. Thus, recognition that the courts of the "place of arbitration" have jurisdiction under the Regulation, whether exclusive or not, to determine certain matters should be expressed to be without prejudice to rules in that place concerning the relationship between courts and arbitral tribunals. Further, in defining the "place of arbitration" in cases where the parties have not made an express choice of seat from the outset, care must be taken not to open up fresh opportunities for tactical litigation to undermine arbitration proceedings by designating as competent the courts of a place that is unlikely to have any close connection to the arbitration.

For the reasons given above, if, as a consequence of these discussions, additional protection is given to arbitration agreements over and above that recognised in the New York Convention (e.g. by giving exclusive jurisdiction to the courts of the "place of the arbitration" to determine the validity of an arbitration agreement), equivalent protection should also be given to choice of court agreements.

Accordingly, the answer to be given to Question 7 could be that the arbitration exception in Art. 1(2)(d) ought to be deleted and appropriate adjustments made to the Regulation to ensure the effective co-ordination of judicial and arbitration proceedings. Arbitration agreements, proceedings and awards should not, however, be given more favourable treatment than choice of court agreements, judicial proceedings and judgments.

> *Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*
> *In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .*
> *Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.*
> *Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award . This may*

prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).

Question 7:

Which action do you consider appropriate at Community level:

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

Exception to the Arbitration

Exception: the 1896/2006 Regulation

It is hardly necessary to remind readers of this blog that the Brussels I Regulation contains an Arbitration Exception. It is pretty difficult not to have heard of, or read about, the *West Tankers* litigation lately.

Of course, the Arbitration Exception is not peculiar to the Brussels I Regulation. It is of general application in European civil procedure. All regulations in the field include the same exception. All? Well, not really. There is an exception to the exception.

Regulation 1896/2006 creating a European Order for Payment Procedure does not keep the Arbitration Exception. In the most usual way, article 2 of Regulation 1896/2006 defines the scope of the regulation, first by stating that it applies to civil and commercial matters, and then by excluding certain fields. As could be expected, social security or bankruptcy appear, but not arbitration (and not status and legal capacity of natural persons either, actually).

So it seems that Regulation 1896/2006 does apply to arbitration. Is it a new direction for European civil procedure? That prospect might make some people happy in Heidelberg, but we are not quite there yet. Regulation 861/2007 Establishing a European Small Claims Procedure (article 2) reincludes the Arbitration Exception.

This remarkable exception to the exception beggs two questions:

First, why? What are the reasons which led the drafters of the regulation to delete the Arbitration Exception? Are there any?

Second, what are the consequences? At first sight, not many. After all, if there is an arbitration agreement, courts will lack jurisdiction to do anything, or almost. And when courts will be petitioned to help constituting an arbitral tribunal, it will be hard to use the European Order for Payment Procedure in any meaningful way. But the issue of the availability of the European remedy in aid of the arbitral proceedings may well arise.

And if it does, a second issue will arise, as discussions in a recent conference at the Academy of European Law (ERA) on Cross-Border Enforcement in European Civil Procedure have shown. It will be necessary to coordinate with the Brussels I Regulation, which governs the jurisdiction of European courts granting European Orders for Payment.