UK’s Ministry of Justice Publishes Guidance on the Rome I Regulation

Yes, there are already at least two specialist works on the Rome I Regulation, but that has not stopped the UK’s Ministry of Justice from producing guidance on the main provisions anyway. Here’s their reasoning:

> *The purpose of this guidance is to provide a brief summary of the most important provisions in the Regulation. The Regulation is a substantial and complex instrument in a technical area of law and the contents of this guidance is only intended to be a brief outline of some of the most significant provisions. This outline is not comprehensive in nature. For a more comprehensive view of the Regulation, and the many issues to which it will inevitably give rise to, reference should be made to specialist literature on private international law.*
>
> *The Regulation provides uniform choice of law rules applicable in contractual obligations. These rules will enable courts throughout the European Union to select the national laws appropriate for the determination of proceedings where the case has a cross-border dimension. Issues concerning the interpretation of the rules in the Regulation can only be conclusively resolved by the European Court of Justice. As a result, any interpretative indications given in this guidance should not be regarded as conclusive in this sense.*

So, brief, incomplete and (once the European Court has started ‘interpreting’) probably wrong. But still, it’s worth a read. Download the PDF here.

French Conference on Private

Military Contractors

The Faculty of law of the University of Clermont-Ferrand will host a conference on *Private Military and Security Companies* on 4 and 5 March 2010.

Speakers will include legal scholars, political scientists and a variety of actors of international humanitarian law. Professors Bérangère Taxil (University of Angers) and Mathias Audit (University of Paris Ouest – formerly Nanterre) will more specifically discuss issues of private international law.

The full program and more details about the conference can be found here. It is free of charge. Interventions will be in French.

International Antitrust Litigation – Brussels Conference

A full-day conference, entitled "International Antitrust Litigation – Conflict of Laws and Coordination" has been organised by Jürgen Basedow (Max Planck Institut, Hamburg), Stéphanie Francq (Chair of European Law, UC Louvain) and Laurence Idot (Paris II, collège européen). It will take place on 26 March 2010 at the Hilton Hotel in Brussels.

The organisers explain the theme of the conference as follows:

> *With the decentralization of competition law enforcement and the development of private damages actions in the European Union as well as with the increasingly international character of antitrust proceedings, there is a growing need for clear and workable rules to coordinate cross-border actions of both a judicial and administrative nature. These include not only rules on jurisdiction, the applicable law and recognition of judgments, but also on sharing of evidence, protection of business secrets and interplay between administrative*

and judicial procedures. Those issues, which have been overlooked for so long, have been reflected upon by a group of international experts from across Europe and the United States who will identify current pitfalls and formulate concrete proposals for improving coordination of cross-border antitrust litigations.

The topics covered include "Jurisdiction in Cross-Border Litigation – Brussels I" (Chair: Dr Karen Vanderkerckhove, European Commission), "The Applicable Law – Rome I and Rome II" (Chair Prof Jürgen Basedow), "Public Enforcement in the EU – Coordination between Authorities" (Chair: Sir Christopher Bellamy QC) and "Antitrust Litigation in the Era of Gloabalisation" (Chair: Prof Horatia Muir Watt). A full programme is available here, with the possibility of online registration here.

Fourth Complutense Seminar on Private International Law

On 11 and 12 March, 2010, a new edition (the fourth) of the Private International Law Seminar organized by Prof. Fernández Rozas and De Miguel Asensio will take place in Madrid . This Seminar, which has proven to be one of the most important and successful in the area of Private International Law in Spain both by the extent of the audience and the quality of the speakers, will be held this time under the name "Litigación civil internacional: nuevas perspectivas europeas y de terceros Estados". As in previous editions, the meeting will bring together numerous experts, academics and lawyers from both Spain and abroad, covering different areas of Private International Law. This edition will gather representatives from Spain, several European countries (Spain, Portugal, France, Italy, Germany, United Kingdom, Luxembourg, Romania) and also from other continents (Panama, Argentina, Cuba and Japan). Spanish, English and French will be spoken -though no translation is provided.

The Congress shall have four sessions, called respectively International

jurisdiction in the European Union; Cross-border effectiveness of resolutions and documents in the European Union; Third States and comparative point of view; and International commercial arbitration and State jurisdiction. Each of them involves several lectures, followed by the reading of papers and a final debate. The program and the registration form (registration is free) can be found here.

As in previous editions, most of the contents of the Seminar will be later published in the Anuario Español de Derecho Internacional Privado.

Foreign Law and Public Policy in Australia

A recent case in the Supreme Court of Victoria provides a good opportunity to point out the new statutory provisions in the State of Victoria for the proof of foreign law, and to discuss the public policy reasons for the non-enforcement of foreign law.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010) concerned a loan for gambling entered into in the Bahamas which the creditor (a Bahamas casino operator) then sought to enforce in Victoria as a debt claim against the Australian-resident debtor. Both parties agreed that the claim was governed by the law of the Bahamas, and expert evidence was received on that law.

Since the hearing of that case, the *Evidence Act 2008* (Vic) has come into force, which contains the same fairly liberal provisions for the proof of foreign law as apply in New South Wales, Tasmania and Commonwealth courts (ss 174-6 of the respective uniform Evidence Acts). Previously, Victoria was alone among Australian jurisdictions in not having any statutory provisions for the proof of foreign law, apart from a curious provision enabling judicial notice to be taken of the statutes of the United Kingdom, New Zealand and Fiji: *Evidence Act 1958* (Vic) ss 59–61, 77.

The Australian defendant unsuccessfully sought to resist the claim on a number of

bases. The first was that the gambling contract was the product of unconscionable conduct (namely, the alleged exploitation of the debtor's pathological gambling). Two curiosities arise from the evidence taken on that point: first, in an equitable claim of that kind it is not clear whether foreign law would generally apply at all; and second, there was in any event a false conflict (Australian law being identical to Bahamas/English law on point).

A second defence concerned the lawfulness under Bahamas law of gaming and the enforceability of gambling loans.

A final defence to the claim was that the enforcement of the debt would be contrary to the public policy of the forum. That received short shrift from the judge:

> *The short answer is that the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria. (at [93])*

This reasoning seems unsatisfactory. Whatever the proper law of the gaming loan contract (or of the debt), the law of the forum can nevertheless intervene in the case of a mandatory rule or a public policy reason for non-enforcement of foreign law. Indeed, a public policy claim presupposes that foreign law would otherwise govern the matter. Of course, this is not to say that the judge should ultimately have reached a different conclusion about the enforceability of the debt, but a few more steps of reasoning were needed before one could reach that view.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010)

Publication: Intellectual Property

in the Conflict of Laws

There is a new book on intellectual property and conflict of laws, written by *Sierd J. Schaafsma:*

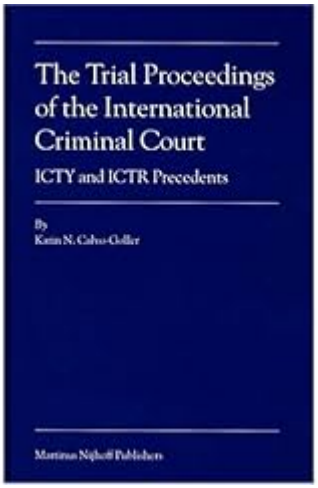
Here is the summary:

> *The interface between intellectual property and conflict of laws is a notorious difficult subject.*
>
> *A recent study puts the subject in a new light. In his recently published book, Sierd J. Schaafsma deals with the fundamental and controversial question whether the two most important intellectual property treaties (the Berne Convention 1886 and the Paris Convention 1883) contain a conflict-of-law rule.*
>
> *The study reveals that the principle of national treatment in these treaties does indeed contain a conflict-of-law rule: an exclusive lex loci protectionis-rule, covering all aspects of the protection of IP-rights. The explanation given for this seems to be new. It provides a comprehensive and consistent interpretation of the respective provisions in the treaties, and it explains why we no longer understand this conflict-of-law rule today. The study provides, in addition, several new insights into the conflict of laws, aliens law, and the relationship between these two fields of law.*

S.J. Schaafsma, Intellectual Property in the Conflict of Laws; the hidden conflict-of-law rule in the principle of national treatment. Kluwer Publishers 2009, 564 pages, Hardcover 59 EUR, ISBN 9789013065916. See Kluwer and Leiden University. The book is written in Dutch, with summaries in English and French. The possibilities for a translation of the book are currently being examined.

Book Reviews, Criminal Libel, and the Jurisdiction of French Courts

What are the risks of facing a criminal trial in France after writing an academic book review in English? You may think that if the book was written in English by a scholar who neither lives nor works in France, and if the reviewer is himself neither French, nor living or working in France, that could not happen.



Well, ask Joseph Weiler.

Calvo-Goller v. Weiler

A variety of blogs of public international law have reported how Joseph Weiler, the Joseph Straus Professor of Law and European Union Jean Monnet Chair at NYU law school, has been sued in France in his capacity of editor-in-chief of a book review website, www.globallawbooks.org. The plaintiff is a scholar teaching in Israel, Dr. Karin N. Calvo-Goller, who has authored a book on international criminal procedure. Weiler asked a German scholar of criminal law and Dean of Cologne law school, Thomas Weigend, to review the book for the site. The plaintiff did not like the review. She wrote to Weiler to ask him to remove the review from the site. Weiler answered that, for a variety of reasons, he would not. Further letters were exchanged between Weiler and the plaintiff. Weiler offered to, and actually did ask Weigend whether he wanted to change anything in his review. Weigend answered that he would not (the letters exchanged by Calvo-Goller and Weiler are available here).

More than a year later, on September 26th, 2008, Weiler was summoned to appear before a French investigating judge. Criminal proceedings had been initiated in France for libel. Weiler appeared before the judge who explained that the hearing would be merely formal. This is because alleged victims of criminal offences may, under French law, initiate criminal proceedings, but a full

investigation by an investigating judge (*juge d'instruction*) will only follow if the case is complex. If it is not, it will be for the court to rule directly on the accusation. In this case, that is what was happening, and Weiler would thus have to face trial in June 2010. I understand that Weigend has not been made a party to the proceedings.

I am no expert in criminal law, so I cannot say whether the offence of libel is constituted under French criminal law. But from a conflict perspective, the case also raises an interesting issue of international jurisdiction.

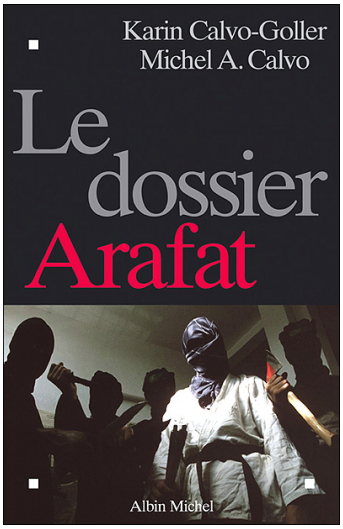
Criminal forum shopping?

Why would French courts have jurisdiction over this ~~dispute~~ offence? I understand that Weigend lives and works in Germany, and is a German national. I also understand that Weiler lives and works in New York. Dr. Calvo-Goller is a senior lecturer at the Academic Center of Law & Business in Israel, so I would think she lives in Israel. What is the connection with France, then? There are arguably two.

First, according to her website, Dr. Calvo-Goller was fully educated in Paris, and worked there for some time. This should not matter. But it might be that the reason why she studied in France is that she was born there. She might then be a French national. That would matter, as Article 113-7 of the French Criminal Code provides that French criminal law governs (and thus French courts have jurisdiction over) offences hurting French nationals. But in such cases, alleged victims cannot freely sue before French courts. The Criminal Code requires that the public prosecution service grants leave to do so.

Then, French law governs offences committed in France, wholly or partially (French Criminal Code, art. 113-2), irrespective of the nationality of the persons involved. The issue here is of course whether a website accessible in France entails that alleged libel on the site is committed in France for the sole reason that the site is accessible there. Actually, recent case law of French superior courts, although it does not directly address the issue, suggests that the answer is probably no. The most relevant case concerned an article published on its website by an Italian newspaper. It was alleged that the article had violated French intellectual property law. The Court held that French law did not apply because the site was written in Italian, and targeted an Italian audience. It further held

that whether the site was accessible from France was irrelevant for the purpose of establishing French criminal jurisdiction. It was necessary to establish a "sufficient, material or significant connection" with French law, and none could be found in this case. The Court concluded that the offence had therefore been (wholly) committed in Italy.



Now, requiring such a connection with France seems most sensible. Otherwise, French courts might become available for protecting the reputation of all victims of libel (by French standards). In the *Calvo* case, is there such connection? Obviously, the review and the book were written in English. They did not specifically target a French audience, but it would probably be too much to say that they excluded it. An additional question is this: should it be relevant whether the alleged victim has a reputation in France? In this respect, it should be noted that Dr. Calvo-Goller has written at least two books in French. So, she does have a reputation which is more specifically French to defend. But would that reputation be a significant connection? And would it be enough if it was found that it is merely based on French publications?

I am grateful to Marie-Elodie Ancel for pointing out to me the most recent cases on the relevance of accessibility in France of foreign websites for international jurisdiction of French courts in criminal matters.

International Conference in Verona

The Verona University School of Law will host a conference titled

Conflict of Laws in International Commercial Arbitration

The conference will take place from 18-20 March 2010 in Verona and will cover in

particular the following topics:

- conflict of law questions concerning arbitration agreements
- jurisdiction of arbitral tribunals
- the law applicable to the merits
- arbitration procedure

There is no registration fee, however, registration is required. For further information and registration please contact Dr. Francesca Ragno (francesca.ragno@univr.it) and see the detailed conference programme which can be found here.

Reformulating a Real and Substantial Connection

In Canada, the test for taking jurisdiction over an out-of-province defendant requires that there be "a real and substantial connection" between the dispute and the forum. In 2002 the Court of Appeal for Ontario created a framework for analyzing a real and substantial connection, setting out, in *Muscutt v. Courcelles*, eight factors to consider. This framework became the standard in Ontario and was adopted by appellate courts in some other Canadian provinces. However, in 2009, in preparing to hear two appeals of decisions on motions challenging the court's jurisdiction, the Court of Appeal for Ontario indicated that it was willing to consider whether any changes were required to the *Muscutt* framework. The two cases, consolidated on appeal as *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 (available here), each concerned serious injuries that were suffered outside of Ontario.

Rule 17.02 of the Ontario Rules of Civil Procedure provides that a plaintiff may serve a defendant outside Ontario with an originating process in certain defined categories of cases. Prior to *Morguard Investments Ltd. v. De Savoye*, the analysis of jurisdiction centered on whether the plaintiff's claim fell within one or more of the enumerated categories. However, *Morguard* established, and

Muscutt confirmed, that rule 17.02 did not in itself create jurisdiction. Separate and apart from whether the claim fell inside the categories, the plaintiff had to establish that there was a real and substantial connection between the dispute and the forum.

In *Van Breda* the court made a significant change to the relationship between the categories in rule 17.02 and the real and substantial connection requirement. It has now held that if a case falls within the categories in rule 17.02, other than rules 17.02(h) and (o), a real and substantial connection with Ontario shall be presumed to exist. The central catalyst for this change is section 10 of the model *Civil Jurisdiction and Proceedings Transfer Act*. Section 3 of that statute provides in quite general terms that a court has jurisdiction when there is a real and substantial connection between the dispute and the forum. However, section 10 contains a list of specific situations in which a real and substantial connection is presumed to exist. Ontario has not adopted the *CJPTA*, but in *Van Breda* the court has adopted the *CJPTA*'s basic approach.

Even with this presumption, a framework for analyzing whether there is a real and substantial connection is still required in any case where a defendant seeks to refute the presumption, any case in which a plaintiff is relying on rule 17.02(h) or (o) so that no presumption arises, and any case in which a plaintiff does not rely on 17.02 at all and instead seeks leave of the court to serve a defendant outside Ontario under rule 17.03. Prior to *Van Breda* the courts used the *Muscutt* framework, which considered the following eight factors to determine whether there was a real and substantial connection to Ontario: (1) the connection between the forum and the plaintiff's claim, (2) the connection between the forum and the defendant, (3) unfairness to the defendant in taking jurisdiction, (4) unfairness to the plaintiff in not taking jurisdiction, (5) the involvement of other parties, (6) the court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis, (7) whether the dispute is international or interprovincial, and (8) comity and the standards of jurisdiction used by other courts.

In *Van Breda* the court determined that it was necessary to "simplify the test and to provide for more clarity and ease in its application". It held that "the core of the real and substantial connection test" is factors (1) and (2), and held that factors (3) to (8) will now "serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the

defendant". The court affirms that factors (3) to (8) remain relevant to the issue of jurisdiction, but the court nevertheless reworks the framework, ostensibly so that no one factor from factors (3) to (8) could be analyzed separately from the other factors and could be independently determinative of the outcome. It is not clear that this change was necessary or that it makes the framework clearer and easier to apply.

For many, *Van Breda* violates the idiom "if it ain't broke, don't fix it". The *Muscutt* framework was well-known and was working effectively. It was relatively easy to explain and to apply. In time we will know if as much can be said for the use of presumptions and the *Van Breda* framework, but for the moment there are questions about how the presumption will operate when challenged by a defendant and about the ongoing role of the factors the court now calls analytic tools.

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.