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.

First Issue of 2010's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes three articles, but one only on private international law.

It is authored by Isabelle Barrière Brousse, who lectures at Aix Marseille University, and discusses the Impact of the Lisbon Treaty on Private international law (*Le traité de Lisbonne et le droit international privé*). The English abstract reads:

Since the evolution of European Community law already threatens the private international law of the Member States, will these systems survive the Lisbon Treaty ?

Despite the weakness of the legal basis of their competence, European authorities have already affected the rules concerning choice of law and of jurisdiction in many ways, and intend to exclude the Member States from the international scene by removing their right to conclude agreements with third countries. Will the Lisbon Treaty change this ? Between the affirmation of Community competence and respect of the Member States' legal systems and traditions, the treaty's influence seems to be difficult to forecast. Nevertheless, the emphasis on the role of the States and their National Parliaments and the very objective of creating a European judicial area while respecting diversity establish implied but real limitations on the expansion of Community rules in this area.

The *Journal* also offers four casenotes on judgments of the *Cour de cassation*, including *In Zone Brands* (Professor Sandrine Clavel) and one of the recent judgments of the Court on Franco-American parallel divorce proceedings (Johanna Guillaumé), and a casenote of the Hadadi judgment of the ECJ (Professor Louis d'Avout).

French Case on Law Governing Ownership of Paintings

On February 3rd, 2010, the French *Cour de cassation* delivered a judgment on choice of law in personal property matters. This is only the fourth time the Court has directly addressed the issue in the last hundred years.

In 2000, a French born painter living in New York city had provided the defendant with 7 of his paintings. The defendant put them on the walls of the restaurant he had just opened in New York. In 2005, the painter passed away. In

2006, the restaurant closed. The defendant then took the paintings to France to auction them.

In the summer 2007, the widow of the painter sought interim relief before a French court in order to attach the paintings before the sale. The attachment was first granted, but the auction house (Camard & associés) and the defendant applied to set aside the attachment. The French court ruled in their favour in December 2007. The widow appealed to the Paris court of appeal, which dismissed the appeal. She then appealed to the *Cour de cassation*.

The central issue was of course whether the defendant was the owner of the paintings. He could have been transfered the ownership of the paintings either in New York by a valid gift, or simply by being the possessor of the property if possession was enough to transfer ownership. Under French law, a person who holds moveable property, and thinks he is the actual owner of that property, becomes the owner of the property for that sole reason. He is, for the purpose of former art. 2279 of the French Civil Code, a "good faith possessor", and this is enough in this respect.

The *Cour de cassation* confirmed its former precedents and held that French law alone governs issues of property for moveables situated in France.

> *la loi française est seule applicable aux droits réels dont sont l'objet des biens mobiliers situés en France*

In this case, this meant that article 2279 had applied since the property had reached the French soil. The widow argued that, under American law, it was up to the beneficiary to show that he had received the paintings as a gift, and that mere possession would not transfer ownership to the holder of the property. The Cour de cassation replied that given that French law had applied since the goods had reached France, article 2279 was enough of a basis to rule that ownership had been transfered by now.

Swiss Institute of Comparative Law: Programme of the Conference on the EU's Proposal on Succession

As we anticipated in a previous post, on Friday, 19th March 2010, the **Swiss Institute of Comparative Law** (ISDC) will host **the 22nd *Journée de droit international privé***, organised in collaboration with the **University of Lausanne** (Center of Comparative Law, European Law and International Law – CDCEI). The conference will analyse the **Commission's Proposal on Succession**: **"Successions internationales. Réflexions autour du futur règlement européen et de son impact pour la Suisse"**.

Here's the programme:

Première session (09h00) – La proposition de règlement européen

Ouverture de la journée: *Christina Schmid* (director a.i., ISDC)*; Andrea Bonomi* (director, CDCEI, Univ. of Lausanne)

Chair: *Lukas Heckendorn Urscheler* (Head of Legal Division, ISDC)

- *Mari Aalto* (national expert, European Commission, DG FSJ): Introduction au projet européen en matière de succession;
- *Paul Lagarde* (Univ. of Paris I): Les grandes lignes de la future réglementation européenne: l'approche unitaire et le rattachement à la résidence habituelle;
- *Andrea Bonomi* (Univ. of Lausanne): Le choix de la loi applicable à la succession;

Discussion.

Chair: *Andrea Bonomi* (Univ. of Lausanne)

- *Olivier Remien* (Univ. of Würzburg): La validité et les effets des actes à cause de mort;
- *Richard Frimston* (Partner, Russell-Cooke LLP): The scope of the law applicable to the succession, in particular the administration of the estate;
- *Eva Lein* (British Institute of International and Comparative Law): Les compétences spéciales dans la proposition de Règlement;

Discussion.

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Deuxième session (14h00) – Round Table: L'impact du futur règlement sur le droit suisse

Chair: *Andreas Bucher* (Univ. of Geneva)

- *Peter Breitschmid* (Univ. of Zurich)
- *Florence Guillaume* (Univ. of Neuchâtel) (invited)

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Troisième session (15h30) – Round Table: La reconnaissance des certificats d'héritiers

Chair: *Christina Schmid* (ISDC)

- *Andreas Fötschl* (Univ. of Bergen and ISDC)
- *Paolo Pasqualis* (notary in Venice, Council of the Notariats of the European Union – CNUE) (invited)
- *Franco del Pero* (notary in Morges)

The conference will be held in French, English and German (no translation is provided).

For further information (including fees) see the conference's programme and the registration form, available on the ISDC's website.

(Many thanks to Prof. Andrea Bonomi)

Conference on Party Autonomy in Property Law

On 27 and 28 May 2010 a conference on Party Autonomy in Property Law, organized by Erasmus School of Law and Leiden University, will be held at the Erasmus University Rotterdam, the Netherlands.

In international trade practice, the question often arises as to whether party autonomy or, more specifically, a choice of law possibility in matters of Property Law should be recommended or required. For example, can a French seller and a German buyer in a purchase agreement concerning movable or immovable assets agree that Dutch Law will be applicable in matters of ownership regarding these assets? Is party autonomy allowed or should it be allowed in other areas of Property Law, such as assignment of claims (receivables)?

This important question is not only answered differently in disparate legal systems but underneath it lie several and often conflicting legal interests. An example is the principle that legal acts in Property Law have not only an effect between the contracting parties but also against a third party.

During the Conference, these diverse aspects of 'Party Autonomy in Property Law' will be discussed by leading specialists in International Property Law. There are four central themes:

1. General aspects of party autonomy, as seen from the perspective of Continental Law as well as of Common Law;

2. Private International (Property) Law;

3. Developments and prospects in Europe and in European Law Projects (e.g. European conflict rules for property law?);

4. Assignment in Private International Law, Financial Instruments/the Collateral Directive; Insolvency Law.

For more information on the program, speakers and to register, please click here.

RELEASE OF LAST ISSUE OF DeCITA (vol. 11)

DeCITA 11 (2009)
on international insolvency (Insolvencia internacional)

Release of the last issue of DeCITA (derecho del comercio internacional – temas y actualidades), the leading law journal on international commercial law and private international law in Latin America. The topic of this issue is international insolvency. In addition to the articles dedicated to this topic, and as usual, DeCITA offers a nourished panorama of the state of the law in different international organisations active in international commercial law.

Laura Carballo Piñeiro, Procedimientos concursales y competencia judicial internacional : anáéisi de dos conceptos clave

Louis d'Avout, Sentido y alcance de la lex fori concursus

David Morán Bovio, Secuencia de los trabajos sobre insolvencia en UNCITRAL

Beatriz Campuzano Díaz, La posición del TJCE con respecto a los problemas interpretativos que planteal el reglamento 1346/2000 en materia de insolvencia

Gioberto Boutin I, La insolvencia transfronteriza en el derecho internacional privado uniforme y en el Código Bustamente

Paula M. All/jorge R. Albornoz, La insolvencia transfronteriza en el derecho internacional privado argentino de fuente interna. Supuestos contemplados. Necessidad de reforma

Cecilia Fresnedo de Aguirre, La nueva ley uruguaya de concursos y

reorganización empresarial : un importante avance en sintonía con los principios internacionales en la materia

Adriana V. Villa, El régimen de DIPr de la ley uruguaya de concursos de 2008 : sus avances con relacíon al sistema argentino actual

Luciane Klein Vieira/Carolina Gomes Chiappini, La problemática de la quiebra internacional en Brasil : ¿existen herramientas para la solucíon de conflictos internacionales ?

Among other articles on jurisprudence and development of international trade law, one should particularly noted :

Makane Moïse Mbengue, The Rise of Private Voluntary Standards in international Trade : A Brief Survey of Current Developments

The table of contents can be read here.

Dallah, Renvoi and Transnational Law

In December, three members of the UK Supreme Court granted leave to appeal in *Dallah v. Pakistan*.

The case concerns the enforcement of an ICC arbitral award in the UK. In a nutshell, the Ministry of Religious Affairs of Pakistan had negotiated with Saudi company Dallah a contract whereby Dallah would provide services (building accomodation in particular) for Pakistani pilgrims visiting Mecca for the Hajj. But the contract was eventually signed by a Pakistani Trust which was to later on lose legal personality under Pakistani law. When the dispute arose, Dallah initiated arbitration proceedings against the Government of Pakistan.

The central issue was therefore whether the arbitral tribunal had jurisdiction over the Government of Pakistan, which was not a signatory of the contract including the arbitration clause. A distinguished arbitral tribunal sitting in Paris held that it had. Both the English High Court and the English Court of appeal disagreed and thus denied enforcement.

The debate before the English courts was and I guess will be about a variety of issues of English and international arbitration law that I will barely touch upon here, including discretion to refuse enforcement under the 1958 New York Convention or the standard of review of arbitral decisions on jurisdiction. But the case also raised a very interesting and arguably novel issue of choice of law. And it involved not only the English but also the French conflict of laws.

Choice of Law in England

The starting point of the reasoning was section 103(2)(b) of the English *Arbitration Act* 1996 , which provides that recognition or enforcement of a New York Convention award may be refused if the person against whom it is invoked proves that "…*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*." Section 103(2)(b) of the Act implements the second part of Article V (a)(1) of the New York Convention in English law.

In the absence of any choice by the parties, the applicable statutory provision of the forum provided that the validity of the arbitration agreement was governed by the law of the seat of the arbitration, which was Paris, France. As a consequence, the English courts applied French law to determine whether Pakistan was bound by the arbitration agreement.

Choice of Law in France

This conclusion, however, was problematic for two reasons. The first is that the arbitral tribunal had actually not applied French law in order to decide the issue. It had applied "transnational principles". Under French law, it was perfectly entitled to do so. Even in the absence of any choice of law made by the parties, Article 1496 of the French Code of Civil Procedure provides that arbitrators may apply any "rules of law" that they deem appropriate. ICC rules, which were applicable, provide the same. In other words, the English courts decided to review the decision of the arbitrators on jurisdiction pursuant to a law (French law) that

the arbitrators had not meant to apply, and had no obligation to apply according to the law of the seat of the arbitration.

Furthermore, when French courts review decisions of arbitrators on jurisdiction, they do not apply French law either. For almost 20 years and the *Dalico* decision in 1993, French courts have held that arbitration agreements are not governed by any national law, and that it is only necessary to assess whether the parties have actually consented to go to arbitration. This is only a factual enquiry. No national law applies.

Renvoi **to Transnational Law?**

So, the French and the English do not have the same choice of law rules. Is that novel in private international law? Not really. For long, conflict lawyers have advocated to take into account foreign choice of law rules in order to coordinate legal systems. For some reason, even the English call it *renvoi*. So, in this case, the issue certainly arose as to whether English courts should have considered French choice of law rules.

The question was well perceived by Aikens J. in first instance. In his judgment of August 1st, 2008, he wondered:

> *78. … Does the phrase "within the law of the country where the award was made" in section 103(2)(b) include a reference to the conflict of laws rules of that country?*

Most unfortunately, however, the two French experts had written in their Joint Memorandum:

> *"Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".*

This statement was misleading. It is true that French law does not have a typical choice of law rule for the purpose of determining whether an arbitration agreement is valid. But French law cannot avoid having an answer to the question of when is an arbitration agreement valid in an international dispute. And the

answer is the *Dalico* rule, which provides that no national law governs, and that it is only necessary to assess whether there was actual consent.

Indeed, the French law experts further wrote in their Joint Memorandum:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

Aikens J. understood this as follows:

> *93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. (…)*

Aikens J.'s understanding of French private international law was perfectly sensible. There is a French choice of law rule, and it provides for the application of a non national set of rules of decision. In other words, and although Aikens J. did not say so, there was a *renvoi* from French law to transnational law.

Applying French Substantive Law?

Both Aikens J. and the Court of appeal ruled that the English court should apply French law. One reason was of course the misleading statement of the French experts on the French conflict of laws. But other reasons were offered.

For the Court of appeal, Moore-Bick LJ held that the English court "was bound by section 103(2) of the Act to apply French law to the facts as he found them" (§ 25). It is true that neither the *Act* nor the New York Convention mention *renvoi*, but none of these norms provide that courts may not apply *renvoi* either.

In first instance, Aikens J. referred to the leading commentary of Van den Berg on the New York Convention which states that conflict of laws rules of the Convention "are to be treated as uniform". Although the English judge characterized Van den Berg's book as "authoritative", it must be recognized that quite a few scholars do not share this opinion. In particular, many Swiss conflict and arbitration scholars have submitted that *renvoi* should be accepted when the choice of law rule of the seat of the arbitration is more favourable than the rule of the New York Convention, which is the case of the Swiss rule since the Swiss conflict of laws was reformed in 1987. And, indeed, given that the New York Convention includes article VII which enables states to apply more favourable regimes, it seems hard to argue that the main point of the Convention was to lay down uniform rules.

Applying French Choice of Law Rules?

So, does this mean that the English court should have taken into account French conflict of laws rules? It is submitted that, in principle, the answer is yes.

- Yet, one should not overlook the difficulties, both practical and doctrinal, that this would create.

To begin with, one would have to determine the content of those transnational rules which French courts hold applicable. Certainly, the arbitral tribunal could do so in this case. But how easily could an English court do it? Here is what Aikens J. had to say about it:

> *93 As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. (…) The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.*

Then, it would be necessary to find a legal ground for justifying taking into account French conflict of laws rules.

The first doctrine which comes to mind is obviously *renvoi*. But the forum is

an English court, and I understand that the doctrine of "total renvoi" is not widely accepted in English law. An extension to the field of arbitration would be quite a novelty.

Another solution might be to take the French rules into account for the purpose of exercising discretion under Article V of the New York Convention. Article V provides that enforcing courts "may" deny recognition to awards when one of the grounds of Article V is established. English courts have held repeatedly that this means that they have discretion to still enforce an award when such a ground can be proved. They have also ruled, including in *Dallah*, that this discretion is not open or broad, but limited. It might be appropriate to use this discretion for allowing the enforcement of an award comporting with the law of the seat of the arbitration, including its conflict of laws rules.

Annual Survey of French PIL of E-Commerce

For several years, Professor Marie-Elodie Ancel (Paris Est Creteil Val de Marne University, formerly Paris 12) has published an annual survey on French private international law of E-commerce in the French monthly law review *Communication, Commerce Electronique*.

The survey for 2009 has just been published in the first issue of the review for 2010. It discusses a variety of issues, including jurisdiction, choice of law and foreign judgments. It reports on both cases and legislation, French and European.

Communication, Commerce Electronique is available online for lexisnexis suscribers.