French Court Denies Recognition to American Surrogacy Judgement

On 26 February 2009, the Paris Court of Appeal denied recognition to a couple of American judgments which had sanctioned a surrogacy. The Court held that it was contrary to French international public order.



In this case, a French couple had found a surrogate mother in Minnesota who had accepted to carry their child. After Ben was born, the parties had obtained on 4 June 2001 two judgments from a Minnesota court, the first finding that that the child had been abandonned by the American surrogate mother, the second ruling that he was adopted by the French couple. A birth certificate had then been delivered by the relevant Minnesota authorities.

When the couple came back to France, they tried to have the child registered as theirs on the relevant French registry. The French public prosecutor initiated proceedings to have this registration cancelled.

Both the French first instance court and the Paris Court of Appeal ruled against the couple. The debate focused on whether the American judgments could be recognised in France (it does not seem that the issue of whether the birth certificate could be recognised was raised). The Paris Court of appeal noticed that there were no international convention between the U.S. and France on the recognition of foreign judgments, and that it followed that the French common law of judgments as laid down by the *Cour de cassation* in *Avianca* applied.

The Court only explored whether one of the conditions was fulfilled, namely whether the foreign judgments comported with French international public order. It simply held that it did not, as the Civil code provide that surrogacy is forbidden in France (Article 16-7 of the Civil Code), and that the rule is mandatory (*d'ordre public*: see Article 16-9 of the Civil Code). In truth, the Code certainly provides that the rule is mandatory in France, but it does not say whether the rule is also internationally mandatory. The Court rejected arguments to the effect that Article

8 ECHR or the superior interest of the child commanded a different outcome.

I had reported earlier about another judgment of the same Paris Court of Appeal (indeed, the same division of the court, which is specialized in private international law matters) which had accepted to recognize a Californian judgment. This decision had been overruled by the *Cour de cassation*, but on an issue of French civil procedure which was unrelated.

Petition Granted in Abbott v. Abbott

This morning, the United States Supreme Court granted the Petition for Writ of Certiorari in *Abbott v. Abbott*, a case concerning the role of *ne exeat* clauses in the Hague Abduction Convention. The grant was urged not only by the petitioner, but also by the Solicitor General on the Court's invitation. Previous coverage of the case on this site can be found here, and here. This will be the first time in nearly two decades that the Supreme Court has considered a Hague Convention case on the merits. We will post the parties briefs, as well as any amici, as they become available in the coming months.

Anuario Español de Derecho Internacional Privado, vol VIII (2008)

The Anuario de Derecho Internacional Privado Español,vol. VIII, 2008 has just been released. These are its contents:

Manuel Díez de Velasco Vallejo,
“Adolfo Miaja de la Muela y el Derecho Internacional Privado español. A propósito de su centenario”

DOCTRINA

Andrea Bonomi
“El Reglamento Roma II y las relaciones con terceros Estados”
Pedro J. Martínez-Fraga
“Estudio de los efectos del Convenio de Nueva Cork y la doctrina de manifiesta indiferencia de la ley sobre el arbitraje internacional: análisis de dos paradigmas afirmativos y defensivos”
Nuria Marchal Escalona
“Disolución de la adopción en Derecho Internacional Privado español”

JORNADAS SOBRE LA COOPERACIÓN INTERNACIONAL DE AUTORIDADES: ÁMBITOS DE FAMILIA Y DEL PROCESO CIVIL, BARCELONA 2 Y 3 DE OCTUBRE DE 2008 (reproduction of papers) :

Alegría Borrás
“La cooperación internacional de autoridades: en particular, el caso del cobro de alimentos en el extranjero”
Joaquim J. Forner Delaygua
“La cooperación en materia de notificación y obtención de pruebas: cooperación internacional de autoridades; problemas generales de cooperación”
Cristina González Beilfuss
“La cooperación internacional de autoridades: articulación del Derecho Internacional Privado interno y el Derecho internacional privado comunitario”
Ramón Viñas Farre
“La cooperación internacional de autoridades en Latinoamérica”
Carmen Parra Rodríguez
“De la cooperación administrativa a la era de los formularios”
Georgina Garriga Suau
“La creciente potencialidad de la red judicial europea en materia civil y mercantil en la construcción del espacio judicial europeo”

III SEMINARIO INTERNACIONAL: AUTORREGULACIÓN Y UNIFICACIÓN DEL DERECHO DE LOS CONTRATOS INTERNACIONALES, MADRID, 5 y 6 DE

FEBRERO DE 2009 (all papers presented at the seminar are reproduced; see more information under my post III International Seminar on Private International Law)

VARIA

Pilar Rodrígez Mateos
“El Convenio entre España y Vietnam sobre cooperación en materia de adopción”
Carmen Otero García-Castrillón
“Efecto directo y aplicación retroactiva del acuerdo sobre los derechos de propiedad intelectual relacionados con el comercio: el problema de las patentes europeas de medicamentos en España”
Nerea Magallón Elósegui
“La Disposición Adicional séptima de la Ley de Memoria Histórica: otra ampliación de los sujetos con derecho de opción a la nacionalidad española”

TEXTOS LEGALES (2008’s PIL Community Regulations, Directives, Decisions and Preparatory works; also International Agreements and Spanish Legislation)

JURISPRUDENCIA (exhaustive collection of 2008’s Spanish case law concerning Private International Law; most cases are commented)

MATERIALES DE LA PRÁCTICA ESPAÑOLA (reports, legislative preparatory works from different Spanish organisations; printout of the jurisprudence from the Dirección General de los Registros y el Notariado, mostly commented)

FOROS INTERNACIONALES (compte-rendu of meetings and activities carried out by different inter-governmental organisations/community bodies in 2008)

Alegría Borrás
“La Conferencia de La Haya de Derecho Internacional Privado (2008)”
Nuria Marchal Escalona
“El Reglamento (CE) nº 1393/2007: ¿una solución o más problemas?”
Aurelio López-Tarruella Martínez
“Las actividades de la Comisión Europea en materia de Derecho Internacional Privado en el período junio 2008-marzo 2009”
José Joaquín Vara Parra
“Dos regulaciones internacionales sobre alimentos: el Reglamento (CE) nº 4/2009de 18 de diciembre de 2008 y el Convenio de La Haya de 23 de noviembre

de 2007”

NOTICIAS (short reference to academic activities held at a national level in 2008/2009)

BIBLIOGRAFÍA (both Spanish and foreign; review of reviews)

C-14/08 Roda Golf v Beach Resort

The service of a notarial act, in the absence of legal proceedings, falls within the scope of the judicial and extrajudicial documents Reg (EC 1348/2000) according to the ECJ in C-14/08 *Roda Golf*.

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

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

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

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

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

2. An exclusive jurisdiction rule is only appropriate for a limited number of supportive measures, such as the appointment of an arbitrator. In this case, support by one single court is usually sufficient in order to set up the arbitral tribunal. Indeed, any other jurisdictional regime could lead to parallel ancillary proceedings that might produce conflicting decisions. The courts at the arbitral seat are well suited to assist in the establishment of the tribunal at the beginning of the arbitration since in most cases the lex arbitri, governing the arbitral proceedings, will be the law of the arbitral seat. Thus, the appointment procedure will usually fulfil the requirements set out by Art. V(1)(d) of the New York Convention. It follows that, at least in this respect, the future enforcement of the arbitral award is guaranteed.

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

4. An exclusive jurisdiction regime will also lead to major problems regarding other supportive measures. The most serious consequences concern the arbitral tribunal's establishment of the facts and the taking of evidence. State court support in this field has to be granted in the state where the evidence is located. In international disputes this state is usually not the state where the seat of the arbitration is located. Parties tend to choose a neutral place in a third state as the arbitral seat. The crucial evidence is often located in their home countries. If the courts at the seat of the arbitration were to have exclusive jurisdiction to assist the tribunal in the taking of evidence, the parties would not be able to directly request judicial assistance in the state where the evidence is located. They would have to apply to the courts at the seat to issue an official request for cross-border judicial assistance. Even under the Evidence Regulation such a procedure is

burdensome and time-consuming. Consequently, it is practically never used in international arbitration.

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

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

7. It seems that the proposed new Art. 22(6) would not affect the state courts' power to grant interim relief in relation to foreign arbitration proceedings. The need for cross-border interim measures is self-evident in international disputes. When a party is about to dissipate its assets or to create a fait accompli, a state judge will often be the only authority to grant effective relief to the other party. In most cases, these assets will not be located in the state of the arbitral seat but in other jurisdictions.

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

9. The European Commission should therefore refrain from enacting an exclusive jurisdiction rule for supportive state court measures as proposed in the Heidelberg Report. By effectively ruling out cross-border judicial assistance, an exclusive jurisdiction rule in this field would be contrary to the interests of

international arbitration (for a detailed analysis of the topic see Steinbrück, Die Unterstützung ausländischer Schiedsverfahren durch staatliche Gerichte, Mohr Siebeck, forthcoming in July 2009).

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

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

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

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

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

14. If the foreign court seized in breach of the arbitration agreement were to determine the issue (other courts being barred by the lis pendens-rule of Art. 27(1) of the Regulation), there would be no remedy against torpedo proceedings.

After the ECJ has now put an end to practice of anti-suit injunctions in West Tankers if the foreign court seized is a Member State court, the threat of torpedo actions requires a solution.

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

16. If the state court's final say is limited to the recognition phase, considerable time and money may have been wasted by the parties in obtaining a practically unenforceable award. Cross-border enforcement requires recognition, such recognition is only available through a state court and the New York Convention empowers the state court to rule on the existence, validity and scope of the arbitration agreement. Arbitration is not a purely transnational process, somehow detached from national laws. At the enforcement stage at the latest, the state courts enter the field.

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

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

19. The advantages of the declaratory relief mechanism are numerous: (i) The court first seized in breach of the arbitration agreement has to stay its

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

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

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

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

22. Including a new Art. 27A does, however, require opening up the arbitration exception at least to some extent. It appears possible to open only one slot in the arbitration exception with regard to the particular problems identified after five years of operation of Regulation (EC) No 44/2001 while leaving the arbitration exception as such untouched. Taking up the initially mentioned adage, we would suggest to fix it only to the extent it is broken.

Publication: Collection of Hague Conventions

- Intersentia have recently published *Recueil des Conventions / Collection of Conventions (1951-2009)*, edited by the Hague Conference. The blurb:

> *This eighth edition of the Collection of Conventions of the Hague Conference contains the most important multilateral treaties entered into under the auspices of the Hague Conference on Private International Law, which has been*

working on the progressive unification of private international law since 1893, and doing so as an intergovernmental organisation since 1955. This new edition, made necessary by a revision of the Hague Conference Statute and the adoption since 2003 of three new Conventions, reproduces the texts of the Hague Conventions in authentic versions as deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The text of the Statute is followed by 38 international Conventions concerning areas as numerous and varied as family law, trade and financial law, or administrative and judicial co-operation and international litigation. These include the most widely ratified and best known Hague Conventions such as the Hague Intercountry Adoption Convention, the Hague Child Abduction Convention, the Hague Apostille, Service, Evidence and Access to Justice Conventions, as well as the most recent Hague Conventions on Choice of Court, Child Support and Maintenance Obligations.

The first seven Conventions, adopted between 1893 and 1904, are not included in this volume as they have since been superseded by more modern instruments. They are available for consultation, however, on the Hague Conference website.

The first nine Conventions were adopted in French only, and so are not reproduced in English herein. However, unofficial translations are available in several languages, including English and Spanish, and may be consulted on the Hague Conference website, together with the references of publications containing such translations.

You can also download a full table of contents (PDF). ISBN 978-90-5095-873-8. Price: 30 EUROS. Available to purchase from the Intersentia website.

I am hesitant to recommend it, *per se*, as most will no doubt be aware that all of the Hague Conventions (including the ones that have been superseded, and so are not present in the collection) are available for free from the Hague Conference website. Much the same argument applied to the Hess/Schlosser/Pfeiffer report on Brussels I, which can be had for free from the Commission website, but costs £66 to purchase in book form. Adrian Briggs pointed to the obvious logical flaw in that model in a recent review of the Brussels I Study ([2009] LMCLQ 268), and the same can be said here. Insofar as you might wish to have a physical copy of

the Conventions on your bookshelf, however, the Collection is competitively priced.

Brussels I Review – Jonathan Hill

Jonathan Hill is Professor of Law at the University of Bristol. He is the author of *Cross-Border Consumer Contracts* (OUP 2008), *The Conflict of Laws* (with CMV Clarkson, 3rd edn, OUP 2006), *International Commercial Disputes in English Courts* (Hart 2005) and is a former editor of *Dicey*.

Comments on the Review of the Brussels I Regulation

Those who have an interest in private international law (PIL) in Europe have been presented with a valuable opportunity to offer their thoughts on how the Brussels I Regulation should evolve. It has been obvious for many years (indeed, in relation to certain issues, for decades) that the Brussels system is subject to certain weaknesses. At last, there is a chance that (some of) these weaknesses may be addressed.

I have read Andrew Dickinson's posts with interest and I do not intend to comment on every point which he makes or to offer my own personal answer to every question which the Commission has posed in its Green Paper. Before turning to some of the specific questions on which the Commission is consulting, I have a couple of general observations.

First, Andrew has drawn attention to the unsatisfactory nature of the some of the ECJ's jurisprudence in the context of the Brussels Convention/ Brussels I Regulation and the need for institutional reform. I suspect that even the ECJ's greatest supporters would not try to argue that the ECJ has always covered itself in glory when considering the provisions of the Convention/Regulation. My own feeling is that some criticism has been somewhat exaggerated and has not sufficiently acknowledged that the Court's room for manoeuvre is restricted by a

legal text which does not say (and, frequently, cannot plausibly be twisted to say) what one wants it to say. Nevertheless, the PIL community is entitled to better than the fare which has been served up by the ECJ in recent years. The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such reform is seriously overdue.

Secondly, the goal of promoting the 'good functioning of the internal market' inevitably provides the backdrop to much of the Commission's discussion. From the perspective of PIL, this focus runs the risk of distorting priorities. What I would like to see is a principled system of PIL rules which will serve the collective interests of the international litigation community; whether or not this advances the internal market is not my primary concern. So, from my perspective, a rule which arguably has the effect of strengthening the internal market (for example, by simplifying the enforcement of judgments granted against defendants domiciled in a third state) is still a bad rule if it unjustifiably discriminates against non-EU defendants.

The wider international picture

1. One of the most unattractive features of the Regulation is the fact that a judgment granted in one member state against a third state defendant is entitled to recognition and enforcement in other member states, regardless of the basis on which the court of origin assumed jurisdiction. In terms of principle, this approach is indefensible. At the jurisdictional stage, the protection against exorbitant jurisdiction rules which the Regulation offers to EU defendants is not extended to third state defendants; but, at the enforcement stage, non-EU defendants are, nevertheless, exposed to the principle of full faith and credit.

One possible solution is to extend the rules of special jurisdiction in arts 5 and 6 to defendants not domiciled in a member state. Andrew suggests that such extension should not, however, prejudice the application of art 4(1). I am not opposed to Andrew's suggestion – but I think that any retention of art 4(1) should be subject to a qualification. As regards a defendant not domiciled in a member state, recognition and enforcement under Chapter 3 should depend on the court of origin having assumed jurisdiction on a Regulation basis – or in circumstances in which, had the defendant been domiciled in a member state, the court of origin

would have been entitled to assume jurisdiction under the Regulation.

2. Should the Brussels I Regulation be extended to cover the recognition/enforcement of third state judgments? I do not think that there is a compelling case for it to do so. There is no obvious community interest in seeking to determine the circumstances in which a New York judgment is enforceable in England (or France or any other member state). It is imperative that the Community legislator takes seriously the limits of its legislative competence.

3. There is one area involving the relationship between member states and non-member states which needs attention. Whereas art 34(4) deals with the potential problems of conflicting judgments, the Regulation's silence on potential jurisdictional conflicts between member states and third states is a significant omission. Whatever solution the ECJ might come to in the Goshawk reference, and notwithstanding the arguments surrounding the theory (or theories) of the 'reflexive effect' of arts 22, 23, 27 and 28, there is a good case for including within the Brussels I Regulation rules which make provision for proceedings to be stayed or jurisdiction to be declined in cases involving a relevant connection with a non-member state (such as cases where there is a jurisdiction clause in favour of a third state). Some indication of what such rules might look like has been suggested by the European Group for Private International Law (EGPIL). (See arts 22bis, 23bis and 30bis of EGPIL's Proposed Amendment of Regulation 44/2001 in Order to Apply it to External Situations. While I would not necessarily want to commit myself to EGPIL's proposed text, EGPIL's basic approach strikes me as the most plausible solution to the problems posed by the Court of Appeal's second question in Owusu (ie, the question that the ECJ declined to answer in that case).

Arbitration

In principle, there is a lot to be said for Article 1(2)(d) in its current version. The idea that 'arbitration' should be excluded in its entirety from the Brussels I Regulation is intuitively attractive as it marks out arbitration as a field of dispute resolution which is separate from litigation. Of course, there is an interface (court proceedings which relate to arbitration) and the ECJ's rulings in Van Uden and West Tankers muddy the waters to such an extent that it is essential that the whole question of the relationship between the Regulation and arbitration is revisited. Doing nothing in this area is not a realistic option.

From the jurisdictional point of view, various elements are required. First, the arbitration exception should be removed. Secondly, there needs to be a new rule in Article 22 which, as regards court proceedings relating to arbitration, confers exclusive jurisdiction on the courts of the (putative) seat of arbitration. Thirdly, there is a good case for extending the approach of art 27 to arbitration proceedings. So, if C refers a dispute to arbitration and D initiates court proceedings, the court (which is second seised) should automatically stay its proceedings (without embarking on an investigation of whether the alleged arbitration agreement is valid or not) and, then, if the arbitral tribunal determines that it does have jurisdiction under the arbitration agreement, decline jurisdiction.

In terms of the recognition/enforcement of judgments, a provision dealing with the potential conflict between judgments and awards – along the lines of art 34(4) – would be beneficial. The problem posed by cases where the court of origin wrongly assumes jurisdiction notwithstanding a binding dispute resolution agreement should be addressed. Art 35(1) needs to be amended to allow a defence to recognition/enforcement along the lines of section 32 of the Civil Jurisdiction and Judgments Act 1982. Where the court of origin wrongly assumes jurisdiction in defiance of a valid arbitration clause, the ensuing judgment should not normally be given effect outside the country of origin. In terms of PIL's priorities, upholding the integrity of dispute resolution agreements (by denying cross-border recognition/enforcement of judgments granted by a non-contractual forum) should be a higher priority than promoting the free flow of judgments regardless of the legitimacy of the assumption of jurisdiction by the court of origin.

Choice of court agreements, lis pendens and related actions

The foregoing paragraph runs in parallel with Andrew's succinct summary of what is currently wrong under the Brussels I Regulation (as interpreted by the ECJ) with regard to choice of court agreements. The problems surrounding the Gasser decision are well known and there seems to be widespread agreement that its effects need to be reversed. Giving priority to the (putative) contractual forum (and strengthening the effect of jurisdiction agreements by amending the defences to recognition/enforcement) seems the most sensible way forward.

Provisional measures

I agree with the majority of Andrew's post on this topic. A court seised of substantive proceedings has jurisdiction to grant, in the context of those proceedings, whatever provisional measures are available under its procedural law and art 31 is irrelevant. Where, however, under art 31 court B is acting in support of substantive proceedings brought (or to be brought) in another member state (in court A), one has to accept that court A is the primary court and court B is the secondary court. The 'real connecting link' requirement of Van Uden has to be understood in that context. While I agree that the Van Uden requirement is not easy to interpret and apply, there must be limits on what court B can do by way of granting provisional measures of support and some mechanism is required to enable those limits to be set.

In view of the fact that the purpose of art 31 is to allow the granting of measures of support, it makes sense to allow the primary court to decide whether or not the measures granted by the secondary court really are supportive or not. In a situation where the rationale for the grant of a provisional measure is to assist the primary court, how can it be said that it would unduly impinge on national judicial sovereignty to allow the primary court to modify or discharge such a measure if the primary court considers it unhelpful? As things currently stand, a court which, although well-intentioned, is insensitive to (or ignorant of) the system of civil procedure adopted by the primary court may grant provisional measures under art 31 which the primary court considers inappropriate or unduly intrusive. The simplest and most efficient way of counteracting such 'unhelpful' support – and promoting better cross-border judicial co-ordination – is to allow the primary court to 'correct' the situation by modifying such measures. If this solution were adopted, there would be no need for the 'real connecting link' requirement: the secondary court could grant whatever measures it thought would be helpful; the primary court could modify or discharge those measures which it did not consider to be so.

Second Issue of 2009's Journal du Droit International

The second issue of French *Journal du Droit International* (also known as *Clunet*) has just been released. It contains seevral articles dealing with conflict issues.

The author of the first is Anne-Sylvie Courdier-Cuisinier, who lectures at the University of Burgundy. This is a study of Assignment of Contracts in Private International Law (*La cession conventionnelle de contrat en matière internationale*). The English abstract reads:

> *Assignment of contract is a current circulation mode of contract. The actual study is suggesting to make an international state of place of this three-persons legal operation which focuses on two main topics : the determination of the international dimension of the assignment of contract and its effects. For this purpose, on one hand the studies deals with the international right rules aimed at the assignment of rights without any specific rules regarding assignment of contract. On the other hand, the article deals mainly on the UNIDROIT principles of commercial contracts and principles of European contract law, both dealing with this type of assignment.*

The second article explores whether U.S. class actions could be recognized in France (*Les "class actions" americaines et leur éventuelle reconnaissance en France*). The authors are Jacques Lemontey, the former president of the chamber of the *Cour de cassation* specialised in private international law matters, and Nicolas Michon, a French lawyer.

> *While there has been some public discussion in France regarding whether a US style class action mechanism should be adopted, the increasing number of US class actions purporting to bind French class members has gone largely unnoticed, yet it raises a number of serious legal issues.*
>
> *Indeed, US style class actions are based upon a utilitarian economic and legal model alien to the French one, and which raises very significant issues, chief among which the conflict of interests between the lawyer for the class and class*

members – issues which various attempts at reform have not been able to solve.

In the authors' opinion, it is therefore clear that a French court would not recognize the preclusive effect of a US class action judgment or settlement over a claim made by French Absent Class Members, as this would offend French conceptions of due process and individual freedom (notably the freedom to bring, or refrain from bringing, a claim) as established inter alia by the French Conseil constitutionnel and the cour d'appel de Paris.

Finally, another article discusses alternative modes of dispute resolution in the context of the return of cultural goods (*Le renouveau des restitutions de biens culturels : les modes alternatifs de règlement des litiges*). Authors are French scholar Marie Cornu (Poitiers) and Swiss Professor Marc André Renold (Geneva).

The alternative methods of dispute resolution in cultural heritage matters are an important resource enabling to deal with the issues relating to the return, restitution and repatriation of cultural goods. The purpose of this article is to analyse the situations which can lead to the use of such methods rather than the classical judicial means and to examine problems which might arise.

The article is divided in two parts. The first part deals with the actors as well as with current methods used for the restitution and the return of cultural goods. The second part of the article underlines the type of goods which can be subject to alternative dispute resolutions and proposes a list of the substantive solutions, often original, which have been proposed in practice.

The alternative methods of dispute resolution enables to take into consideration of non legal elements, sometimes of emotional nature or linked to « doing the right thing », which can help the parties to find a way leading to a consensus.

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Brussels I Review – Loose Ends

The final question in the Commission's Green Paper (which, incidentally, deserves praise for its concise and focussed presentation of the issues), covers other suggestions for reform of the Regulation's rules not falling under any of the previous headings. It is divided into three headings: Scope, Jurisdiction and Recognition and enforcement, as follows:

> *8.1. Scope*
>
> *As far as scope is concerned, maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance. With respect to the operation of Article 71 on the relation between the Regulation and conventions on particular matters, it has been proposed to reduce its scope as far as possible.*
>
> *8.2. Jurisdiction*
>
> *In the light of the importance of domicile as the main connecting factor to define jurisdiction, it should be considered whether an autonomous concept could be developed.*
>
> *Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights in rem or possession with respect to such assets are concerned. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged.With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national*

procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

In maritime matters, it should be reflected to what extent a consolidation of proceedings aimed at setting up a liability fund and individual liability proceedings on the basis of the Regulation might be appropriate. With respect to the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading, stakeholders have suggested that a carrier under a bill of lading should be bound by and at the same token allowed to invoke a jurisdiction clause against the regular third-party holder, unless the bill is not sufficiently clear in determining jurisdiction.

With respect to consumer credit, it should be reflected whether it might be appropriate to align the wording of Articles 15(1)(a) and (b) of the Regulation to the definition of consumer credit of Directive 2008/48/EC .

With respect to the ongoing work in the Commission on collective redress , it should be reflected whether specific jurisdiction rules are necessary for collective actions.

8.3. Recognition and enforcement

As far as recognition and enforcement is concerned, it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments. In family matters (Regulations (EC) No 2201/2003 and (EC) No 4/2009), the settlement of a dispute in an authentic instrument is automatically recognised in the other Member States. The question arises to what extent a "recognition" might be appropriate in all or some civil or commercial matters, taking into account the specific legal effects of authentic instruments.

Further, the free circulation of judgments ordering payments by way of penalties might be improved by ensuring that the amount fixing the penalty is set, either by the court of origin or by an authority in the Member State of enforcement. It should also be considered to what extent the Regulation should not only permit the recovery of penalties by the creditor, but also those which

are collected by the court or fiscal authorities.

Finally, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment . Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the requirement to designate an address for service of process or to appoint a representative ad litem . In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters , such a requirement does indeed seem obsolete today.

The Commission asks whether the operation of the Regulation could be improved in the ways suggested above. While different respondents will, no doubt, pick out different elements of these proposals as being significant and deserving of attention, the following conclusions could be drawn:

1. Domicile of individuals (Art. 59)

In terms of the objective of the Regulation in promoting clear and uniform solutions to problems concerning the jurisdiction of Member State courts, it makes no sense for the key concept of "domicile" to be defined, in the case of individuals, by reference to national law, particularly as an autonomous definition has been provided for bodies corporate and unincorporated (Art. 60). A uniform approach should be adopted for individuals as well. This could refer to the concept of "habitual residence", consistently with the Rome I and Rome II Regulations, with the possible alternative of "main place of residence". These two factors would, broadly speaking, correlate to the second and third factors for bodies corporate etc. ("central administration" , "principal place of business"). Nationality, however, should not be adopted as a factor corresponding to the first factor for bodies corporate etc. ("statutory seat"), as the prospect of being brought before the courts of a country of origin, with which a person may no longer have a close connection, may act as a deterrent to the free movement of persons within the EC.

2. "Seat" of companies (Art. 22(2))

It would, in principle, appear equally desirable to develop a uniform approach to determining the "seat" of a company etc. for the purposes of Art. 22(2). If such a provision is to be adopted, the "statutory seat" (cf. Art. 60(1)(a), 60(2)) should be favoured over the "real seat" as being more certain and consistent with EC law principles of freedom of establishment. Continuing differences between the Member States as to the private international law rules to be applied to questions of corporate status and internal management – despite the intervention of the ECJ on more than one occasion – may, however, make agreement on this point difficult, if not impossible at this stage in the development of private international law in the Community.

3. Rules of special jurisdiction

An additional rule of special jurisdiction for cases concerning title, possession or control of *tangible* moveable assets (favouring the courts of the place where the asset is physically located at the time that the court becomes seised) would potentially be valuable, particularly in cases involving ships and aircraft. There may, however, be a risk that the rule could be abused by moving assets so as to create, or remove, jurisdiction of a particular Member State's courts. In particular, a party in possession or control of assets may move them to a particular jurisdiction with laws favourable to him and immediately issue proceedings for positive or negative declaratory relief, thereby blocking proceedings in other Member States to claim the asset. Such tactics may hinder, for example, efforts to recover artworks or cultural artefacts. As a consequence there would appear a strong argument for limiting any new rule to claims that include a claim to recover possession or control of tangible moveable assets. The rule should not, in any event, be extended to intangible assets, for which any "location" or situs is artificial and does not demonstrate the necessary close connection.

The special provision in Art. 65 for Germany, Austria and Hungary, excluding the application of Arts. 6(2) and 11 for third party proceedings and substituting certain national rules of jurisdiction, should be deleted, as being incompatible with an EC Regulation intended to have uniform effect.

4. Rules for employment cases

As the Commission suggests, the *Glaxosmithkline* decision should be partially

reversed by allowing an employee who sues two or more employers (whether joint or several) in the same proceedings to bring those proceedings before the courts of the domicile of one of them, provided that the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcileable judgments resulting from separate proceedings.

5. Collective redress

The possible development of specific jurisdiction rules for collective redress cases should be considered (outside the present review of the Brussels I Regulation) as part of an overall package of measures designed to improve protection for consumers and, possibly, other categories of claimants in particular situations (e.g. in anti-trust cases).

6. Recognition and enforcement

The recognition of authentic instruments and court settlements should be addressed, alongside their enforcement, in Chapter IV of the Regulation, as the Commission suggests.

More generally, and importantly, consideration should be given to elaborating in the Regulation what is required of Member States by the obligation in Art. 33 to "recognise" a judgment. In its judgment in *Hoffmann v. Krieg*, the ECJ suggested (citing a passage in the Jenard Report) that "[r]ecognition must therefore 'have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given'" (paras. 10-11). More recently in *Apostolides v. Orams*, albeit in the context of proceedings relating to the enforcement of a judgment, the ECJ appeared to qualify that proposition by applying a "correspondence of effects" test (para. 66):

> *Accordingly, the enforceability of the judgment in the Member State of origin is a precondition for its enforcement in the State in which enforcement is sought (see Case C-267/97 Coursier [1999] ECR I-2543, paragraph 23). In that connection, although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given (see Hoffmann, paragraphs 10 and 11), there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin (see the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in*

Civil and Commercial Matters (OJ 1979 C 59, p. 0048) or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have.

Despite these dicta, it remains unclear whether "recognition" under the Regulation consists only of "formal recognition" of the judgment as an instrument generating or discharging obligations, or having other constitutive effects, or whether it extends (for example) to the effect of a judgment in precluding the re-litigation of claims or issues. A recent study led by Jacob van de Velden and Justine Stefanelli of the British Institute of International and Comparative Law has confirmed that Member States currently take widely diverging views on these questions. Accordingly, further development of the Regulation's understanding of the concept of recognition deserves closer attention as part of the present review of the Regulation.

Finally, as to enforcement (see also the earlier post on the proposed abolition of "*exequatur*"), the Commission's proposed improvements to the enforcement regime (i.e. creation of a standard form containing all relevant information as to the nature and terms of the judgment) and removal of the requirement (Art. 40(2)) to have an address for service within the jurisdiction) appear sensible.

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This is the last of my posts on the current Brussels I review, the initial consultation period for which closes on 30 June 2009. Even after that date, I would encourage conflictoflaws.net users who take an interest in the Regulation and its application in the Member States to comment here on the issues raised by the Commission's Green Paper.

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Question 8:

Do you believe that the operation of the Regulation could be improved in the ways suggested above32

Brussels I Review – Interface with Arbitration

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

According to the Commission:

Arbitration is a matter of great importance to international commerce.

Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .

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

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

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for

the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

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

The Commission seeks responses to the following questions:

Question 7:

Which action do you consider appropriate at Community level:

• To strengthen the effectiveness of arbitration agreements;

• To ensure a good coordination between judicial and arbitration proceedings;

• To enhance the effectiveness of arbitration awards?

The Commission observes, correctly, that "arbitration is a matter of great importance to international commerce" and that "[t]he 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners". Any solution to the problems described in the Report and the Green Paper must, therefore, be without prejudice to the functioning of the New York Convention in the Member States. Further, Art. 71 of the Brussels I Regulation (which, inexplicably, does not presently concern itself with obligations

to decline jurisdiction) should be amended to make clear that the Regulation shall not prevent a court from declining jurisdiction, or from recognising or enforcing a judgment or award, where it is required to do so by the New York Convention (or, equally, the Hague Choice of Court Convention).

That said, it is also important that the treatment of arbitration in the Regulation should not give more favourable treatment, or greater protection, to arbitration agreements or to arbitral processes and awards than that given to choice of court agreements or to the judicial determination of disputes in, and the recognition and enforcement of judgments from, Member State courts. Within the EC's "area of justice", private methods of dispute resolution should not be favoured over judicial determination. This proposition is supported, for example, not only by the need for equal and fair access to justice for all at reasonable cost, but also by the important position that national courts hold in the Member States' constitutional orders and the need to protect the vital role those courts play in developing and declaring civil and commercial law. Arbitration tribunals, given their self-regulatory and confidential character, are not well suited to performing the latter role. One (perhaps the only) positive consequence of the ECJ's decision in the West Tankers case is that it removed the anomaly whereby an anti-suit injunction could be sought to restrain proceedings in another Member State brought contrary to an agreement for arbitration with its seat in a Member State, but not an exclusive jurisdiction agreement designating the courts of a Member State.

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

Accordingly, in addition to the adjustment of Art. 71 to confirm the overriding effect of the New York Convention (above), further adjustments to the Regulation will be necessary. The proposals in the Study, emphasising the key role of the courts of "place of the arbitration" (which must be understood as referring to the seat of the arbitration and not the venue for any hearing) seem as good a starting point for discussion as any. Further work will, however, be required on the detail

of the proposals, including the proposed definition of "place of the arbitration", with input from practitioners specialising in arbitration as well as international arbitration bodies such as the ICC and LCIA, and (if possible) UNCITRAL as the custodian of the New York Convention. In particular, it will be necessary to ensure that the existing allocation of competence between national courts and arbitral tribunals (e.g. as to determination of questions of the tribunal's jurisdiction) is not upset. Thus, recognition that the courts of the "place of arbitration" have jurisdiction under the Regulation, whether exclusive or not, to determine certain matters should be expressed to be without prejudice to rules in that place concerning the relationship between courts and arbitral tribunals. Further, in defining the "place of arbitration" in cases where the parties have not made an express choice of seat from the outset, care must be taken not to open up fresh opportunities for tactical litigation to undermine arbitration proceedings by designating as competent the courts of a place that is unlikely to have any close connection to the arbitration.

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

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

> *Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties .

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

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