Programme and Booking for the Journal of Private International Law Conference 2009 at NYU

The **programme for the Journal of Private International Law Conference 2009**, to be held at New York University Law School on 17-18 April 2009, along with a special tribute to Andreas Lowenfeld on 16 April, is now available. The line-up, both in the early careers section, and in the plenary sessions, makes this a diverse and fascinating conflicts conference of the very highest quality. There is limited space available, so it is strongly recommended that you book early. The booking page has details on New York accommodation, as well as the relevant fee for each category of registrant.

I look forward to seeing many of you there. Martin.

10th Anniversary of the Yearbook of Private International Law

For the 10th Anniversary of the **Yearbook of Private International Law**, a conference will be held in Lausanne, Switzerland, on 19 March 2009 at the Swiss Institute of Comparative Law.

The topic of the day will be "The Future of PIL between National and International Codifications and Case Law". The program can be found here.

The following day, on 20 March, the Swiss Institute organizes the "21e journée de droit international privé", on "La loi fédérale de droit international privé, 20 ans après" (interventions in French or German). The program can be found here.

First Issue of 2009's Journal du Droit International

The first issue of French *Journal du Droit International* (also known as *Clunet*) will shortly be released. It contains several articles dealing with conflict issues.

The topic of the first two is the 2008 Rome I Regulation on the law governing contractual obligations. First, Hughes Kenfack, a professor at Toulouse University, wonders whether the Regulation will function like a steady vessel or will be unable to avoid the reefs (*Le règlement Rome I, navire stable aux instruments efficaces de navigation ?*). The English abstact reads:

> *The Regulation on the Law Applicable to Contractual Obligations (« Rome I ») was adopted after five years of preparatory work. It supersedes the Rome Convention for contracts concluded after the 17th of September 2009, and works harmoniously within a framework of other Regulations including « Brussels I » and « Rome II ». Its purpose is to reinforce predictability and security in legal solutions to disputes while safeguarding a measure of flexibility. While upholding certain solutions imposed by the Rome Convention, the new text introduces some well met changes, notably regarding the determination of the applicable law in the absence of choice by the parties. The outcome will now be more predictable for most international commercial contracts.*
>
> *In the main, as a metaphor in the maritime field, the « Rome I » Regulation functions like a steady vessel with effective instruments of navigation. With the guiding light of the Court of justice of the European Communities, it should allow to avoid the reefs and lead to safe harbour.*

In the second article, Stephanie Francq, a professor of law at the Catholic University of Louvain (Belgium), presents the changes introduced by the new legislation (*Le Règlement Rome I. De quelques changements…*). The abstract reads:

EU Regulation n° 593/2008 (« Rome I ») harmonises conflicts-of-law rules in the area of contract law. The Regulation, which replaces the Rome Convention, applies to contracts entered into as from December 17, 2009. This article analyses in details the main changes brought about by the Regulation and reflects on the consequences of its adoption at EU level. In turn, it inquires into the existence of a logical and theoretical underpinning for the new rules. Finally, it highlights the particular influence exercised by certain Member States in the process leading to the adoption of the Regulation because of their opt-out from title IV of the EC Treaty.

The third article is a short report by Hélène Péroz (Caen University) on Certifying Authorities for European Enforcement Orders after a recent French Decree (*Les autorités certificatrices de titre exécutoire européen. A propos du Décret n°2008-484 du 22 mai 2008*). Here is the English abstract:

Decree n° 2008-484 regarding proceedings before the French Cour de cassation amends the list of authorities in charge of certifying European Enforcement Orders. French notarial acts will from now on be certified by the notary keeping the original document.
Decisions will also henceforward be certified by the chief registrar of the Court, choice which seems in contradiction with Regulation (EC) N° 805/2004 the decree is supposed to implement and therefore contrary to law.

Finally, the Journal offers two articles on international commercial law.

The first is the written version of the Lalive Lecture that Pierre Mayer, a professor of law at Paris I University and a partner at Dechert, gave in Geneva on Contract Claims and Jurisdiction Clauses in Investment Treaties (Contract Claims *et clauses juridictionnelles des traités relatif à la protection des investissements*).

The drafting of the dispute resolution clause contained within most investment treaties varies from one treaty to another. Certain clauses limit the offer of arbitral jurisdiction (addressed by each State party to the investors of the other State parties) to claims based on a breach of the substantive clauses of the treaty (treaty claims). Other clauses are drafted in more general terms, but arbitral tribunals limit their scope and exclude, here as well, claims based on a breach of the investment contract (contract claims). In these two cases,

requests of the investors which are based on the same facts and seek the same relief – compensation for the loss suffered due to the host state – have to be therefore submitted to different tribunals, which results in injustice and contradictions. No theoretical argument, based in particular on the alleged necessity to distinguish between State legal order and international legal order, justifies such an unacceptable result in practice.

The second is the second part of a piece on The New International Oil Exploration and Sharing Agreements in Libya (the first part was published in the first issue of the 2008 volume of the Journal) by professor de Vareilles-Sommières and attorney Anwar Fekini.

Concluding the previously undertaken study on the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005 (cf. JDI 2008, p. 3 for its first part), this second part of the article focuses on te rights and obligations deriving from the EPSA. A distinction has to be made between the main contract regarding the exploration or production on the one hand, and auxiliary legal acts such as the Bid Package or other agreements which are annexes to the EPSA like the letter of guarantee, the Shareholders agreement and the Joint operating agreement, on the other hand. The EPSA in itself appears to be a sui generis agreement, neither a concession, nor a works contract, from which derive a number of obligations (payment of bonus, setting up of managing bodies, lifting of oil portion by each party…), as well as a number of rights including a right of property over the oil produced. The article then considers, in order to assess their legal consequences, the four possible occurrences looming for better or worse over the EPSA (commercial discovery, breach of contract, change of circumstances, differences between parties). Regarding auxiliary legal acts, emphasis is lain on coordinating each of them with the main contract and on sorting out problems this coordination is likely to raise.

PIL conference in Johannesburg

PIL conference at the University of Johannesburg
9-11 September 2009
Call for papers: www.uj.ac.za/law
Closing date: 28 February 2009

ECJ Judgement on Deko-Marty Belgium, Case C-330/07

Many thanks to Professor Laura Carballo (Santiago de Compostela University, Spain), who has asked me to upload this brief comment on the ECJ judgment following *Veronika Gaertner*'s *post* ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency.

By Judgement of 12th of February 2009, the ECJ has addressed the issue of international jurisdiction for claims "which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings". These terms are contained in Recital 6 of Regulation (EC) Nr. 1346/2000, on insolvency proceedings; its Article 25.1 repeats the same definition, stating that judgments delivered in such kind of claims are to be recognized according to Articles 31 to 51, with the exception of Article 34(2), of the Brussels I Convention (now Articles 32 to 52, with the exception of Article 45.1, of the Brussels I Regulation). But Regulation (EC) Nr. 1346/2000 does not say anything about international jurisdiction rules for such claims, i.e. about a rule on *vis attractiva concursus*.

The issue was directly addressed by 1970 and 1980 Drafts of an European instrument on insolvency proceedings, both setting out which claims closely connected with insolvency proceedings must be concentrated before the *forum concursus*. Because of these statements, the silence of Regulation (EC) Nr.

1346/2000 was understood as an acknowledgment of the application of national jurisdiction rules. But this resulted to be a dangerous interpretation, because, as mentioned, Article 25 of this Regulation grants a privileged recognition system, without examination on the grounds of international jurisdiction; therefore, Member States should enforce all judgements, even when delivered by an exorbitant forum. Besides, application of national jurisdiction rules gives rise to negative conflicts of jurisdiction, because of the many understandings of the *vis attractiva concursus* rule by Member States. This is the outcome in the case underlying the recent EJC Judgement: On 14 March 2002, Frick Teppichboden Supermärkte GmbH, which has its seat in Germany, transferred EUR 50 000 to Deko Marty Belgium NV, a company with its seat in Belgium. Frick made an application for opening an insolvency proceeding the 15th March of 2002 and the named liquidator brought an action to set the transaction aside. He tried it first in Belgium, but Belgian Law establishes a *vis attractiva concursus* for avoidance proceedings and sent the matter to Germany. On the contrary, Germany places this action by the courts of the defendant's domicile, in this case Belgium. In the end, the German Bundesgerichtshof posed the two following questions to the ECJ, framing the issue in terms of European Regulations' scope of application:

"(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

(2) If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?"

The EJC gives a positive answer to the first question:

"Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State".

The EJC's answer is a logic one, given the fact that the definition stated by Recital 6 and Article 25.1,II of Regulation (EC) Nr. 1346/2000 comes from Case 133/78 Gourdain [1979] ECR 733, paragraph 4, a judgement delivered on the interpretation of Article 1(2)(b) of the Brussels I Convention, where it was decided that the so defined claims do not fall within the scope of application of the Convention, now Brussels I Regulation, in the case a French action against the de facto manager of an insolvent company. Therefore, this judgement is not a surprise, but a step forward in bringing juridical security to insolvency proceedings in the European Union. As a result of this answer, the question of which claims "are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings" and, therefore, are to be located before the courts where insolvency proceedings are conducted, is now open and should give rise to an autonomous interpretation by the ECJ. *Gourdain* and *Deko Marty Belgium* give just some clues, but the issue is far from being closed. For now, this judgement makes it clear that avoidance proceedings are one of them, but it is going to be more difficult to decide other claims, such as liability claims against managers and administrators, or claims arising from the impact of insolvency in running contracts.

ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency

On 12th February, the ECJ delivered its judgment in case C-339/07 (*Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*).

The questions referred to the ECJ concern the international jurisdiction of courts in respect of actions to set a transaction aside by virtue of insolvency. Thus, the

case raises the question of the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

See for a short summary of the background of the case our previous post on the AG's opinion which can be found here and our post on the referring decision which can be found here.

The German Federal Court of Justice (*BGH)* had referred the **following questions** to the ECJ for a preliminary ruling:

> *(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?*
>
> *(2) If the first question is to be answered in the negative:*
>
> *Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?*

Now, the **ECJ** followed the opinion given by *Advocate General Ruiz-Jarabo Colomer* and held in its **judgment** that

> *Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.*

In its reasoning, the Court referred to its case law on the Brussels Convention (*Gourdain*) where the Court has held that an action similar to that at issue in the main proceedings is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and that such an action does not fall within the

scope of the Convention (para. 19). The Court emphasises that it is exactly this criterion – i.e. the strong connection to insolvency proceedings – which is used by Recital 6 of the Insolvency Regulation to delimit its purpose (para. 20). According to Recital 6 of the Insolvency Regulation "the Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings."

The Court concludes that "concentrating all the actions directly related to the insolvency of an undertaking before the courts of a Member State with jurisdiction to open the insolvency proceedings" is "consistent with the objective of improving the effectiveness and efficiency of insolvency proccedings having cross-border effects […]." (para. 22)

This result is supported by the Court with reference to Recital 4 of the Insolvency Regulation according to which forum shopping shall be avoided and further by means of a conclusion drawn from Art. 25 Insolvency Regulation: According to Art. 25 (1) Insolvency Regulation, judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 Insolvency Regulation and which concern the course and closure of insolvency proceedings – and thus a court with jurisdiction under Art. 3 (1) Insolvency Regulation – have to be recognised with no further formalities. According to the second subparagraph of Art. 25 (1) Insolvency Regulation, the first subparagraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked to them. This means – in the Court's words – that this "provision allows the possibility for courts of a Member State within the territory of which insolvency proceedings have been opened, pursuant to Article 3 (1) of that regulation, also to hear and determine an action of the type at issue in the main proceedings." (para. 26)

Service of Federal Court documents outside Australia

Practitioners in Australia should be aware that, pursuant to Practice Note No 13 (4 September 2008), the Federal Court requires a party applying for leave to serve originating process or other documents outside Australia to support the application with evidence of information obtained from the Private International Law Section of the Commonwealth Attorney-General's Department in relation to the appropriate method of transmitting documents for service, including certain specified information. See the Practice Note for further details.

Layton on West Tankers

Alexander Layton QC is a barrister in practice at 20 Essex Street, London. He is a specialist in private international law and arbitration, and joint general editor of European Civil Practice. Although he acted for the UK government at the oral hearing in West Tankers, the views below are purely personal.

Much of what I would have said on this judgment has already been said, more cogently, by others. My comments will therefore be brief.

First, it seems that the ECJ may well have applied one law correctly, namely the law of unintended consequences. In its use of simple – or at least sparse – reasoning to resolve a complex problem is reminiscent of what Alex Tabarrock has written in a different context:

> *The law of unintended consequences is what happens when a simple system tries to regulate a complex system. The political system is simple. It operates with limited information (rational ignorance), short time horizons, low feedback, and poor and misaligned incentives. Society in contrast is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system you often get unintended consequences.*

The unintended consequences here are, surely, the disruption which may flow to the exercise of arbitrators' powers. As Andrew Dickinson and Jonathan Harris have already pointed out, the extent to which these are affected by this decision is unclear.

The Court has held that court proceedings based on the arbitration agreement are outside the scope of the Regulation (paragraph 23) and so its decision that such proceedings contravene European law is based not on an application of the Regulation, but on that part of the *acquis communautaire* which is based on the doctrine of *effet utile.* (It is striking how thinly reasoned this part of the judgment – paragraph 24 – is; there is no reference to any earlier decision on the point at all). While we may agree that Regulation 44/2001 does not affect the jurisdiction of arbitrators, can the same be said of wider European law? Very possibly not. If you take this decision alongside the *Eco-Swiss* decision, you are left in great doubt whether it is contrary to EU law for arbitrators even to rule on the validity of an arbitration agreement, let alone award damages for its breach. The use of lax language by the Court in paragraph 27 ("it is … exclusively for [the court seised of the underlying dispute] to rule on that objection" – i.e., an objection as to the existence of an arbitration agreement) is particularly regrettable.

An extra layer of confusion arises in respect of arbitrators' powers to award anti-suit injunctions. The basis on which this specific procedural device was outlawed in *Turner*, and which forms a subsidiary basis for outlawing the anti-suit injunction in this case (paragraph 30) is that it is contrary to the doctrine of mutual trust. But, as *Gasser* (paragraph 72, where the doctrine was first identified in the Court's jurisprudence) makes clear, that doctrine is specifically based on the structure and principles underlying the Brussels I Regulation, namely the existence of uniform jurisdictional rules for *courts* and the largely automatic recognition and enforcement which is the corollary of those rules. The uniformity of jurisdictional rules does not apply to arbitrators and such rules for the recognition and enforcement of awards as there may be arise not under European law at all, but under the New York Convention and under the varying domestic laws of Member States. How then can the doctrine of mutual trust apply to preclude arbitrators from granting anti-suit injunctions?

The second and much briefer comment I wish to make is to echo the sense of disappointment that the European Court has again failed to rise to the occasion in grappling with complex issues of private law and procedure. In a Community of

27 Member States, the Court cannot perhaps be expected to provide reasoning which shows sensitivity to the complexities which arise from the panoply of national legal systems and international norms; but it can surely be expected to grapple with the issues which arise from its own previous case law. I have already referred to *Eco-Swiss* as an example. In the present case, it is surprising that the Court founds its decision on the scope of Article 1(2)(d) on paragraph 35 of the Kerameus and Evrigenis Report, without acknowledging that that paragraph has been the subject of scrutiny and strong adverse comment by Advocate General Darmon in his Opinion in *Marc Rich* (paragraphs 43 to 48).

Thirdly, a comment directed to the future. There appears to be a welcome consensus emerging, encompassing commentators from at least Germany, France and the United Kingdom, that legislative change is needed to grapple with the unsatisfactory state of the law in this context. The suggestion in the Heidelberg Report, to which Professor Hess refers, that Brussels I be amended so as to bring proceedings ancillary to arbitration within it, and to confer exclusive jurisdiction on the courts of the state of the arbitration deserves support (as do similar proposals relating to choice of forum clauses).

Rafael Arenas on West Tankers

Rafael Arenas is Professor of Private International Law at the University of Barcelona (Universidad Autónoma). He has numerous publications in the field of international commercial law. He is author of several monograph works, such as Registro Mercantil y Derecho del Comercio Internacional, and co-author of Derecho de los negocios internacionales

Regulation 44/2001 also applies to arbitral proceedings

The key words of the decision are clear enough: “recognition and enforcement of foreign arbitral awards”, “Regulation (EC) No 44/2001” “scope of application” “Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration

agreement", "New York Convention". It is obvious that the ECJ is dealing with an arbitral case, and it is also obvious that Regulation 44/2001 does not apply to arbitration. These are obvious statements, but the final conclusion of the Court is that the English proceeding (which falls outside the scope of Regulation 44/2001, see number 23 of the decision) is not compatible with the Regulation. How can this be possible?

The reasoning of the ECJ is based on two facts. First, there is an Italian proceeding that falls within the scope of Regulation 44/2001; second, this Italian proceeding could be affected by the English proceeding. The conclusion is that the English proceeding is not compatible with Regulation 44/2001. Obviously, there is some kind of gap in the reasoning: if the proceeding is not compatible with Regulation 44/2001, this means that Regulation has an influence of some kind on the English proceeding, but this influence does not fit with the assertion that "proceedings, such as those in the main proceedings (…) cannot, therefore, come within the scope of Regulation No 44/2001" (number 23 of the decision).

The conclusion of the ECJ is not problem-free. The reasoning is not strong enough to justify the extension of Regulation 44/2001 to arbitral proceedings, which are excluded of the Regulation expresis verbis (art. 1). From my point of view it is also a dangerous decision. The reasoning of the Court implies that every proceeding that could affect a proceeding within the scope of Regulation 44/2001 must be examined in order to determine if it is compatible with the Regulation. This is new and shocking. Let's think about proceedings before an arbitral court. They obviously fall outside the Regulation scope but this is not a justification for not applying Regulation 44/2001 anymore. If the proceeding affects another proceeding falling within the scope of Regulation 44/2001, then we must analyse the compatibility of the first proceeding with the Regulation; and it is obvious that a proceeding before an arbitral court could affect proceedings falling within the scope of the Regulation. How about a court decision designating an arbitrator? Is this decision compatible with the Regulation in the case that a judicial proceeding involving the same cause of action has already started in a member State? I think that Regulation 44/2001 has nothing to say in this case, but following the "West Tanker doctrine" the answer to these questions could be a different one. I can imagine a decision of the Luxembourg Court establishing something like this: "In the light of the foregoing considerations the answer to the question referred is that a court of a Member State cannot help a proceeding that could limit the

application of a judgment that falls within the scope of Regulation 44/2001" In this sense, the Opinion of the Court 1/03 (Lugano Convention) must also be considered.

Finally, I would like to point out that this decision can only be understood if we consider the supremacy of the Community legal order. The "useful effect" doctrine implies that in conflicts between Community Law and other legal sources Community Law always prevails; even when the case is not ruled directly by Community Law. The consequence of this is that the "indirect" effect of Community Law expands the scope of the Community competences more and more; in the same way that a black hole becomes bigger and bigger thanks to the matter that it soaks up. In the end, nevertheless, bigger does not necessarily mean greater or better.

Kessedjian on West Tankers

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Commenting "à chaud" is contrary to the good lawyer's tradition (at least in civil law). But our world does not allow anymore reflecting for substantial periods of time and everything has to be done now. So be it!

The relation between arbitration and the Brussels I Regulation is everything but an easy question and the least to be said is that the Judges at the European Court cannot be bothered to really ask themselves the hard questions. One page or so of reasoning in West Tankers shows that, for the Court, the matter is "evident" and without much interest. This is exactly the kind of attitude which is counterproductive.

The decision is narrow-minded. It is surprisingly so since the Court has, in the past, tackled very important political issues (political in the sense of, for example, the place of Europe within the word etc…). It is about time that the European

Institutions think about the policy Europe wants to establish about arbitration, and the European Court could have sent some encouraging signals to the Member States. This is a missed occasion.

On the substance of the case:

1) The starting point taken by the Court (after the Advocate General) is a mistake. If the arbitration exception in Reg 44/2001 is to be taken seriously, the Court cannot say that the validity of an arbitration agreement is a "question préalable" in the classic meaning of the expression. Indeed, as soon as there is a prima facie evidence that an arbitration agreement exists, there is a presumption that the parties wanted to free themselves from the judicial system. Consequently, any jurisdiction in the world lacks power to decide on the merits because, in matters where they are free to do so, parties have deprived courts from the power to decide on their dispute. Power is preliminary to jurisdiction. Jurisdiction is a question which does not arise if the entire judicial system is excluded from the parties' will. This is why the starting point of the analysis is to say that Reg 44/2001, which deals with jurisdiction, has nothing to say about whose power it is to decide on questions of arbitration. Hence the exclusion of arbitration, from its scope,

2) To say that the scope of Brussels I is only to be interpreted as far as the merits of a case are concerned (point 26) may be true for other exclusions of Article 1 of 44/2001, not for arbitration. If we go the route taken by the Court, then the arbitration exclusion is emptied of its significance because every single matter referred to arbitration is indeed also capable of being arbitrated (at least in a great number of Members States). The interpretation made by the Court is contrary to the well settled principle when interpreting a legal text; i.e. that of giving an effective meaning to the provision.

3) I am not saying that West Tankers inaugurates the trend. Indeed, it was already there in the *Van Uden* decision. And we were probably not attentive enough to the potential damaging effect of *Van Uden*.

4) The validity of the arbitration agreement is consubstantial with the power to arbitrate. Therefore, it cannot be taken lightly. This is why, instead of leaving the New York Convention as an afterthought (point 33), the Court should have started the analysis with the Convention. The Court should have embraced the well

known consequence of Article II-3 of the Convention: it is for the arbitral tribunal to decide on the validity of the arbitration agreement, unless (and only in that case) it is "null and void, inoperative or incapable of being performed".

5) Then the court should have asked the only legitimate question: "which court has the power to decide whether the arbitration agreement is "null and void, inoperative or incapable of being performed". Here the Court should have noted that the New York Convention is silent. And it should have noted also that Reg 44/2001 is silent too for very good reasons: because arbitration is excluded.

6) The next question would have then been: can we go beyond the text and provide for a uniform jurisdictional rule? There, I think, the Court should have paused and ask herself what is the policy behind the need for a uniform rule. Certainly, the importance of Europe as a major arbitration player in the world could have been one consideration. But there are others which I won't detail here.

7) Is it for the Court to go beyond the text it is asked to interpret (and decide contra legem)? Most of the time, the answer is NO. And the Court has, in some occasions, clearly said so and said that it is for the Member States to adopt the proper rules (one of the last occasions of such a prudent approach by the Court is the *Cartesio* case in matters of company law). Why in the world the Court did not take that prudent approach when it comes to arbitration? I have nothing to offer as a beginning of an answer.

8) If the Court had taken that approach, then the answer to the House of Lords would have been, as European Law stands now, the matter falls under national law and there is nothing in European Law which prevents you from using your specific procedural tools, even though we may disapprove of them.

9) This, in my view, was the only approach possible. It is so much so, that part of the reasoning of the Court is based on an erroneous analysis of what is an anti suit injunction. Unless I am mistaken, I understand those injunctions to be addressed to the party not to the foreign court. Yes, at the end of the process, it is the foreign court which will be deprived of the matter because the party would have withdrawn from the proceedings. But the famous "mutual trust" (which alone would merit a whole doctoral dissertation) has no role to play here.

10) By deciding the matter the way it did, the Court does not render a service to the parties. *West Tankers* basically says that any court in the EU which could

have had jurisdiction on the merits (if it were not for the arbitration agreement) has jurisdiction to review the validity of the arbitral agreement. This is the wrong message to send. It allows for mala fide persons who want to delay proceedings and harass the party who relies on an arbitration agreement. It may not have been the problem in *West Tankers* as such, but the effect of *West Tankers* is clearly contrary to a good policy.