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

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

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

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

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

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

3. It appears that most national arbitration laws in the EU provide for this kind of state court support. Thus, a party to an arbitration agreement will usually find its

juge d'appui at the seat of the arbitration if the opponent is refusing to cooperate in the establishment of the tribunal. Hence there is no need for a harmonised mandatory rule to this effect in the Brussels I Regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. If in contrast, the state court renders a decision on the existence, validity or

scope of the arbitration agreement even before the arbitral process was initiated, legal certainty and procedural economy are fostered. State court intervention is indispensable in the West Tankers scenario – the earlier, the more convenient, faster and cheaper it is for the parties.

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

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

20. Approving the suggested solution of the Heidelberg Report one should stress the following point: the proposed Art. 27A does not interfere with the national arbitration laws regarding the power of the national courts to grant declaratory relief. It merely provides for an exclusive jurisdiction if the national law chooses

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

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

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

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

Brussels I Review – 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.

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.*
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> *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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> *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.*
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> *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.*
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> *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.*
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agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.
Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).
Question 7:
Which action do you consider appropriate at Community level:
• To strengthen the effectiveness of arbitration agreements;
• To ensure a good coordination between judicial and arbitration proceedings;
• To enhance the effectiveness of arbitration awards?

Brussels I Review – Online Focus Group

Many will, by now, have had the opportunity to consider the Commission's Report and Green Paper on the review of the Brussels I Regulation, if not also the detailed Studies by Professors Hess, Pfeiffer and Schlosser and Nuyts, on which they were based. As the Commission's initial deadline for consultation concludes at the end of this month, this seems an appropriate time at which to invite conflictoflaws.net users to participate in an online discussion on the Report and Green Paper, with a view to debating some or all of the Commission's proposals.

Over the next few days, therefore, a series of posts will invite comments (see the Post a Comment box below) on particular aspects of the proposed reform of the Brussels I Regulation. These will follow the order of topics in the Green Paper,

that is to say (links will be added to each topic as the relevant post is published):

- the abolition of intermediate measures to recognise and enforce foreign judgments (*exequatur*) (Question 1);
- the operation of the Regulation in the international legal order (Question 2);
- choice of court agreements (Question 3);
- industrial property (Question 4);
- *lis pendens* and related actions (Question 5);
- provisional measures (Question 6);
- the interface between the Regulation and arbitration (Question 7); and
- other issues (Question 8).

Responses (that are published as posts, rather than comments) to any or all of the initial posts:

- Jonathan Hill
- Illmer and Steinbrück on the Interface Between Brussels I and Arbitration

Each post will contain relevant extracts from the text of the Green Paper, together with a preliminary reaction and suggestions as to the way forward. This commentary (based on the author's personal views) is intended as a spur for debate of the Green Paper, rather than to define the areas for discussion or criticism of its proposals (or any counter-proposals). It is hoped that the debate will be as wide-ranging, in terms of subject matter and contributors, as possible. Comments from all site users, whether general or limited to a single point, are actively encouraged.

Before opening the discussion with the first of these posts, it seems appropriate to make a few introductory comments on the Green Paper and Report.

First, the response to the Green Paper and the Report should be only the start, and not the end, of consultation with stakeholders of these important matters. The Commission has had 18 months to consider the Studies referred to above, and to develop its own analysis and proposals. It is disappointing, therefore, that a period of only 2 months (up to 30 June 2009) has been allowed for responses to the Green Paper, especially as an extended period over the summer vacation could not conceivably have materially delayed progress in formulating a draft updating Regulation. Mechanisms must be found, whether directly or through the

Member States, to ensure that the views of individuals, interest groups and academic and practising lawyers are fully taken into account at all stages of the legislative process.

Secondly, it is vital that consideration should also be given as a matter of priority to structural changes within the European Court of Justice, so far as compatible with the EC Treaty, that will enable the Court to deal with preliminary references concerning the Regulation and other EC private international law instruments in a manner befitting their significance for the parties and the Member States' systems for dispensing civil justice. As the content of the Commission's Report demonstrates, the ECJ has regularly provided answers to questions put by Member State courts that are unsatisfactory in their reasoning or practical application, or both. In particular, the Court, particularly in its recent case law, has shown a worrying disregard of arguments founded on the commercial consequences or justice of a particular interpretation in favour of an approach driven, apparently, solely by considerations of legal certainty and the exclusion of other considerations by the text of the Regulation.

As a result, there is (whether justified or not) a perception among legal practitioners that the ECJ in its current constitution lacks the all-round expertise to deal with references in the area of civil justice and, at least in England and Wales, that it is insensitive to the traditions and methods of the common law. It is, of course, a matter of fundamental importance that the citizens and courts of the Member States should have trust and confidence in the ECJ to exercise its overriding interpretive power responsibly. Against this background, and mindful of the possible expansion of the ECJ's caseload if the Lisbon Treaty is ratified, the creation of a specialist chamber (with its own Judges and Advocates-General) to deal with references relating to the several instruments adopted under Title IV of the EC Treaty would be a significant advance, and would appear to be within the powers conferred on the Community legislature by Art 225a of the Treaty. If this, or equivalent steps, are not taken at this stage, reform of the Brussels I Regulation in isolation is likely to be a case of "swallowing a spider to catch a fly" and to lead to further complications (and the need for further reform) as a result of the ECJ's future jurisprudence interpreting any new rules.

Thirdly, to increase the accessibility of the Regulation to non-experts, deregulation (i.e. reduction in the complexity or number of jurisdictional rules) should be preferred to increased regulation in the Brussels I reform process. Any

modification of an existing instrument carries with it an inherent degree of legal uncertainty, by requiring existing case law and commentary to be re-appraised in light of the change. That effect must be taken into account in deciding which issues to tackle, and how, in the review process.

Finally, as to the Commission's comments in its Report on the functioning of the Brussels I Regulation, it seems fair to conclude that the Regulation, and its predecessor convention, have offered significant advantages for business, by promoting the free circulation of judgments in the EC and (in many situations) increasing predictability and consistency as to the criteria to be applied by Member State courts in accepting jurisdiction. There is, however, no doubt that the Commission is also correct to conclude that functioning of the Regulation is open to improvement. It would be surprising if that were not the case. Further, it may be doubted whether (as the Commission suggests) the Regulation is "highly appreciated among practitioners". Many legal practitioners, whose practices concern only domestic matters, are untroubled by the Regulation. For others, the overall impression of the Regulation is, frequently, coloured by situations in which its operation is perceived as giving rise to inconvenient or uncommercial results. For example, in the United Kingdom, widespread (adverse) publicity in the legal profession followed the English High Court's decision in *J P Morgan v. Primacom* (following the earlier ECJ decision in *Gasser v. MISAT Srl*), that proceedings brought by a borrower in Mainz, Germany with the evident intention of frustrating proceedings to enforce a loan agreement in England (the jurisdiction chosen by the parties) must take priority under Art. 27 of the Regulation. One UK legal newspaper described the Primacom case "an intercreditor nightmare" that was "playing havoc with exclusive jurisdiction clauses and is threatening to derail cross-border restructurings in Europe". Criticism in UK legal circles has also followed the recent ECJ decision in *Allianz v. West Tankers*. Commenting on that decision, the Chief Executive of the Law Society, the representative body for solicitors in England and Wales, argued that the ruling "does Europe no favours as a place to do business" (see here).

Against this background, it is vital that any reform of the Brussels I Regulation should address, and be seen to address, the problems that EC litigants and their legal advisers actually face in practice, rather than pursuing the holy grails of "mutual recognition" and "legal certainty". Whether pragmatism will prevail over ideology remains, however, to be seen.

To conclude on a personal note, I should add that I was delighted to receive and accept an invitation to join conflictoflaws.net as a Consultant Editor. Through the breadth and quality of submissions by its editorial team and other contributors, the site has established itself as an essential point of reference for all practising and academic lawyers with an interest in private international law. I look forward to reading the reaction to this, and future posts on the site, concerning the European private international instruments and related matters.

Exception to the Arbitration Exception: the 1896/2006 Regulation

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

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

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

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

Arbitration Exception.

This remarkable exception to the exception beggs two questions:

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

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

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

Conference: Arbitration and EC Law

The Heidelberg Centre for International Dispute Resolution at the Institute for Private International and Comparative Law will host a conference with the topic

“Arbitration and EC Law – Current Issues and Trends”.

The conference will focus on the relations between European civil procedure and arbitration which have been an intensely debated topic among legal scholars and practitioners for a long time. Lately the debate has been fuelled in particular by:

- the upcoming decision of the European Court of Justice which will decide on the availability of anti-suit injunctions for the protection of arbitral agreements (case C-185/07) – on September 4, 2008 GA Kokott proposed in her conclusions not to permit such remedies in the European Judicial Area,
- recent case law in several EC Member States addressing the arbitrability of EC antitrust law,
- the publication of a report, commonly known as the Heidelberg Report, analyzing – in view of the European Commission's upcoming proposals on possible improvements of the Brussels I Regulation in 2009 – the application of the Regulation in 25 Member States, which proposes to delete the arbitration exception in article 1 no. 2d in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation

The conference will take place from 5th to 6th December 2008 in Heidelberg. Here is the **conference program**:

Friday, Dec. 5, 2 p.m.

1. Free movement of arbitral awards: European challenges

Prof. Gomez Jene, Madrid

2. West Tankers Litigation – the present state of affairs

Att. Prof. H. Raeschke-Kessler, Karlsruhe

3. Articles 81 and 82 EC-Treaty and arbitration

Prof. P. Schlosser, Munich

4. The Regulations Rome I and Rome II: Their impact on arbitration

Prof. T. Pfeiffer, Heidelberg

Dinner

Saturday, Dec. 6, 9.30 a.m.

5. Roundtable: The Brussels I Regulation and arbitration

(Chair: *Prof. H. Kronke*)

5.1 Findings and proposals of the Heidelberg Report on the Regulation (EC) 44/01

Prof. B. Hess, Heidelberg

5.2 A French reaction

Att. Alexis Mourre, Paris

5.3 An English reaction

Att. VV. Veeder, London

5.4 A Belgian perspective

Prof. H. van Houtte, Leuven

5.5 An Italian reaction

Prof. C. Consolo, Verona.

The conference will end at 12.00.

Further information, in particular on registration and accomodation, can be found at the website of the Institute for Private International and Comparative Law Heidelberg.

Arbitration Agreements, Anti-Suit Injunctions and the Brussels

Regulation

Martin Illmer (*Hamburg*) and Ingrid Naumann (*Berlin, currently New York*) have published a very interesting analysis of the compatibility of anti-suit injunctions in aid of arbitration agreements with the Brussels Regulation in *International Arbitration Law Review* (Int. A.L.R. 2007, 10(5), 147-159): **Yet another blow – anti-suit injunctions in support of arbitration agreements within the European Union**.

An abstract has been kindly provided by the authors:

Following the ECJ's judgment in *Turner* the issue of the compatibility of anti-suit injunctions with the regime of the Brussels Regulation has again attracted much attention due to the reference by the House of Lords to the ECJ in the *West Tankers* case. By virtue of the eagerly awaited judgment of the ECJ anti-suit injunctions in support of arbitration agreements are at risk to fall within the European Union. Illmer and Naumann provide a thorough and detailed analysis of whether anti-suit injunctions in support of arbitration agreements are compatible with the Brussels Regulation (Regulation 44/2001) and general principles of EU law. Weighing and assessing the arguments put forward in both directions they reach the compelling conclusion that anti-suit injunctions in support of arbitration agreements are incompatible not only with the Brussels Regulation but with general principles of European law. This conclusion based on legal reasoning cannot be overcome by reference to an alleged practical reality of arbitration which the authors unveil as disguised protectionism for the arbitral seat London.

In the first part of their article, Illmer and Naumann provide a detailed analysis of the scope of the arbitration exception of Art. 1(2)(d) of Regulation 44/2001 with regard to anti-suit injunctions. This comprises of an analysis of the ECJ's former judgments in *Marc Rich* and *van Uden*, the English courts' understanding and interpretation of Art. 1(2)(d) which the authors criticise as a cherry picking exercise and finally a thorough construction of the arbitration exception based on the canon of interpretation tools generally applied by the ECJ. They conclude that the arbitration exception does not cover anti-suit injunctions in support of arbitration agreements. Caught by the the regime of the Brussels Regulation they are incompatible with it as follows inevitably from the ECJ's judgment in *Turner*.

In the second part of the article, the authors continue their analysis under the presumption that the anti-suit proceedings are covered by the arbitration exception and thus do not fall under the Brussels Regulation. Whereas one may take the view that principles underlying the Regulation, in particular the notion of mutual trust, cannot be applied to anti-suit proceedings falling outside the scope of the Regulation, one cannot bypass the general principle of *effet utile*: Even proceedings in national state courts that do not fall under the Brussels Regulation by virtue of the arbitration exception must not impair proceedings that come within the scope of the Brussels Regulation (i.e. the proceedings which are intended to be restrained by the anti-suit injunction) and thus distort the effective functioning of European law.

In a third, complementary part the authors rebut the arguments put forward by the House of Lords in the *West Tankers* reference concerning the so-called practical reality of arbitration. They show that the truth behind this argument is a protection of London as an arbitral seat vis-à-vis its European competitors in the fierce competition for arbitration amongst arbitral seats. Furthermore, the authors hint at alternatives to anti-suit injunctions in protecting the undeniable interest of the parties to an arbitration agreement in avoiding a breach or circumvention of it.