Yearbook of Private International Law, vol. X (2008)

I am grateful to Gian Paolo Romano, Production Editor of the Yearbook of Private International Law, for providing this presentation of the new volume of the YPIL.

Volume X (2008) of the Yearbook of Private International Law, edited by *Prof. Andrea Bonomi* and *Prof. Paul Volken*, and published by Sellier European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC) of Lausanne, was put on the market last week.

Volume X, which celebrates the tenth anniversary of the Yearbook, is made up of 35 contributions on the most various subjects authored by scholars and practioners of almost all continents. Its 743 pages make him one of the most considerable collections of PIL essays in English language of recent years. The volume may be ordered via the publisher's website, where the table of contents and an extract are available for download.

The **Doctrine** section includes three contributions concerning the European judicial area: a first on the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments of 30 October 2007, a second on the European jurisdiction rules applicable to commercial agents and a third on the recent decision of the European Court of Justice in *Grunkin-Paul*, a seminal case that opens new perspectives for the application of the recognition principle as opposed to classical conflict rules in the field of international family law. Other original contributions concern damages for breach of choice-of-forum agreements, accidental discrimination in conflict of laws and the recent Spanish regulation of arbitration agreements.

Two **Special sections** of this volume are devoted, respectively, to the EC Regulation on the law applicable to contractual obligations (Rome I) and to the new Hague Convention and Protocol on maintenance obligations.

- In addition to several contributions of general nature, the **special section on Rome I** includes detailed analyses of the impact that the Regulation will have on the connection of specific categories of contracts (contracts relating to intellectual and industrial property rights, distribution and

franchise contracts, financial market and insurance contracts), as well as some remarks from a Japanese perspective.

- The **special section on maintenance obligations** includes insider commentaries on the two instruments adopted by the Hague Conference on 23 November 2007: the Convention on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol, which includes rules on the law applicable to maintenance obligations and aims to replace the 1973 Hague Applicable Law Convention.

The **National Reports** section includes the second part of a detailed study on private international law before African courts, a critical analysis of the new Spanish adoption system and of the conflict of laws issues raised by the Panamanian business company, two articles on arbitration (in Israel and Romania), and several contributions concerning recent developments in Eastern European countries (Macedonia, Estonia, Lithuania and Belarus). Africa is also at the centre of the report on UNCITRAL activities for international trade law reform in that continent.

The section on **Court Decisions** includes – together with commentaries on the *Weiss und Partner* and the *Sundelind López* decisions of the ECJ – detailed analyses of a recent interesting ruling of the French *Cour de cassation* on overriding mandatory provisions and of two Croatian judgments on copyright infringements.

The **Forum Section** is devoted to the recognition of trusts and their use in estate planning, the juridicity of the *lex mercatoria* and the use of nationality as a connecting factor for the capacity to negotiate.

Here is the full list of the contributions:

Doctrine

- *Fausto Pocar*, The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;
- *Peter Mankowski*, Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation Plus the Procedural Consequences of *Ingmar*;
- *Koji Takahashi*, Damages for Breach of a Choice-of-court Agreement;

- *Carlos Esplugues Mota*, Arbitration Agreements in International Arbitration. The New Spanish Regulation;
- *Gerhard Dannemann*, Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdiction;
- *Matthias Lehmann*, What's in a Name? *Grunkin-Paul* and Beyond;

Rome I Regulation – Selected Topics

- *Andrea Bonomi*, The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks;
- *Eva Lein*, The New Rome I / Rome II / Brussels I Synergy;
- *Pedro A. De Miguel Asensio*, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Right;
- *Marie-Elodie Ancel*, The Rome I Regulation and Distribution Contracts;
- *Laura García Gutiérrez*, Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts;
- *Francisco J. Garcímartin Alférez*, New Issues in the Rome I Regulation: The Special Provisions on Financial Market Contracts;
- *Helmut Heiss*, Insurance Contracts in Rome I: Another Recent Failure of the European Legislature;
- *Andrea Bonomi*, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts;
- *Yasuhiro Okuda*, A Short Look at Rome I on Contract Conflicts from a Japanese Perspective;

New Hague Maintenance Convention and Protocol

- *William Duncan*, The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Comments on its Objectives and Some of its Special Features;
- *Andrea Bonomi*, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations;
- *Philippe Lortie,* The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information Technology Systems – The Example of the 2007 Hague Convention and Protocol;

National Reports

- *Richard Frimpong Oppong*, A Decade of Private International Law in African Courts 1997-2007 (Part II);
- *Santiago Álvarez González*, The New International Adoption System in Spain;
- *Daphna Kapeliuk*, International Commercial Arbitration. The Israeli Perspective;
- *Toni Deskoski*, The New Macedonian Private International Law Act of 2007;
- *Karin Sein*, The Development of Private International Law in Estonia;
- *Radu Bogdan Bobei*, Current Status of International Arbitration in Romania;
- *Marijus Krasnickas*, Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania;
- *Daria Solenik*, Attempting a 'Judicial Restatement' of Private International Law in Belarus;
- *Gilberto Boutin*, The Panamanian Business Company and the Conflict of Laws;

News from UNCITRAL

- *Luca G. Castellani*, International Trade Law Reform in Africa;

Court Decisions

- *Pietro Franzina*, Translation Requirements under the EC Service Regulation: The *Weiss und Partner* Decision of the ECJ;
- *Marta Requejo Isidro*, Regulation (EC) 2201/03 and its Personal Scope: ECJ, November 29, 2007, Case C-68/07, *Sundelind López*;
- *Paola Piroddi*, The French Plumber, Subcontracting, and the Internal Market;
- *Ivana Kunda*, Two Recent Croatian Decisions on Copyright Infringement: Conflict of Laws and More;

Forum

- *Julien Perrin*, The Recognition of Trusts and Their Use in Estate Planning under Continental Laws;
- *Thomas Schultz*, Some Critical Comments on the Juridicity of *Lex Mercatoria*;

- *Benedetta Ubertazzi*, The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce.

(See also our previous posts on the 2006 and 2007 volumes of the YPIL)

Articles on Rome II and Hague Convention on Choice of Court Agreements

The current issue (Vol. 73, No. 1, January 2009) of the Rabels Zeitschrift contains inter alia two interesting articles on the Rome II Regulation and the Hague Convention on Choice of Court Agreements:

Thomas Kadner Graziano: "The Law Applicable to Non-Contractual Obligations (Rome II Regulation)" – the English abstract reads as follows:

> *As of 11 January 2009, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) will be applicable in twenty-six European Union Member States. The Rome II Regulation applies to events giving rise to damage which occur after its entry into force on 19 August 2007 in proceedings commenced after 11 January 2009. This Regulation provides conflict of law rules for tort and delict, unjust enrichment and restitution, negotiorum gestio and culpa in contrahendo. It has a wide scope covering almost all issues raised in cases of extra-contractual liability.*
>
> *The majority of the rules in the Rome II Regulation are inspired by existing rules from European countries. Others are pioneering, innovative new rules. Compared to many of the national systems of private international law of non-contractual obligations, Rome II will bring significant changes and several new solutions. The Rome II Regulation introduces precise, modern and well-targeted rules on the applicable law that are well adapted to the needs of European*

actors. It provides, in particular, specific rules governing a certain number of specific torts (e.g. product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, and industrial action). The provisions of the Regulation will considerably increase legal certainty on the European scale, while at the same time giving courts the freedom necessary to deal with new or exceptional situations. This contribution presents the rules designating the applicable law set out in the Rome II Regulation. The raisons d'êtres behind these rules are explored and ways in which to interpret the Regulation's provisions are suggested. Particular attention is given to the interplay between Rome II and the two Hague Conventions relating to non-contractual obligations. Finally, gaps and deficiencies in the Regulation are exposed, in particular gaps relating to the law applicable to violations of privacy and personality rights and traffic accidents and product liability continuing to be governed by the Hague Conventions in a number of countries, and proposals are made for filling them.

Rolf Wagner: "The Hague Convention of 30 June 2005 on Choice of Court Agreements" – the English abstract reads as follows:

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Enforcement of Judgments in Civil and Commercial Matters. The member states of the European Community saw in the US proposal an opportunity to harmonize the bases of jurisdiction and also had in mind the far-reaching bases of jurisdiction in some countries outside of Europe as well as the dual approach of the Brussels Convention which combines recognition and enforcement of judgments with harmonization of bases of jurisdiction (double convention). Despite great efforts, the Hague Conference did not succeed in devising a convention that laid down common rules of jurisdiction in civil and commercial matters. After long negotiations the Conference was only able to agree on the lowest common denominator and accordingly concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This Convention aims to do for choice of court agreements what the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has done for arbitration agreements.

The article provides an overview of the negotiations and explains in detail the

content of the Choice of Court Convention. In principle the Convention applies only to exclusive choice of court agreements. However an opt-in provision allows contracting states to extend the rules on recognition and enforcement to non-exclusive choice of court agreements as well. The Convention is based on three principles. According to the first principle the chosen court in a contracting state must hear the case when proceedings are brought before it and may not stay or dismiss the case on the basis of forum non conveniens. Secondly, any court in another contracting state before which proceedings are brought must refuse to hear the case. Thirdly, a judgment given by the chosen court must be recognized and enforced in principle in all contracting states. The European instruments like the Brussels I Regulation and the Lugano Convention will continue to apply in appropriate cases albeit with a somewhat reduced scope. The article further elaborates on the advantages and disadvantages of the Choice of Court Convention and comes to the conclusion that the advantages outweigh the disadvantages. The European Community has exclusive competence to sign and ratify the Convention. The author welcomes the proposal by the European Commission that the EC should sign the Convention. Last but not least the article raises the question what has to be done in Germany to implement the Convention if the EC decides to ratify the Convention.

Discovery in Aid of Litigation Post-"Intel": The Continuing Split

Law.com just posted a good article on the follow-on litigation after the Supreme Court's decision in Intel *Corp. v. Advanced Micro Systems, Inc.*, 542 U.S. 241 (2004). That decision, in short, held that 28 U.S.C. 1782–which empowers federal district courts to compel discovery "for use in a proceeding in a foreign or international tribunal"–could be utilized in aid of the EC Directorate-General for competition. That body was a "foreign or international tribunal" in the eyes of the Court. The next logicial question, though, is "what about private arbitral

tribunals?" Is that a "foreign or international tribunal" within the meaning of Section 1782?

Despite the broad guidance given by the Court in *Intel*, the lower courts remain split: two district courts in three seperate districts have held that private arbitral tribunals are not included in the statute, while three others have held that they are. The authors of this article provide a good summary of the post-*Intel* case law, up to and including the most recent decision denying discovery in aid of private arbitration by the Southern District of Texas.

An Early 2009 Round-Up: Significant Federal Cases Over the Past Two Months

In this round-up of significant U.S. decisions during the first two months of 2009, we'll focus on two areas of law that generate a lot of jurisprudence at the appellate level.

A. Jurisdiction for Acts Occurring Abroad

Two federal statutory schemes—the first a response to the events of September 11, the second a 200 year old response to piracy on the high seas—are generating a lot of jurisdictional quandaries of late. The Intelligence Reform and Terrorism Prevention Act of 2004 criminalizes the provision of material support to foreign terrorist organizations, and provides for "extraterritorial Federal jurisdiction" to punish those acts. It also provides a civil remedy for those injured in his "person, property or business" by such criminal acts. In *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 538 F.3d 71 (2d Cir. 2008), pet'n for cert. filed, No. 08-640 (Nov. 12, 2008), the Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack

targets in the United States." According to the court, even those foreign entities who knowingly funded al Quada and Osama bin Laden were "far too attenuated" to fall within the jurisdiction of U.S. courts. This decision fostered a split with decisions in the D.C., Ninth and Seventh Circuits, and (along with other facets of the opinion on scope of the FSIA) is now pending on a Writ of Certiorari before the United States Supreme Court. This week, the Court requested the views of the Solicitor General on whether to grant the Petition. This case could become a very significant decision on the constitutional scope of personal jurisdiction over foreign parties if it is granted.

The Second Circuit returned a few months later in *Abdullahi v. Pfizer, Inc.*, No. 05-4863, 2009 U.S. App. LEXIS 1768 (2d Cir., January 30, 2009), to assert subject matter jurisdiction over a cause of action under the Alien Tort Statute of 1789 for defendant's alleged drug tests on unwitting Nigerian children. The court—in a 2-1 decision—held that the prohibition on non-consensual medical experimentation is a specific and universal norm of "the law of nations," which satisfies the jurisdictional predicate of the ATS. Because defendant acted in concert with the Nigerian government, the court held that the claim could proceed past the pleading stage. The Court also reversed the district court's decision on choice of law—which held that Nigerian law would have applied to these claims—and remanded the case with instructions to the court to more carefully and thoroughly weigh the factors of the "most significant relationship test" which could—the Court suggested—eventually lead to the application of Connecticut law.

B. Forum Selection Clauses

In a topic that is of practical import for both litigators and transaction attorneys alike, the federal courts of appeals have been active in the past two months concerning the scope, validity and enforceability of forum selection clauses. Most recently, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd*., Nos. 08-6014/6032, 2009 U.S. App. LEXIS 2743 (6th Cir., February 13, 2009), the parties disputed the meaning of a contract that contained a "non-exclusive" choice of court clause vesting jurisdiction in the courts of Australia, alongside a provision that allowed either party to request arbitration of their disputes. One party compelled arbitration in the United States, and the other sought to enjoin such arbitration in favor of litigation it previously filed in Australia. The Sixth Circuit held that the choice of court clause did not preclude arbitration, because reading the contract "as a whole . . . unambiguously provides that the courts of

[Australia] are only one possible forum" for the claims in this dispute. The court then moved onto thornier issues of international comity abstention and anti-suit injunctions, both of which were "issues of first impression for [the Sixth] Circuit." Surveying the case law on the "complex interaction of federal jurisdictional and comity concerns," as well as the dictates of "international law" expressed in treaties expressing the judicial preference for allowing arbitration, the court held that "abstention is inappropriate in this case." Interestingly, the court seemed to suggest that in any case falling within Article II(3) of the New York Convention, a court in a signatory country has no authority to abstain from compelling arbitration on comity grounds. With the Australian proceedings voluntarily stayed by the parties pending this appeal, the court declined to review the district court's denial of an anti-suit injunction, but left open the possibility that such an injunction could issue if that litigation were to be reopened and thereby threaten the "important public policy" of the Convention and the United States.

Finally, an interesting recent decision by the Ninth Circuit illustrates the differential treatment a forum selection clause will get in U.S. courts, depending upon what substantive federal statute governs the cause of action. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd*., No. 06-56831, 2009 U.S. Dist. LEXIS 2111 (9th Cir., February 4, 2009) was, as the Ninth Circuit put it, a "maritime case about a train wreck." There, the parties contracted for the carriage of goods from China to the United States by sea, and then inland by rail to various points in the American Midwest through a single bill of lading. The train derailed in Oklahoma, the American buyer sued in California, but the contract contained a choice of forum clause in favor of Tokyo. The Japanese Defendants moved to dismiss the action on the basis of that clause. If the federal Carriage of Goods by Sea Act (COGSA) were to apply to the entire journey, the choice of forum clause would be liberally respected, and the defendants' motion to dismiss likely granted. If the federal Carmack Amendment—which generally covers inland rail transportation—were to apply to the inland portion of the trip, the deference to choice of courts is much more narrow. In the end, the Ninth Circuit held that the Carmack Amendment applied to the claims, and remanded the case to determine whether that statute's narrow allowance of a foreign forum selection clauses were satisfied. How it got to that conclusion, however, is much more interesting.

For starters, the Defendants argued that the Carmack Amendment was categorically inapplicable to them. They are ocean carriers, who only contracted

for follow-on rail line transportation at the end of their journey, and the Carmack Amendment literally applies only to persons or companies "providing common carrier railroad transportation for compensation." The Second Circuit, the Florida Supreme Court, and at least one other federal district court, have held that the Carmack Amendment did not apply to ocean carriers who did not perform rail transportation services. The Ninth Circuit disagreed with these decisions, and held that ocean carriers could fall within the Amendment's provisions.

The Defendants next argued that, even though an ocean carrier may fall within the Carmack Amendment, when that carrier provides only one bill of lading covering the entire trip (over-sea and over-land), and thereby elects to contractually extend COGSA to the inland portion of the trip, the Carmack Amendment does not apply. No less than four circuits (the Seventh, Sixth, Fourth and Eleventh) support this view. "Despite this weight of authority," the Ninth Circuit held, "our own precedent expressly forecloses" this argument. The Ninth Circuit, like the Second Circuit, has long held the view that "the language of Carmack encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."

The discord in this area is especially troubling in light of recent Supreme Court jurisprudence. The Court has held—and the Ninth Circuit even acknowledged—that contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of extending COGSA inland when a single bill of lading takes goods from overseas to inland destinations. Indeed, "confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning," and the Supreme Court has suggested that where this is the case, "the apparent purpose of COGSA" is defeated. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004). Still, in the Ninth Circuit, "the policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent."

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

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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.

Pfeiffer on West Tankers

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1) For those who have read the famous opinion of Lord Ellenborough in Buchanan v. Rucker (Court of King's Bench 1808), the following may sound familiar:

Can the island of Britannia render a judgment to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? – For EC Member States, according to Allianz v. West Tankers, the answer is "not any more", not only with regard to anti-suit injunctions in general but also with regard to injunctions meant to protect arbitration agreements.

2) The exception for "arbitration" in Art. 1 II lit. d) Regulation 44/2001 applies if the subject matter of the case falls within its scope. Based on this criterion, it seems correct to say that the London High Court proceedings fall under the arbitration exception whereas the Syracuse proceedings do not. My only objection against the Court's reasoning on this issue relates to the statement that, in Syracuse, where the defendant raised the arbitration agreement as a defence, the validity of the agreement only formed a "preliminary question". In Private International Law, the term "preliminary question" or "incidental question" refers to situations where one legal relationship (e.g. succession) depends on the existence of another legal relationship (e.g. marriage). The arbitration issue raised in Syracuse was relevant for the admissibility of the proceedings. Procedural admissibility is a separate issue of its own, not a mere preliminary question for the subject matter (insofar I agree with Andrew Dickinson). However, even if it is not a mere preliminary issue, the arbitration agreement still is only a defence so that it is correct to say that it is outside the scope of the subject matter of the Syracuse proceedings. In other words: the Syracuse proceedings fall under the regulation whereas the London proceedings do not.

3) Under these circumstances, the legal situation is the following: An English injunction can in no way at all touch the Syracuse Court's legal competence to determine its international jurisdiction (governed by the Brussels I Regulation) on its own. Instead, such an injunction would have affected the court's ability to effectively make use of this competence as a matter of fact. According to the ECJ, such a factual effect constitutes an infringement of EC law, and this view can indeed be based on the general principle of practical effectiveness of EC-law and the principle of loyalty under Art. 10 EC-Treaty. No Member State must conceive

its law in a way so that EC law is deprived of its practical effectiveness.

4) In West Tankers, it was argued that the court at the seat of the arbitral tribunal is best able to protect the arbitration agreement by supportive measures so that there is a conflict between the principle of effectiveness of community law on the one hand and of effectiveness of the procedural system on the other hand. The ECJ gives a formal answer to that: The formal answer is that, in the European area of Freedom, Justice and Security under Art. 65 EC-Treaty, both the London and the Syracuse Court are Courts of the same system and of equal quality. That is both legally correct and fiction with regard to reality.

5) Despite of these reservations, there are good reasons why the result of the ECJ deserves support. According to the logic of anti-suit injunctions, the outcome of jurisdictional conflicts depends on the effectiveness of enforcement proceedings available on both sides and on other accidental factors such as the localisation of assets that can be seized to enforce court decisions. Letting the outcome of cases depend on factors like these is a concept that is essentially unjust, unless one claims that the stronger system is automatically better. International cooperation between legal systems is possible only on the basis of equality and the mutual respect. Trying to impose the view of one country's courts on the court system of another country is a concept which might have been appropriate in the times of hegemony. And although I admire many of the superb qualities of the English legal system and profession, there should be no space for such a one-sided concept in the context of international co-operation.

6) English lawyers will certainly come up with other ideas of how to protect English arbitration proceedings such as e.g. penalty clauses and other contractual constructions, the validity of which will raise interesting new questions.

7) Instead of a conclusion: Why is everybody talking about the "West Tankers" and not of "Allianz"? It seems that Britannia, despite of the outcome of this case, does not only still rule the waves but also the names. Be that a comfort for all my English friends.

Harris on West Tankers

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I have little to add about the judgment itself. Whatever one's views on the outcome of the case, it is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings. Key cases such as *Marc Rich* and *Hoffmann* are glossed over; and one is left not altogether sure why the argument that the proceedings in Syracuse fall partly within and partly outside the Regulation has been rejected.

It is no surprise that the ECJ found its answer primarily from within the text of the Regulation and was essentially uninfluenced by arguments about the practical impact of its decision. The appeal by Lord Hoffmann for the ECJ to consider the commercial realities of the situation was unlikely to carry the day. In the event, although this is alluded to by the ECJ in setting out the question referred, it receives no real consideration in the ECJ's reasoning. The nearest the ECJ gets to this is in expressing its concern that:

> *a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.*

This is not very convincing. The interests of a party who might wish to commence proceedings in a non-designated State, perhaps in bad faith, are arguably given greater weight than the interests of the party who alleges that the agreement is binding and seeks effectively to protect his/her legal rights. One might think that

the parties will normally have had a mutual expectation that any issue as to the validity of the arbitration clause would be determined by the courts of the state to which the arbitration agreement putatively points. The reference to Article II(3) of the New York Convention also fails to convince. The Convention unsurprisingly states that a court is expected to give up jurisdiction if it finds there to be a binding arbitration clause. But it does not obviously conclusively address the matter at hand, which is the question of *which courts* should determine the validity of the arbitration clause.

No doubt, the arbitration could proceed with or without an anti-suit injunction and the defendant to the foreign proceedings need not wait for the courts of that Member State to interpret the arbitration clause. Even so, the existence of parallel court and arbitral proceedings is best avoided; especially if there is a risk of them leading to irreconcilable decisions and producing a great deal of litigation for a rather inconclusive outcome. When thinking about the aftermath of *West Tankers*, perhaps we might usefully turn our attention to the question of the impact of arbitration proceedings on the foreign court proceedings.

Suppose that proceedings are commenced by X against Y in the courts of another Member State in alleged breach of an English arbitration clause. What would happen if Y nonetheless commenced or proceeded with an arbitration in London and were to obtain a declaration that the arbitration clause was binding; and/or a decision in its favour that it was not liable on the merits. How might the courts of the foreign Member State seised react? The applicant has obtained an award from arbitrators in a state which is party to the New York Convention. The Brussels I Regulation does not contain a provision permitting, still less requiring, the courts to stay their proceedings in the face of an arbitration award. Nor does it state that the court's judgment should not be recognised or enforced in other Member States. But Article 71 of the Regulation makes it clear that the Regulation gives way to existing international Conventions to which Member States are parties.

Again, could Y seek damagers against X in the arbitration for the costs incurred in respect of the foreign proceedings; and in respect of any judgment which that court ultimately delivers in favour of X? Whatever the strengths and weaknesses of the arguments as to the competence of the English courts to award such damages, it is less easy to see how the Regulation could control the award of such damages by arbitrators.

So, the question in essence is this: what will be the effects of proceeding with the arbitration whilst the foreign court decides if it has jurisdiction or not; and what are the implications for the foreign court proceedings, especially if they lead to a conflicting decision on the validity of the arbitration clause; and also, perhaps, to a conflicting decision on the merits of the dispute?

Dickinson on West Tankers: Another One Bites the Dust

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The views expressed below are the author's personal, initial reaction to the judgment.

> ***Scaramanga: "A duel between titans, my golden gun against your Walther PPK. Each of us with a 50-50 chance."***
>
> ***James Bond: "Six bullets to your one?"***
>
> ***Scaramanga: "I only need one."***
>
> ***(from The Man with the Golden Gun (1974))***

Reading the decision of the Court of Justice in the *West Tankers* case is a little like watching a sub-standard James Bond Movie (*The World is Not Enough*, perhaps). You know the outcome, but do not know exactly how 007 will overcome

the latest plan for global domination. You check your watch, hoping that he will get on with it before last orders at the bar. So it is here, but in reverse. The common law deploys its latest weapon to defeat a perceived attempt to pervert the course of justice, but it is defeated by the greater might of European Community law. The only reason to read to the end is to see exactly how the deed is done and the corpse disposed of.

The Court's reasoning is brief, more than can be said of some of Mr Bond's adventures. It is, nevertheless, unconvincing.

The Court concludes, it is submitted correctly, that the subject matter of the English proceedings falls outside the scope of the Brussels I Regulation (para 23) whereas the (principal) subject matter of the Italian proceedings falls within scope (para 26). The second of these findings, in accordance with the reasoning in the *Van Uden* case, would arguably have been sufficient in itself to dispose of the question presented to the Court in *West Tankers*, having regard to the very broad way in which the injunction had been framed by the English Court (preventing the taking of any steps in connection with the Italian case).

No doubt mindful of a more targeted weapon being produced by the enemy (perhaps an injunction to restrain a party from making any application or submission before the Italian court contesting the validity or applicability of the arbitration agreement) the Court felt it necessary to supplement its reasoning with the propositions that (a) a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity also comes within the scope of application (para 26), (b) under the Brussels I Regulation, this preliminary issue is exclusively a matter for the court (here, the Italian court) seised of the proceedings in which the issue is raised (para 27), and (c) the anti-suit injunction constitutes an unwarranted interference in the Italian court's decision making process (paras 28-30).

It cannot be denied that an anti-suit injunction, whether in the wider or narrower form suggested above, indirectly interferes with the foreign proceedings to which it refers. For some, that is enough to condemn it as an unwarranted interference in the affairs of a foreign sovereign State. It may be questioned, however, whether an injunction in the narrower form woud interfere in any way with the effectiveness of Community law, in the form of the Brussels I Regulation. That, of course, is the only question that the Court could address.

We can accept, for the sake of argument at least, that (putative) competence under the Regulation's rules of jurisdiction carries with it competence to determine any question of fact or law bearing on the application of those rules. The Court, drawing succour from a passage in the Evrigenis and Kerameus Report, no less, concludes that questions concerning the validity or application of an arbitration agreement relate to the scope of application of the Regulation and, therefore, fall within this category (paras 26 and 29).

The conclusion seems, however, open to several objections. First, the Regulation excludes "arbitration" (Art 1(2)(d)). The Court accepts that proceedings founded on an arbitration agreement, and having therefore as their subject matter the validity and application of an arbitration agreement, fall outside the the Regulation's scope (para 23). The Court fails, however, to explain why a preliminary issue of precisely the same character is brought within scope. As the Court recognised in its decision in *Hoffmann v Krieg*, a decision may relate partly to matters within scope and partly to matters outside – the fact that the former may be said to constitute the principal subject matter of proceedings does not (or at least has never before been understood by the author to) require a decision, often a separate decision, on the latter in the same case to be recognised under the Regulation. If the Court was intending to develop a theory of parasitic jurisdiction/recognition in this context (cf. Schlosser Report, para 64; *Van Uden*, para 32), it should have made this clear and explained its reasoning in greater detail.

Secondly, the Court's view that the right to apply the Regulation includes the right to determine its scope, fails to lift its argument to a higher level. As the decision in *Van Uden* makes clear, the assessment whether the subject matter of proceedings falls within the scope of the Regulation (and outside the scope of the arbitration exception in Art 1(2)(d)) cannot be influenced by the fact that the parties may have chosen arbitration as their method of dispute resolution or that arbitration proceedings have been commenced. Accordingly, the Italian court could determine that the proceedings before it fell outside the arbitration exception and within scope without the need to characterise the preliminary issue, still less to treat that issue as independently or parasitically falling within the scope of the Regulation.

Thirdly, as the Court admitted (para 33), the Italian court in considering whether to give effect to an arbitration agreement between the parties is not applying a

rule in the Brussels I Regulation but, instead, is applying the rules contained in the New York Convention, as a convention which (to the extent that its effect is not excluded from scope by Art 1(2)(d)) takes priority over the Regulation's rules by virtue of Art 71(1) of the Regulation. On this view, the anti-suit injunction (at least in the narrower form suggested above) interferes only with the proper functioning of that Convention rather than with the Regulation and does not fall foul of the EC Treaty. Even if, as the Court appeared to assume, it is contrary to the letter or spirit of the New York Convention to preclude a Contracting State court from carrying out its functions under Art II(3), that question was not one that the ECJ had power to determine. Without the New York Convention, there might be scope for argument that the Regulation's rules of jurisdiction are somehow modified by an arbitration agreement (cf. *Van Uden*, para 24), Where the New York Convention applies, the Regulation's rules provide merely the preliminary course and do not apply at all to determine the validity or effect of the arbitration agreement.

Returning to the Court's first conclusion, that the English proceedings to obtain an injunction fell outside the Regulation's scope, it may be thought to follow that, equally, proceedings in a Member State court for a declaration that the parties have entered into a valid arbitration agreement or for damages following breach of an arbitration agreement would also fall outside scope, having as their subject matter the arbitration agreement (whether it is seen as having a contractual or quasi-public law effect). On that view, judgments in such proceedings would not be recognised or enforceable under the Regulation but, in view of this characteristic, might also be argued not to interfere directly or indirectly with the "right" of another Member State court to determine its own jurisdiction under the Regulation. These questions must be faced by the Englsh courts and perhaps even the ECJ in years to come. Further, the possibility would appear to remain open of taking steps (by default processes, if necessary, as occurred in the *West Tankers* case) to establish an arbitration tribunal for the purpose not only of disposing swiftly of the substantive dispute between the parties in such a way as to create an award enforceable under the New York Convention, but of obtaining an enforceable award for an anti-suit injunction or damages for breach of the arbitration agreement. Although arbitrators sitting in Member States are bound, to a certain extent, to apply EC law (Case C-126/97, *Eco Swiss*), an interesting debate may emerge as to whether they are obliged to comply with the principle of "mutual trust" embodied in the Brussels I Regulation.

Finally, if some satisfaction is to be gained from the *West Tankers* judgment, it is that arbitration and jurisdiction agreements have been restored to greater parity in terms of securing their effectiveness within the Community legal order. One curious side-product of the ECJ's decisions in *Gasser* and *Turner* was that the potential availability of an anti-suit injunction was thought to provide a reason for choosing arbitration instead of judicial resolution. *West Tankers* has once again levelled the playing field in this respect, at least within the legal systems of the Member States. The unsatisfactory consequences of *Gasser* and the risk of a flight to dispute resolution outside the European Community, by whatever method, must be addressed head on in the forthcoming review of the Brussels I Regulation.