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3. Fairy is back – have you got your wand ready?

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In relation to international commercial arbitration, the exclusion of arbitration from the scope of application of the new Regulation (EU) No. 1215/2012, of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter the Regulation), in Article 1(2)(d) re-defines the litigation tactics for this popular method of dispute resolution dealing with cross-border disputes, especially in terms of anti-suit injunctions. This provision is in consonance with the European Court's *West Tankers* decision,¹ which not only forces English courts to stop their over-zealous willingness to grant an anti-suit injunction across borders but also has sent the issue of anti-suit injunction back to the battle-field.

An anti-suit injunction is an application to the court in favour of a valid arbitration agreement between the parties to issue an injunction restraining a party from proceeding with foreign court proceedings. This is frequently used as litigation tactics in commercial litigations worldwide. Such practice has seen the Indian court's refusal to issue an injunction to stop ICC (International Chamber of Commerce) arbitration proceedings in *Renusagar v General Electric*² and the French court's non-interference attitude in terms of arbitration proceedings in *Guinee Equatoriale v Fitzpatrick*³, as well as the infamous *West Tankers*, which was followed by the recast of the Brussels I Regulation.

¹ Case C-185/07 *Allianz v West Tankers* [2009] ECR I-663.

² *Renusagar Power Co Ltd (India) v General Electric Company (US) and the International Chamber of Commerce (France)*, Supreme Court (India) 16 August 1984, Yearbook of Commercial Arbitration, 431.

³ *République de Guinée Equatoriale v Fitzpatrick Equatorial*, Tribunal de Grande Instance, Paris, 29 March (2010) Les Cahiers de l'Arbitrage 521. Also see Mauro Rubino-Sammartano, 'Turning The Tanker: Anti-Suit And Anti-Arbitration Injunctions – Injunctions And Anti-Injunctions', (2013) 79(1) Arbitration 12, 13.

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In cases involving an arbitration agreement or arbitration itself, an anti-suit injunction is viewed as a defence shield to force the unwilling party back to the arbitration table. Among the European jurisdictions, England, attempting to establish itself as an arbitration friendly country, was renowned to be one of the jurisdictions which were happy to allow such an application providing that a valid arbitration agreement existed between the disputants. Consequently, an application for an anti-suit injunction involving arbitration agreements in English courts was regarded as a magic wand that ran the errand of all aspects of the jurisdiction issue until *West Tankers*, followed by the revised Brussels I Regulation in 2012. Suffering from the double blows of the European Court decision on *West Tankers* and the arbitration exemption in the revised Regulation in 2012, the English courts have been forced to re-think the issue arising from the application of anti-suit injunctions. While the magic wand waves its way through the European jurisdictions, it seems to send Prince Arbitration back to the frog it once was.

The purpose of this chapter is to present the background which prompted the changes in anti-suit injunction application and examine whether the Commission's trust in the current New York Convention framework is well placed when it decides to exclude arbitration from the scope of the application of the Regulation. The author will also examine the assumptions made by the Commission under the existing arbitration legal framework and questions whether the exclusion offers parties with confidence and certainty in their decision to arbitrate. Furthermore, the international practice will be examined to ascertain whether the principle of mutual trust and the New York Convention do provide the parties with a final efficient and conclusive decision, which is supposedly recognised or enforced by the signatory countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the New York Convention).⁴

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series (UNTS), vol.330, p. 3.

BEFORE THE RECAST OF THE REGULATION – ENGLISH COURTS SEEN AS THE GUARDIAN OF ARBITRATION AGREEMENTS

To maintain the popularity of London as the place of international commercial arbitration, the English courts always showed their willingness to grant anti-suit injunctions to applicants who wished to prevent any foreign proceedings taking place in breach of a valid arbitration agreement between the parties. As Millett LJ once said, the English Court did not need to feel any diffidence in granting an injunction to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law as long as the foreign proceedings were not too far advanced.⁵ Thus the English courts were happy to support the applicant's intention to pursue dispute resolution through arbitration. In consonance with Millett LJ, Cresswell J was of the opinion that injunctions should be granted if the applicant could demonstrate to the court that an injunction would be an effective remedy in vexatious or oppressive foreign proceedings.⁶ He stated:

The principles relevant to applications for an anti-suit injunction in cases where there is an arbitration agreement governed by English law can be stated as follows: ...

An injunction will only be issued restraining a party who is amenable to the jurisdiction of the Court, against whom an injunction will be an effective remedy. Since such an order indirectly affects the foreign Court, the jurisdiction is one which must be exercised with caution. The Court will, generally speaking, only restrain a party from pursuing proceedings in a foreign Court if such pursuit would be vexatious or oppressive. If contracting parties agree to give a particular court or arbitral tribunal exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the Court will ordinarily exercise its discretion ... to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum ... can show strong reasons for suing in that forum.⁷

⁵ *The Angelic Grace* [1994] 2 Lloyd's Rep 87, 96 (Millett LJ).

⁶ *American International Specialty Lines Insurance Co. v Abbott Laboratories* [2002] EWHC 2714 (Comm),

⁷ *Ibid.*, 274 (Cresswell J).

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Although the English Court has been seen as a willing jurisdiction to issue anti-suit injunctions, caution is said to be essential when issuing such injunctions. Citing *National Westminster Bank v Utrecht-America Finance Company*,⁸ it was pointed out by Cresswell J that

It would be inappropriate to grant an interlocutory injunction to restrain foreign proceedings at a time when it is no more than arguable that they were brought in breach of contract, because it could not be said that such proceedings were vexatious or oppressive. ... [T]he applicant must show to a high degree of probability that its case is right, and that it is entitled as of right to restrain the foreign proceedings.⁹

The same practice was also applied in *British Airways Board v Laker Airways Ltd.*, where the English Court of Appeal was undeterred by the extraterritorial effects of US antitrust law between the United States and England, and granted the four defendants to a case lodged with the United States District Court for the District of Columbia¹⁰ an anti-suit injunction to restrain Laker Airways from pursuing its antitrust action in the US court.¹¹ Although this injunction was later reversed by the House of Lords¹² on the grounds of public policy, the reversal made by the House of Lords itself also received negative criticisms for its lack of clear guidance to provide adequate safeguards against the future issuance of a similar injunction.¹³

In Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd., Clarke LJ was of the view that, regardless of whether the dispute is ancillary to, or an integral part of, the arbitration process,¹⁴ the arbitration exemption stipulated in Article 1(2)(d) of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial

⁸ *National Westminster Bank v Utrecht-America Finance Company* [2001] EWCA Civ 658.

⁹ Note 6 above, per Cresswell J, 275.

¹⁰ *Laker Airways Ltd. v Pan American World Airways*, 559 F. Supp. 1124.

¹¹ *British Airways Board v Laker Airways Ltd.* [1984] 1 Q.B. 142.

¹² Note 11 above.

¹³ Robert Cannon, 'Laker Airways and the Courts: A New Method of Blocking the Extraterritorial Application of U.S. Antitrust Laws', (1985) 7 Journal of Comparative Business and Capital Market Law 63, 78.

¹⁴ *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd.* [2004] EWCA Civ 1598.

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Matters would apply to anti-suit injunction cases and was not subject to the first seised principle in Articles 27 and 28;¹⁵ consequently,

[the] question in each case is whether the (or a) principal focus of the proceedings is arbitration. That test seems to us to be consistent Another way of putting the same point is to ask the question ... whether the essential subject matter of the claim concerns arbitration ... [or] whether the relief sought in the action can be said to be ancillary to, or perhaps an integral part of the arbitration process. In our opinion the decisions that ... both the claim for a declaration that there was a binding arbitration agreement between the parties and the claim for an anti-suit injunction within the arbitration exception were correct.”¹⁶

However, such willingness was not shared in a series of EU cases.

REVIEW OF THE ENGLISH PRACTICE BY THE
EUROPEAN COURT

The different conclusions reached by a series of EU cases, such as *Marc Rich v Impianti (The Atlantic Emperor)*,¹⁷ the *Gasser* case,¹⁸ *Turner v Grovit*,¹⁹

¹⁵ Article 27:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28:

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. ... For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

¹⁶ Note 14 [47–48].

¹⁷ Case C-190/89 *Marc Rich v Impianti* [1991] ECR I-3855.

¹⁸ Case C-116/02 *Erich Gasser LmbH v MISAT Srl* [2003] ECR I-14693.

¹⁹ Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit* [2005] ECR I-3565 (Reference for a preliminary ruling from the House of Lords, Opinion of Ruiz-Jarabo Colomer AG, Reference for a preliminary ruling from the House of Lords); [2005] 1 A.C. 101.

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*Van Uden Maritime v Deco-Line*²⁰ and *West Tankers*²¹ led the English courts to review policy on granting anti-suit injunctions and eventually stopped the practice. The issues considered by the European Court include that the substance of the dispute determines the scope of application of the Regulation in *Marc Rich*, mutual trust among European jurisdiction must prevail in *Gasser* and *Turner*, provisional measures arising from arbitration are not ancillary but parallel matters in *Van Uden Maritime* and, finally, no interference of other European court proceedings in *West Tankers*. All these issues laid down the foundation of the recast of the Regulation, and will be examined in turn.

***Marc Rich v Impianti*²² (*The Atlantic Emperor*)²³ – Substance of Dispute will Decide**

On 31 May 1989, the English Court of Appeal referred to the European Court for a preliminary ruling between Marc Rich and Scoietá Itaiana Impianti P.A., parties to an arbitration agreement. Earlier, in 1988, Marc Rich had sought assistance from the English High Court for an appointment of arbitrators on behalf of Impianti. Impianti requested that the order granting leave be set aside due to the invalidity of the arbitration agreement. While Impianti argued for the exclusion of proceedings for the appointment of an arbitrator from the scope of the Convention, Marc Rich and the UK Government asked for a wider interpretation on the arbitration exclusion under Article 1(2)(d) of the Convention. To facilitate the Union-wide recognition and enforcement of court judgments, in the European Court of Justice's (ECJ's) own words, it does not follow that the Convention, whose purpose is in particular the reciprocal recognition and enforcement of judicial decisions, must necessarily have attributed to it a wide field application.²⁴ The European Court affirmed that the subject matter of the dispute will determine the scope of application in terms of the Convention. It stated:

In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an

²⁰ Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091.

²¹ Case C-185/07 *Allianz v West Tankers* [2009] ECR I-663.

²² See note 17, para.18.

²³ *The Atlantic Emperor* [1992] 1 Lloyd's Rep 624.

²⁴ See note 17, para. 16.

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arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.²⁵

Contrary to Clarke LJ's decision in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd.*, the ECJ highlighted the importance of the nature of subject matter, which would determine whether the subject matter would fall into the scope of the Regulation. It was determined that the scope of application of the Regulation can only be determined by the subject matter of the dispute alone. As long as the subject matter falls within its scope of application, the Regulation applies, not only to the main dispute, but also to ancillary or preliminary issues. The European Court was of the opinion that:

It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator. Consequently, the reply must be that the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.²⁶

The Gasser Case²⁷ and Turner v Grovit²⁸ – Ideology of Mutual Trust among the National Courts of Member States

Gasser and *Turner* are the two judgments delivered by the European Court to re-confirm the ideology of mutual trust as the unshakable pillar among the European jurisdictions. In *Gasser*, a dispute arose between Gasser, an Austrian children's clothing seller, and an Italian buyer, MISAT. On 19 April 2000 MISAT brought proceedings against Gasser before the Italian *Tribunale Civile e Penale* (Civil and Criminal District Court) *di Roma* seeking a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies. On 4 December 2000 Gasser brought an action against MISAT before an Austrian court to obtain payment of outstanding invoices. In support of

²⁵ See note 17, para. 26.

²⁶ See note 17, paras 28–29.

²⁷ See note 18 above.

²⁸ See note 19.

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the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, within the meaning of Article 5(1) of the Convention, but was also the court designated by a choice-of-court clause. Although confirming its own jurisdiction as the court of the place of performance, the Austrian court decided to stay its proceedings²⁹ until the jurisdiction of the Italian court had been established. Gasser appealed, complaining, among other things, of the inefficiency of the Italian court system. Consequently, the issue was referred to the European Court.

One of the issues the European Court was asked to determine was whether a court other than the court first seised within the meaning of the first paragraph of Article 21 of the Brussels Convention may review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or whether it must wait until the second court proceeds in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction. The European Court ruled that the court subsequently seised must apply the normal rules on concurrent proceedings, which prevent it from reviewing the jurisdiction of the court first seised, even where there is alleged to be an agreement conferring jurisdiction on the court subsequently seised. It stated:

The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all the courts within the purview of the Convention are required to observe. The Contracting States can therefore be obliged to ensure mutual recognition and enforcement of judgments by means of simple procedures. This compulsory system of jurisdiction is at the same time conducive to legal certainty since, by virtue of the rules of the Brussels Convention, the parties and the courts can properly and easily determine international jurisdiction. Within this system, Section 8 of Title II of the Convention is designed to prevent conflicts of jurisdiction and conflicting decisions.³⁰

Therefore, all the courts within the purview of the Brussels I Regulation are required to respect the compulsory system of jurisdiction based on mutual trust. The Member States would waive their right to apply their internal rules on recognition and enforcement of foreign judgments but in favour of a simplified mechanism for the recognition and enforcement of

²⁹ Pursuant to Article 21 of the Brussels Convention.

³⁰ See note 18, para. 67.

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judgments. Consequently, the Convention will be able to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.³¹ In short, the Italian court had to be trusted to determine whether it would decline jurisdiction and such jurisdiction was not derogated until it decided to stay its proceedings or declined its proceedings.³²

The same view was expressed in the *Turner* case, where one sees the English practice of awarding anti-suit injunctions take a further serious blow. Apart from applying subject matter criteria in determining the scope of application, the importance of *Turner v Grovit* is that the ECJ re-asserted the essential nature of the principle of mutual trust within the European Union. It was highlighted that mutual trust between EU jurisdictions shall see national courts restraining themselves from interfering with foreign court proceedings in another Member State.

An unfair dismissal claim under an employment contract between Mr. Turner, a British national, and Mr. Grovit, Harada Limited (UK) and Changepoint SA (Spain) was brought to an employment tribunal in the English court and the Spanish court. In March 1998, Mr. Turner initiated an unfair dismissal claim against Harada Ltd. in an employment tribunal in London. The tribunal confirmed its jurisdiction and awarded damages in Mr. Turner's favour. However, in July 1998, Mr. Turner was sued by Changepoint in the Spanish court (Madrid). Mr. Turner refused to accept the summons issued by the Spanish court and protested the jurisdiction of the Spanish court. Later, Mr. Turner asked the English High Court to issue an injunction based on Section 37(1) of the Supreme Court Act 1981, backed by a penalty restraining Mr. Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued by the High Court but was later refused for its extension. On appeal by Mr. Turner, the Court of Appeal issued an injunction ordering the defendants not to continue the proceedings commenced in Spain and to refrain from commencing further proceedings in Spain or elsewhere against Mr. Turner in respect of his contract of employment on the ground of bad faith. On appeal, the House of Lords was asked whether the English courts have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Regulation. The House of Lords sought clarification from the European Court to decide whether the national courts of a Member State have the power to award an anti-suit injunction to prohibit a party

³¹ See note 18, para. 72.

³² Also see Mauro Rubino-Sammartano, note 3, 15.

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from participating in foreign court proceedings when that party is acting in bad faith.

Three main issues – the importance of mutual trust, undesirable interference of foreign jurisdiction and potential abusive litigation tactics – were examined by the European Court in order to determine whether the English courts had the jurisdiction to award Mr. Turner an anti-suit injunction to prohibit other parties from participating in foreign court proceedings as well as to restrain the Spanish court from exercising its jurisdiction over the disputes submitted to it.

The judgments showed that the European Court was absolutely clear and took an uncompromising stand on the issue of mutual trust. Following *Gasser*, the European Court was of the opinion that mutual trust as the pillar of the Brussels I Regulation cannot be shaken in any way. Upholding the ideology of mutual trust, the European Court dismissed the possibility of anti-suit injunctions and effectively told the English courts that they have to trust the Spanish courts to determine on the issues of bad faith and jurisdiction, respect the jurisdiction of the Spanish courts, recognise the need for an independence of the proceedings in Spain, and eventually to decline jurisdiction and concede to the English employment tribunal.³³ It stated:

[O]ne of the pillars of the Brussels Convention is the reciprocal trust established between the various national legal systems, upon which the English restraining orders would seem to cast doubt. That view seems to me to be decisive. European judicial co-operation, in which the Convention represents an important landmark, is imbued with the concept of mutual trust, which presupposes that each state recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration. No superior authorities have been created to exercise control, beyond the interpretative role accorded to the Court of Justice; still less has authority been given to the authorities of a particular State to arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with. It would be contrary to that spirit for a judicial authority in member states to be able, even if only indirectly, to have an impact on the jurisdiction of the court of another contracting state to hear a given case. ...

It is difficult to accept that a state which issues an injunction of this kind could unilaterally attribute to the jurisdiction which it is protecting an

³³ S. Wolff, 'Tanking Arbitration or Breaking the System to Fix It?', (2009) 15 Columbia Journal of European Law, 65, 66, http://www.cjel.net/online/15_2-wolff-2/. Accessed 14 August 2013.

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exclusive character. If all European courts arrogated such a power to themselves, chaos would ensue.³⁴

Clearly, the English courts' attempt to interfere with the Spanish courts' jurisdiction was seen as an unwelcome move, as such a step would damage the ideology of mutual trust within the European Union. The European Court in *Turner* was of the opinion that mutual trust lays down the foundation to a successful compulsory system of jurisdiction established by the Brussels I Regulation for the Member States. This principle has to be respected by all relevant national courts with the purview of the Brussels I Regulation. Under the Regulation framework, those national courts are to waive the right to apply their domestic law on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments made by the national courts of other Member States.³⁵ Such a mutual trust, coming with the waiver, will guarantee the European-wide recognition and enforcement of the judgments made by all courts across the Union.

In relation to the issue of interference of foreign jurisdiction, the European Court expressed a strong negative view on the English practice and stated that the request for an anti-suit injunction restraining the Spanish courts from exercising jurisdiction over the dispute between the parties amounted to a serious interference in foreign court proceedings. The Spanish court's jurisdiction to determine the issues would be seriously undermined by such an injunction issued by the English courts. Consequently, the Spanish court would effectively be deprived of its jurisdiction to deal with the dispute by the issuance of the anti-suit injunction. The European Court also rejected the English court's argument on the difference between an order *in personam* addressed to a litigant and one which is addressed to a foreign court. Believing that these two orders aim to reach the same result and in view of the lack of clear distinction between them, the European Court stated that plaintiff's right to action is essential for a court to hear a case. If the plaintiff is deprived of the right to do so under an anti-suit injunction issued by a foreign court, the result is unwanted interference with the jurisdiction of the judge as he is not permitted to hear or decide the case.³⁶ Such interference with and deprivation of the jurisdiction of the foreign court is incompatible with the ideology of the Regulation.³⁷

³⁴ Note 19 [30–33].

³⁵ Note 19 [24]. Also see Case C-116/02 *Gasser* [2003] ECR I-14693, [72].

³⁶ Note 19 [34].

³⁷ Note 19 [27].

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Being unwillingly dragged into a foreign jurisdiction to deal with the same dispute as the one being dealt with by the employment tribunal, understandably Mr. Turner and the UK Government raised the argument of possibility of abuse of process by Grovit and Changepoint in the Spanish court. They further pointed out that granting an anti-suit injunction is a measure to protect the victim of abuse of process who is at the receiving end of unscrupulous behaviour in the form of a vexatious or an oppressive proceeding, regardless of the place of jurisdiction.³⁸ Consequently, they said that the principles of mutual trust and non-interference must give way to the protection of the victim in such abuse. The European Court refused to accept such a view. Waving the flag of mutual trust, the European Court even pointed out that such argument ‘runs counter to the principle of mutual trust which ... underpins the Regulation and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State’.³⁹ Furthermore, the UK’s argument that the granting of an anti-suit injunction would contribute to the attainment of the objective of the Regulation by minimising the risk of conflicting decisions and multiplicity of proceedings was also rejected by the European Court. It held:

First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of *lis alibi pendens* and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting State. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.⁴⁰

Gasser and *Turner* clearly held that the principle of mutual trust among the jurisdictions of the European Member States is of paramount consideration of the European Court. This principle cannot be undermined in any way. Consequently, parties’ intention to use arbitration to resolve dispute must give way to mutual trust, even at the cost of multiple civil proceedings.

³⁸ Note 19 [15].

³⁹ Note 19 [28].

⁴⁰ Note 19 [30].

***Van Uden Maritime v Deco-Line*⁴¹ – Provisional Measures Arising out of Arbitration are not Ancillary but Parallel Matters**

A similar line of reasoning on the subject matter decided in *Marc Rich* can also be seen in *Van Uden Maritime v Deco-Line*, which upheld that interlocutory orders are not ancillary to arbitration proceedings but are ordered in parallel to arbitration proceedings.⁴² The logic behind the decision leads to two different proceedings. The first type is arbitration proceedings which fall outside the scope of the Regulation by virtue of Article 1(2)(d) of Brussels I. The second type is court proceedings dealing with interlocutory orders which fall within the scope of the Regulation. This analogy can be seen in the European Court's answer to the question whether a Dutch court has jurisdiction to hear a case involving an interlocutory order against a German party who was a party to an arbitration agreement. The European Court first stated that any matters which are excluded from the scope of Brussels I cannot rely on Article 35 (ex 31) to resolve the issue of jurisdiction.⁴³ Later the European Court famously found that though arbitration in its entirety is excluded from the scope of the Regulation, the parallel nature of interlocutory order proceedings to arbitration allowed the Dutch court to exercise jurisdiction to decide whether it is appropriate to offer interlocutory orders. In this case, Van Uden and the Commission were of the viewpoint that the subject matter of the dispute is decisive and that the issue underlying the interim proceedings concerns the performance of a contractual obligation – a matter which falls within the scope of the Brussels I Regulation.⁴⁴ The Court held that the mere fact that proceedings have been, or may be, commenced on the substance of a case before a court of a contracting state does not deprive a court of another contracting state of its jurisdiction under Article 35 (ex 31) of the Brussels I Regulation.⁴⁵ That is why Article 35 (ex 31) of the Convention applies even if a court of another Member State has jurisdiction as to the substance of the case, provided that the subject matter of the dispute falls within the scope *ratione materiae* of the Brussels I Regulation.

⁴¹ Note 20.

⁴² Note 20.

⁴³ Note 20 [30]; Case 143/78 *De Cavel v De Cavel* [1979] ECR 1055 [9].

⁴⁴ Note 20 [27].

⁴⁵ Note 20 [29].

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Agreeing with Schlosser's report,⁴⁶ the European Court pointed out that Brussels I⁴⁷ does not apply to issues concerning the validity of arbitration agreements, the revocation, amendment, recognition or enforcement of arbitral awards, or any proceedings which are ancillary to arbitration proceedings.⁴⁸ However, referring to *Reichert and Kockler v Dresdner Bank*,⁴⁹ the Court stated that the interlocutory order concerned not arbitration as such but the protection of a wide variety of rights which are intended to be covered by the Convention. In other words, the Court can invoke Article 31 in support of arbitration proceedings as 'these measures are not ancillary to the arbitration but rather stand-alone and parallel to such arbitration. They are therefore not excluded from the Convention.'"⁵⁰ The Court explained:

[I]t must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights.⁵¹ Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.⁵²

Bringing provisional measures into the scope of the Convention, the Court stated that:

It must therefore be concluded that where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and Article 24 thereof may confer

⁴⁶ P. Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark and others to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice', [1979] OJ C59/71.

⁴⁷ Now the Regulation.

⁴⁸ Note 46 [92–93]. Also, see Andreas Estrup Ippolito and Morten Adler-Nissen, 'West Tankers Revisited: Has The New Brussels I Regulation Brought Anti-Suit Injunctions Back Into The Procedural Armoury?', (2013) 79(2) Arbitration 158, 160.

⁴⁹ Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149 [32].

⁵⁰ C. Van Calster, 'Kerpow! The United Kingdom Courts, West Tankers, and the Arbitration "Exception" in the Brussels I Regulation', (2013) 21(1) European Review of Private Law 205.

⁵¹ Note 20 [33].

⁵² *Ibid.* Also see Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149 [32].

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jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.⁵³

West Tankers – No Interference with Judicial Proceedings Elsewhere in Europe⁵⁴

In this case, a ship chartered by West Tankers collided with a jetty in Syracuse, an Italian port, and caused damage to it. The owner of the jetty, Erg Petroli, was also the owner of the ship. The governing law of the charterparty was English law and a London arbitration clause was incorporated. After obtaining partial damages in the form of compensation for the damage to the jetty from its insurers, Allianz and Generali, Erg Petroli brought arbitration proceedings against West Tankers in London for the balance. At the same time, Allianz and Generali brought tortious claims against West Tankers in the Italian court based on subrogation arising from the indemnity from the compensation to Erg Petroli. West Tankers responded with the argument that the Italian courts could not hear the claim because it was covered by the arbitration clause, as well as bringing proceedings in England for a declaration that its dispute against Allianz and Generali was covered by the arbitration clause. Consequently, an anti-suit injunction against Allianz and Generali was requested by West Tankers with regard to the Italian proceedings. Both the declaration and the injunction were later granted by the English courts. Allianz and Generali appealed to the House of Lords on the ground that the grant of the injunction was contrary to the first seised principle under the Brussels I Regulation (Regulation 44/2001). West Tankers argued that the Regulation did not apply because arbitration is excluded from its scope by means of Article 1(2)(d). Later, the House of Lords referred the case to the European Court for guidance after failing to find an answer to the question whether a court of a Member State could issue anti-suit injunctions in support of arbitration agreements from the precedents. While seeking clarification on the provision, the House of Lords also expressed their opinions to give wider interpretation of the exclusion of Regulation in following the words:

The proceedings now before the House are entirely to protect the contractual right to have the dispute determined by arbitration. Accordingly, they fall outside the Regulation and cannot be inconsistent with its provisions. The

⁵³ Note 20 [34].

⁵⁴ Case C-185/07 Allianz v West Tankers [2009] ECR I-663.

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arbitration agreement lies outside the system of allocation of court jurisdictions which the Regulation creates. There is no dispute that, under the Regulation, the Tribunale di Siracusa has jurisdiction to try the delictual claim. But the arbitration clause is an agreement not to invoke that jurisdiction and it is that agreement which the order of Colman J requires to be performed. As Professor Dr Peter Schlosser points out in an illuminating article (Anti-suit injunctions zur Unterstützung von Internationalen Schiedsverfahren (2006) RIW 486–492), an exclusive jurisdiction clause is in this respect quite different. It takes effect within the Regulation under article 23 and its enforcement must therefore be in accordance with the terms of the Regulation; in particular, article 21. But an arbitration clause takes effect outside the Regulation and its enforcement is not subject to its terms.⁵⁵

However, such a view was not taken by the European Court. The ideology of mutual trust established in *Gasser* and *Turner* supports the ECJ's belief in *West Tankers* that the court of a Member State shall have the power to rule on its own jurisdiction under the Regulation; therefore any attempt to issue an anti-suit injunction by national courts of other Member States, the English court in this case, would be deemed inconsistent with the purpose of the Regulation.⁵⁶ Following the reasoning applied in *Marc Rich*, the European Court took the view that any preliminary issues associated with the main subject matter of the dispute would fall into the scope of the Regulation. It stated:

[T]he Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.⁵⁷

The European Court repeated the line held by *Van Uden* that the Regulation applies to any preliminary issues associated with the main subject matter of the dispute. Furthermore, the Court stressed that the scope of Regulation 44/2001 will be decided solely by the subject matter of the proceedings,⁵⁸ and the subject matter is determined by the nature of the rights which the proceedings in question serve to protect.⁵⁹ In this

⁵⁵ [2007] UKHL 4 [14].

⁵⁶ Note 54 [32].

⁵⁷ Note 54 [26].

⁵⁸ Note 18 [26].

⁵⁹ Note 54 [22]; see also *Van Uden* [33].

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case, it is the right of a foreign court to determine its own jurisdiction. In contrast the proceedings leading to the making of an anti-suit injunction do not fall into the scope of the Regulation.⁶⁰ With the preliminary issues falling into the scope of the Regulation, national courts of Member States will not be subject to the first seised principle incorporated in the Regulation. Instead they are to determine the issue of their own jurisdictions on the disputes which are meant to be resolved by arbitration. Such a restrictive interpretation of Article 1(2)(d) of the Regulation is not only in consonance with the precedents but also is said to be in compliance with the European Court's restrictive agenda on anti-suit injunctions.⁶¹

To sum up, the application for an anti-suit injunction with the effect of denying the Italian court to assert jurisdiction under Article 5(3) is contrary to the general principle which emerges from the case-law of the European Court on the Brussels I Regulation. Every court should have the power to determine whether it has jurisdiction to resolve the dispute before it, as

[i]t should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State. ... That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction.⁶²

Moreover, the Court expressly pointed out that 'such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based'.⁶³

The *West Tankers* decision told the English courts that they do not have the power to issue an anti-suit injunction to interfere with the jurisdiction of other Member States. Instead of being told by the English courts what to do or what not to do, foreign courts shall be left alone to determine their own jurisdiction. The English courts are minded that they have to respect the principle of mutual trust and believe that the courts of other

⁶⁰ Note 54 [23].

⁶¹ Note 50, 212.

⁶² Note 54 [29].

⁶³ *Ibid.* [30].

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Member States can and will make the correct decision in terms of their jurisdiction or the lack of it over the disputes.

POST *WEST TANKERS* – FROM THE PROPOSAL TO THE FINAL VERSION OF THE REGULATION

In accordance with the principle of *lis pendens*, Article 29 of the revised version of the Brussels I Regulation⁶⁴ stipulates that, without prejudice to the cases where the defendant enters an appearance in court under Article 26(1) or of exclusive jurisdiction agreements under Article 31(2),⁶⁵ where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court seised is established. The revised *lis pendens* rule set out in Articles 29–34 (ex 27–30) of the Regulation is designed to deal to some extent with so-called ‘torpedo action’⁶⁶ within the European jurisdictions, which enabled a natural defendant to utilise the first-seise approach to prevent the natural plaintiff from initiating the dispute in an appropriate forum, by means of an earlier filing by the natural defendant in another country of a request for a judgment declaratory of non-liability.

However, despite the debates concerning the exclusion of arbitration in EC Regulation 44/2001 from the case-law, the Commission decided to go ahead with the recast of the Regulation. The background to the recast is said to minimise the possibility of concurrent proceedings, to avoid abusive litigation tactics and maintain mutual trust. Recitals 21, 22, 26 and 27 of Regulation No 1215/2012 highlight such objectives:

⁶⁴ Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2012] OJ L351/1.

⁶⁵ Article 31(2) provides the legal basis for the exception of exclusive jurisdiction which reads: ‘Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any courts of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.’

⁶⁶ M. Franzosi, ‘Worldwide Patent Litigation and the Italian Torpedo’, [1997] 7 EIPR 382.

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1. *To minimise the possibility of concurrent proceedings – Recital 21*
In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.⁶⁷
2. *Avoid abusive litigation tactics – Recital 22*
However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings. This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis pendens* rule of this Regulation should apply.⁶⁸
3. *Mutual trust – Recitals 26 and 27*
Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be

⁶⁷ Recital 21 of EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1. The copyright of the European Union in the text and recitals of the Regulation is hereby acknowledged.

⁶⁸ Note 67, Recital 22.

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recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.⁶⁹ For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State.⁷⁰

Before these three principles were written in stone in the revised Brussels I Regulation as adopted, a rather different solution was envisaged in the EU Commission's Proposal, under which the parties' intention to use arbitration to resolve their disputes was recognised and given full effect in the proposed Recital 20. It was proposed to have special provisions designed to avoid abusive tactic parallel proceedings aiming to compromise arbitration proceedings, and further allow improvement of the effectiveness of arbitration agreements.⁷¹ Hence, a flexible mechanism was proposed to allow the courts in the Member States to take into account proceedings pending before the courts of non-contracting states, and in particular the proper administration of justice and whether or not any non-contracting state judgment is capable of recognition and enforcement in that Member State.⁷² Based on such a view, a very different version of proposed Article 29(4) containing the principle of *lis pendens* saw a call for the courts of Member States to stay court proceedings when the parties argue for the validity of arbitration agreements. It reads:

⁶⁹ Note 67, Recital 26.

⁷⁰ Note 67, Recital 27.

⁷¹ Proposed Recital 20, [16] of the Proposal for a Regulation to the Commission's Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) of 14.12.2010 (COM(2010) 748 final); Recital 20 reads: 'The effectiveness of arbitration agreements should also be improved in order to give full effect to the will of the parties. This should be the case, in particular, where the agreed or designated seat of arbitration is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. The seat of the arbitration should (p. 16) refer to the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution or by any other authority directly or indirectly chosen by the parties.'

⁷² Proposed Recital 21.

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Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes. Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II.⁷³

The effort to include arbitration in the scope of application of the Regulation could find its origin in the Commission's proposal, which reads:

The interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Regulation. However, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.⁷⁴

The proposal also evoked coordination between courts of Member States when dealing with anti-suit injunctions. It suggests:

Concerning provisional, including protective measures, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte*. By contrast, the proposal prevents the circulation of provisional measures ordered by a court other than the one having jurisdiction on the substance. Given the wide divergence of national law on this issue, the effect of these measures should be limited to the territory of the Member State where they were granted, thereby preventing the risk of abusive forum-shopping. Finally, if proceedings on the substance are pending in one court and another one is asked to issue a

⁷³ Proposed Article 29(4).

⁷⁴ Proposal for a Regulation to the Commission's Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) of 14.12.2010 (COM(2010) 748 final). Section 1, p. 4.

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provisional measure, the proposal requires the two courts to cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted.⁷⁵

Efforts were also made to eliminate the possibility of parallel proceedings between the competing European jurisdictions as well as between arbitration and European court proceedings. This is evident in the interaction between the earlier proposed Recitals 11 and 20. The proposed Recital 11 maintained the same position as the EU case-law which excludes the application of arbitration in terms of the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, recognition and enforcement of arbitral awards.

In December 2012, the final version of the Regulation not only maintained the arbitration exemption but also removed the proposed Article 29(4), Recitals 20 and 21. Its failure to address the concerns over parallel proceedings between arbitration and court proceedings will disappoint most arbitration practitioners and academics who have been searching for a way to avoid conflicting decisions or indeed parallel proceedings.⁷⁶ In its final version, the European Commission took the same standing as the European Court by expressly excluding arbitration from its scope of application in accordance with Article 1(2)(d). Convinced that the New York Convention⁷⁷ and other international agreements are sufficient to deal with the issues arising from arbitration, Article 1 of the Regulation stipulates: (1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. (2) The Regulation shall not apply to: ... (d) arbitration.' Although the Regulation may serve well in dealing with competing European court proceedings, by the same token the Commission's decision in not extending these provisions to arbitration is rather disappointing.

From this provision it is clear that the decisions and the opinions delivered by the English Supreme Court in *West Tankers* no longer

⁷⁵ Note 74, Section 3.1.5, p. 9.

⁷⁶ David Holloway, 'Avoiding Duplicative Litigation about Arbitration Awards within the EU', (2011) 9(2) Journal of International Dispute Settlement 435.

⁷⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series (UNTS), vol.330, p. 3.

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stands. Consequently, the concerns raised in the proposal – such as increased additional costs and delay, undermining of the predictability of dispute resolution, the creation of incentives for abusive litigation tactics, the potential circulation of provisional measures ordered by a court, and the possibility of parallel proceedings between competing court jurisdictions as well as between arbitration and courts – fell behind the principle of mutual trust in the Regulation.

THE FINAL VERSION OF THE REGULATION – ARTICLE I(2)(D) AND RECITAL 12

With an outright exception written in Article 1(2)(d), which leaves the definition of scope of arbitration undefined, Recital 12 is seen as an effort to provide clarification on the concise arbitration exception. Recital 12 reads:

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognized or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement for Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

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What Recital 12(1) does is to set out the scope of arbitration exception stipulated in Article 1(2)(d) of the Regulation. The scope of exception ranges from referring the parties to arbitration and staying or dismissing the proceedings, to examining whether the arbitration agreement is null and void, inoperative or incapable of being performed. In short, nothing in the Regulation would prevent the national courts of the Member States from applying their own national laws to determine the above issues. Linking Recital 12(1) with the Commission's restatement about avoiding undermining the New York Convention, this paragraph intends to uphold the signatory countries' obligation to recognise the validity of a written arbitration agreement under Article II(1) of the New York Convention and the consequential legal effects of a valid arbitration agreement under Article II(3) of the same Convention. Accordingly, the courts of the Member States may exercise their jurisdiction to refer the parties to arbitration; in the case where the disputes are submitted to national courts, the courts may decide whether to stay or simply dismiss the court proceedings until the parties' disputes are resolved by arbitration.

The long awaited hope of avoiding parallel proceedings between court litigation and arbitration is dashed as the second part of the paragraph gives the Member State courts the go-ahead and the freedom to examine the validity of arbitration agreements. The issue is further complicated by the lack of priority order between the courts seised of the matter.⁷⁸ For instance, the words 'the court of a Member State' seem to suggest that a party can still initiate court proceedings in any national court of a Member State, either the place of arbitration or a state different from the seat of arbitration, to examine the validity of arbitration agreements. Suppose arbitration is to take place in Member State A: the issue of the validity of the arbitration agreement can be raised in a court of Member State A; the party may request this court to affirm the validity of the arbitration agreement and refer the parties to arbitration. However, with the nature of international commerce it is very likely that the other party may already have initiated foreign court proceedings in a different Member State or Member States outside of the place of arbitration in order to declare the arbitration agreement null and void, inoperative or incapable of being performed, in accordance with its national law, in order to force the claimant to abandon arbitration through the recognition and enforcement of court judgments under the Regulation. The effect of

⁷⁸ Andreas Estrup Ippolito and Morten Adler-Nissen, 'West Tankers Revisited: Has the New Brussels I Regulation Brought Anti-Suit Injunctions Back Into the Procedural Armoury?', (2013) 79(2) Arbitration 158, 167.

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this paragraph is that an unwilling party to arbitration can still apply abusive litigation tactics to stall arbitration proceedings at the place of arbitration by requesting a foreign court to determine the validity of the arbitration clause.

Undesirable results are further compounded by the *West Tankers* decision, where the court of place of arbitration was specifically told by the European Court that it did not have the power to issue an anti-suit injunction to interfere with foreign court proceedings on the same issue, that is, validity of arbitration. This would lead to further delay and costs, as with the complaints made by the claimants in *Gasser* and *West Tankers* in relation to the concerns over the inefficiency of the Italian courts. Although the tribunal has the power to determine its jurisdiction in relation to the validity of an arbitration agreement and carry on with arbitration with or without the affirmation given by the courts of the place of arbitration, the award can potentially still be challenged at a later stage if the arbitration agreement is declared null and void, inoperative or incapable of being performed by the court of place of arbitration or a foreign court. For a court system which is efficient, the parties may not have to wait too long to hear the decision. However, such an award will be subject to a long period of uncertainty due to inefficient court proceedings, as raised by *West Tankers* and the English Supreme Court in *West Tankers*. Therefore, the questions one has to ask are whether it is fair to place a party in such a position when speed and certainty are the main reasons why one decides to avoid the court system in the first place, and whether it is a good idea to reduce arbitration to such muddled-up legal accidents without a coordinated and articulated sense of direction.

To avoid the different interpretations of the Anglo-Saxon and Continental European debates on the relationship between anti-suit injunctions and the main disputes discussed in *West Tankers*, the second paragraph of Recital 12 states that, regardless of whether the validity of arbitration agreements forms the main issue or is an ancillary issue to be decided by the courts of a Member State, any such decisions do not fall into the scope of the Regulation and shall be subject to the national principles of *res judicata*, and issue estoppel.⁷⁹ This is also stated in paragraph 4 of Recital 12, which excludes any ancillary proceedings from its application.

Interestingly, this view does not apply to the preliminary issues between the parties, where the European Court held that preliminary issues parallel to arbitration would be subject to the scope of the Brussels

⁷⁹ Note 78, 167.

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I Regulation, and any decisions made by the courts of a Member State would be binding on the courts of other Member States. The consequence of this view is that the parties are given the go ahead by the Recital to revert back to the practice of parallel proceedings which would see a party who is keen to resolve disputes by means of arbitration being dragged through unwanted court proceedings screaming to defend their wish to resolve disputes by arbitration.

Furthermore, this exercise of jurisdiction dealing with disputes by the courts will not prevent the courts of other Member States from recognising or enforcing the arbitral awards under its prioritised obligation under the New York Convention. The non-interference with the New York Convention can also be noted in the last part of paragraph 4 of Recital 12, which excludes any recognition, enforcement, annulment or review of the arbitral awards from its application and leaves such matters to be decided under Articles V(1)(e) and VII of the New York Convention. Unfortunately, due to the wording used in these two provisions, such matters are left to the discretion of the relevant courts of the Member States.

THE DISCRETION OF THE COURTS OF THE MEMBER STATES

The main aims of the revised Brussels I Regulation are to promote the mutual trust of the national courts of the Member States and to ensure the Union-wide recognition and enforcement of any judgments made by the courts of any Member State. The Regulation may achieve such goals in terms of court judgments now; however the exclusion of arbitral awards and other important issues related to the validity of the arbitration agreements or awards from the application of the Regulation means that the predictability of arbitration is placed on a rather unstable basis. Consequently, the validity of arbitration agreements or awards is to be decided by the different interpretations of national laws and every court of the Member States will have a say on the important issues which go to the heart of an award, regardless of whether the court is the first seised or second seised court. This leads to a very high risk of parallel proceedings and conflicting judgments and awards on the same issues. It will create the typical nightmare scenario which appeared in *Dallah Real Estate*,⁸⁰

⁸⁰ [2010] UKSC 46. In this case, an award in favour of Dallah Real Estate was given by the arbitral tribunal. Actions over tribunal jurisdiction were raised

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which was not the first and will not be the last case to be experienced. In fact, the introduction of Article 1(2)(d) and Recital 12 can only eliminate the possibility of torpedo action if (1) the court of the seat of arbitration decides to refer the parties to arbitration proceedings; (2) the same issues have been raised by the unwilling party in the domestic and foreign court proceedings; and, most importantly, (3) the judgment of the court of the seat of arbitration is delivered before the foreign courts. Without meeting any of these three conditions, Article 1(2)(d) and Recital 12 would fail to prevent a party from being dragged into an unplanned and unwanted court battle-field just to reiterate his intent to arbitrate. A further complication that needs to be addressed is whether the court of the seat of arbitration has to accept a negative decision delivered by a foreign court earlier than its own. This is totally undesirable, as Hodges and Shore pointed out:

Even if the court of the seat of arbitration referred the parties to arbitration, the prospects of answering the case across jurisdictions to defend his right to arbitrate would be a daunting task and unnecessary burden on the parties. Although it is said that the court of the seat of arbitration is not required to be bound by the decision declaring the invalidity of arbitration agreement by the foreign courts, before the judgment on the preliminary issues is delivered by the court of the seat of arbitration, potential conflicting EU court judgments and arbitral award may not be avoidable, both of which may be presented to an enforcing court for enforcement.⁸¹

in the French courts and the English courts. Holding different views on the principle of 'group of company' which was used to determine whether the Pakistani Government was a party subject to the tribunal's jurisdiction, the French courts and the English courts came to different conclusions. The French court viewed the Pakistani Government and the Trust which signed the arbitration agreement as one group; consequently the Government subjected itself to the arbitration agreement. In contrast, the English courts viewed them as different entities and decided that the Pakistani Government was not a party to the arbitration agreement.

⁸¹ Paula Hodges and Laurence Shore, *The Revised Brussels Regulation: Are We Back To Where We Started?*, Herbert Smith Freehills Arbitration Notes; <http://hsf-arbitrationnotes.com/2012/12/12/the-revised-brussels-regulation-are-we-back-to-where-we-started/>. Accessed 14 August 2013.

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THE ASSUMPTION OF THE EU COMMISSION ON THE MUST-FOLLOW DOCTRINE OF MUTUAL TRUST

It has been pointed out that the English courts have given the arbitration exemption a broad interpretation which includes primary and secondary disputes connected with an arbitration agreement manifesting the parties' intention to resolve disputes by means of arbitration.⁸² In contrast, the European approach is said to be more restrictive and the scope of the exemption will depend on the nature of the substantive subject matter of the main disputes. If the type of dispute falls within the scope of the Regulation, a court of the Member State is entitled to exercise jurisdiction and examine whether arbitration exemption applies. This approach can be seen clearly in the opinion expressed by Advocate General Kokott⁸³ and the *West Tankers* case examined above.⁸⁴

The different interpretation of the arbitration exception in relation to anti-suit injunctions given by the English courts and the European Court represents the different approaches taken by the Anglo-Saxon and Continental jurists. For the Anglo-Saxon jurists, a wider interpretation including all related matters arising from arbitration proceedings is a more logical thinking to define the arbitration exception as they believe that the exception shall include arbitration in its entirety, including the issue of jurisdiction.⁸⁵ This can be seen in *Gasser*, where the United Kingdom Government and Gasser relied on the *Overseas Union Insurance and Others*⁸⁶ and argued that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction.⁸⁷ Furthermore, considering avoiding the risk of irreconcilable judgments, the UK Government proposed that the Court should hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and which is the court second seised, is given the opportunity to decide on its own jurisdiction.⁸⁸

⁸² Note 46, [61]. Also see, Andreas Estrup Ippolito and Morten Adler-Nissen, note 79 above, 158.

⁸³ Opinion of Kokott AG (9 September 2008), [44].

⁸⁴ Case C-185/07 *Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*

⁸⁵ Note 18 [18]. See also see note 50, 207.

⁸⁶ Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317.

⁸⁷ Note 86 [23].

⁸⁸ Note 86 [33].

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In contrast, relying on the combination of the judgments outlining ‘subject matters decide’ in *Marc Rich* and ‘provisional measures as parallel proceedings’ in *Van Uden*, the Continental European jurists drew a clear line between arbitration proceedings and related court proceedings. Consequently, as one can see, the two sides met at the battle-ground of the *West Tankers*, and the recast of the Regulation. Trumpeting the principle of mutual trust as the basis of the success of the Brussels I Regulation and the Union, from the wording of Article 1(2)(d) and Recital 12, the Continental approach, with the support of the Commission, has won the battle for now and forced the English court to adjust its position on this issue.⁸⁹

The Regulation may have reaffirmed the doctrine of mutual trust and provided the courts of Member States a clear guidance on the issue of competing jurisdictions in the court system. As stated by Lord Hobhouse in *Turner*, ‘it is not the purpose of the Convention to require uniformity but to have clear rules governing jurisdiction’.⁹⁰ However, the combination of ‘subject matters dictates the scope of application’ and the principle of mutual trust, along with *West Tankers*, will definitely see a rise in the possibility of parallel proceedings and irreconcilability between judgments and arbitral awards. The European Court’s decision in *West Tankers* literally ended the English practice, allowing the possibility of torpedo actions, which are viewed as unwelcome, and the results are likely to frustrate the reputation of arbitration as a swift dispute resolution mechanism. Both the Regulation and the precedents also sent out an alarming message to academics and practitioners in the field of international private law and arbitration about the come-back of parallel proceedings.

The risk arising from such a possibility is especially high for the party who wishes to manage the dispute resolution within an agreed period of time. Instead he is left with delay and extra costs to battle with the other litigant in a court or courts of the Member States. Most undesirably, the party is forced to take part in foreign court proceedings, despite intending to avoid such a situation when the parties entered into an arbitration agreement. The principle of mutual trust may also see an unwilling party sit nervously waiting for delayed court judgments which may be in

⁸⁹ Ben Steinbruck, ‘The Impact of EU Law on Anti-Suit Injunctions in aid of English Arbitration Proceedings’, (2007) 25 Civil Justice Quarterly 358; Christa Roodt, ‘Conflicts of Procedure between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court’, (2011) African Journal of International and Comparative Law 236.

⁹⁰ *Turner v Grovit* [2001] UKHL 65 [37].

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conflict with the award made by the tribunal or the judgments delivered by the court of the seat of arbitration. Furthermore, it is very likely that the existence of parallel proceedings in dealing with the preliminary issues could see the party faced with conflicting decisions on the same substantive issue arising out of those parallel proceedings, leading to further complications at the enforcement stage.

THE EU COMMISSION'S ASSUMPTION ON THE SATISFACTORY FRAMEWORK UNDER THE NEW YORK CONVENTION

Apart from the must-follow principle of mutual trust, the Commission also places its trust in the 'satisfactory framework' established by the New York Convention. The Commission maintains that the combination of Articles I, V and VII of the New York Convention will be able to ensure the recognition and enforcement of arbitral awards among all signatory countries. In its proposal the Commission acknowledges that 'In any event, most stakeholders expressed general satisfaction with the operation of the 1958 New York Convention which should not be undermined by any Union action on the matter.'⁹¹ A question which remains worthy of examination is whether New York Convention is indeed sufficient to eliminate parallel proceedings and to ensure consistent judgments. More importantly, the New York Convention and international agreements have to answer the question of whether mutual trust exists between national courts as well as between arbitration and national courts.

The assumptions behind the promulgation of arbitration exemption under Article 1(2)(d) are said to be the Commission's contentment with the existing arbitration legal framework, including the New York Convention and other international agreements. The Commission is of the opinion that the interaction between national arbitration laws and the international legal framework is sufficient to deal with the parties' intention to arbitrate and obtain certainty in final arbitral awards. Such contentment can be seen in *Marc Rich*,⁹² where the European Court was explicit that the New York Convention itself includes a number of

⁹¹ Proposal for a Regulation to the Commission's Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) of 14.12.2010 (COM(2010) 748 final). Section 2, p. 5.

⁹² Note 17 [18].

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obligations for the courts of the Member States and such Convention obligations would provide certainty in arbitral awards. Moreover, by virtue of its subject matter, such as the appointment of an arbitrator, any dispute falling outside the scope of the Regulation or the existence of a preliminary issue which the court must resolve in order to determine the dispute, cannot justify application of the Regulation.⁹³

The Commission's contentment with the New York Convention can be traced back to *Marc Rich*, where the European Court pointed out that:

There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration.⁹⁴

Also,

The international agreements, and in particular the abovementioned New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ... , lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.⁹⁵

It is open to question whether the New York Convention is indeed sufficient to provide certainty in the finality of arbitral awards. While Article I of the New York Convention requires all signatory countries to recognise and enforce arbitral awards 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal',⁹⁶ past research and the reading of Article V have shown that the national courts of the signatory countries are also left with a high level of discretion in deciding whether a convention award

⁹³ Note 17 [12].

⁹⁴ Note 17 [17].

⁹⁵ Note 17 [18].

⁹⁶ Article I(1) of New York Convention 1958.

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can be recognised or enforced in its jurisdiction. This can be seen in the wordings ‘under the law to which the parties have subjected to’, ‘under the law of the country where the award was made’⁹⁷ and ‘was not in accordance with the law of the country where the arbitration took place’,⁹⁸ as well as the inarbitrability exception⁹⁹ or public policy¹⁰⁰ of the country where the recognition or enforcement is sought. Placing much of its trust in the New York Convention and enforcement mechanism set up in Article III of the New York Convention, one can only guess that the Commission assumption was founded upon the parties’ voluntary performance of the award and non-interference of the awards by the relevant courts. However, what the Commission ignored is un-cooperative parties and the discretion enjoyed by the national courts. The issue of un-cooperative parties could lead to parallel proceedings between arbitration and courts and see the parties debating the tribunal jurisdiction at the same time as arbitration is taking place. Too much reliance on Article I and the failure to address the issue of discretion in Article V, as well as hoping Article VII allows the enforcing court discretion to enforce the award despite a successful challenge to the award being made in the countries where arbitration took place, will see inconsistent judgments on matters arising from arbitration.

Common sense tells us that the tribunal’s award may not in reality automatically lead to the finality of an arbitral award. Its finality depends on the decisions of the enforcement court or, in some cases, the court of the place of arbitration. This can be seen in the grounds listed in Article V of the New York Convention. Article V(1)(e) allows the court of the seat of arbitration to set aside an award with a consequence of non-recognition and non-enforcement of the award at the enforcing court. Article V also allows the enforcing court, either on the losing party’s application under Article V(1) or on its own initiative under Article V(2), to decide on the finality of the award.

While the so-called ‘final’ award delivered by the tribunal has to wait for the final stamp of the enforcing court before its finality can be established, what the arbitration exclusion in the Regulation does is to throw arbitration back to the situation of competing jurisdiction between the tribunal, the enforcing courts, the court of the place of arbitration and any other relevant court. A frequent scenario in international commercial arbitration is that the claimant submits the disputes to arbitration, and the

⁹⁷ Article V(1)(a) New York Convention 1958.

⁹⁸ Article V(1)(f) New York Convention.

⁹⁹ Article V(2)(a) New York Convention.

¹⁰⁰ Article V(2)(b) New York Convention.

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defendant then challenges the validity of the arbitration agreement in a foreign court or in the court of the place of arbitration. The claimant may then resort to the court of the place of arbitration to declare the validity of the arbitration agreement. As common occurrences after the award is delivered, the winning party would be busy identifying the places of enforcement while the losing party may challenge the award at the place of arbitration, with an intention to undermine the legality of the award under Article V(1)(e) and rule out future recognition and enforcement in other jurisdictions with a single blow. Such competing jurisdiction or interference from national courts at different stages of arbitration will very likely take one back to non-certainty of arbitral awards and the parallel proceedings the Regulation eagerly wishes to avoid in national court proceedings.

The likelihood of non-certainty of arbitral awards and parallel proceedings in arbitration is caused by the lack of mutual trust between arbitration and national courts. Such a lack of trust has already been seen in various stages of arbitration in case-law. Frequently, court actions are brought to challenge a tribunal's jurisdiction and the validity of the arbitration agreement. It has already been seen as one of the litigation tactics involving arbitration, as many writers have highlighted.¹⁰¹ In relation to the relationship between arbitration and national courts,

¹⁰¹ Michael Black and Rupert Reece, 'Anti-Suit Injunctions and Arbitration Proceedings', (2006) 79(3) *Arbitration* 207; Ben Steinbruck, 'The Impact of EU Law on Anti-suit Injunctions in Aid of English Arbitration Proceedings', (2007) 25 *Civil Justice Quarterly* 358; Carlyn Lamm, Eckhard Hellbeck and Joseph Brubaker, 'Anti-suit Injunctions in Aid of International Arbitration: The American Approach', (2009) 12 *International Arbitration Law Review* 115; Christophe Imhoos, Delphine Rooz and Christophe Seraglini, 'International Arbitration and Alternative Dispute Resolution', (2009) *International Business Law Journal* 767; Christa Roodt, 'Conflicts of Procedure between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court', (2011) *African Journal of International and Comparative Law* 236; David Holloway, note 76 above; John Zadkovich and Nicholas Roberts, 'West Tankers 2012: Pro-arbitration through Enforcement of Declaratory Awards', (2012) 15 *International Arbitration Law Review* 51; Hew Dundas, 'The West Tankers Saga Continues: A New Twist – Negative Declaratory Awards', (2012) 85 *Arbitration* 212; Zheng Sophia Tang, 'Parallel Proceedings and Anti-arbitration Injunctions', (2012) 7 *Journal of Business Law* 589; Andreas Estrup Ippolito and Morten Adler-Nissen see note 48 above; Hakeem Seriki, 'Anti-suit Injunctions and Arbitration: Parasitic or Free Standing?', *JBL* (2013) 3 267; Ugo Draetta, 'Italy as a Place for International Arbitrations: The Myths of the "Italian Torpedo", the "Irritual" Arbitration et alia', (2013) *International Business Law Journal* 159; Mauro Rubino-Sammartano, note 2 above; Elizabeth Crawford and Janeen Carruthers,

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national courts are said to provide a supporting role before or during arbitration as well as a supervisory role after arbitral awards are rendered. Carrying out a supervisory role, national courts are expected to take on the discretion provided in Article V of the New York Convention and willingly review any procedural irregularities in arbitration. Such a supervisory role also implies distrust between arbitration and national courts. This explains the reason why some arbitral awards are refused recognition or enforcement by the enforcing courts or are set aside by the courts of the place of arbitration.

*Dallah Real Estate and Tourism Holding Company v the Ministry of Religious Affairs, Government of Pakistan*¹⁰² is the best example illustrating such a tangled relationship between parallel proceedings and inconsistent decisions between arbitration and national courts. In this case, Dallah made a proposal to the Pakistani Government to provide housing for pilgrims on a long term basis. Both parties entered a Memorandum of Understanding. By virtue of a Promulgated Ordinance, the Awami Hajj Trust was set up by the Pakistani Government to contract and fund the project. The Government in the whole contract only played a role as a guarantor to a financing facility which was to be granted to the Trust by an affiliate of Dallah. Failing to submit the Ordinance before the Pakistani Parliament on 19 May 1998, the Trust ceased to exist as a legal entity in December 1998. Disputes regarding revised payment arose and the dispute was referred to ICC arbitration against the Government of Pakistan. However, the tribunal confirmed its jurisdiction over the Pakistani Government in a partial award dated 21 June 2001. Two further awards, dated 19 January 2004 and 23 June 2006, saw the tribunal find the case in Dallah Real Estate's favour.

Regarding French court proceedings, after the presiding judge of *the Tribunal de Grande Instance de Paris* granted Dallah Real Estate an exequatur of the final award on 24 August 2009, the Government of Pakistan, Ministry of Religious Affairs filed three applications for annulment of the three respective arbitral awards and sought their annulment on the basis of Article 1502(1) of the Civil Procedure Code on the grounds, according to its submissions of 10 November 2010, that the arbitral tribunal was wrong on the issue of jurisdiction. In the end, a leave to enforce the final award was obtained by Dallah in August 2009 in France and in October 2009 in England. However, the Pakistani

'Ferrezpo AG v Gilson Investment Ltd and Ors: A Flexible Interpretation of the Reflexive Doctrine', (2013) *Edinburgh Law Review* 78; C. Van Calster, note 50 above.

¹⁰² [2008] EWHC 1901 (Comm), [2009] EWHC Civ 755 (Court of Appeal).

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Government opposed enforcement before the UK courts and commenced annulment proceedings before the Paris Court of Appeal against all three awards. Soon after this, a legal tangle unfolded across the English Channel.

In England, on 1 August 2008, *Dallah Real Estate* saw its effort to enforce the award against the Pakistani Government denied by the High Court on the grounds of lack of jurisdiction. *Dallah's* appeal was again denied by the Court of Appeal on 20 July 2009. On 12 January 2010 the UK Supreme Court refused *Dallah's* request to stay its court proceedings pending the outcome of the French action to set aside the three awards brought by the Government before the Paris Court of Appeal. After the Pakistani Government successfully annulled the awards before the English Courts, on 17 February 2011 the Paris Court of Appeal refused to set aside the three awards, upholding the arbitral tribunal's finding that the Government's implication was sufficient to justify the extension of the arbitration agreement; hence, the tribunal's jurisdiction was properly established. The Pakistani Government's action to set aside the award was dismissed.

The issue of distrust between arbitration and national courts can be frequently demonstrated in the issue of jurisdiction, as *Dallah Real Estate* has shown. This case explicitly highlighted the issues of distrust between arbitration and national courts, inconsistent court judgments and the English court's denial of mutual trust and refusal to stay court proceedings pending the French outcome. What such distrust translates in arbitration is the effort to ensure the tribunal has the power to determine its own jurisdiction to avoid litigation tactic under the principle of competence-competence¹⁰³ would have to be reviewed by the courts of

¹⁰³ Article 16(1) of the UNCITRAL Model Law provides: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.' Also see, Cap. 609 of the Arbitration Ordinance of Hong Kong, 2011, s.34; J. Delvolvé, J. Rouché and G. Pointon, *French Arbitration Law and Practice* (2003) 93; *Christopher Brown Ltd. v Genossenschaft Oesterreichischer Waldbesitzer* [1954] 1 QB 8 [12–13]; *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [94] and [97] and *Weissfisch v Julius* [2006] EWCA Civ 218, [32]; Article 186 of the Swiss Private International Law Act – Chapter 12: International Arbitration, 18 December 1987; Article 1697(1) of the Belgian Judicial

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the place of arbitration or the courts of where the unwilling arbitrating party intends to challenge the same issue in the court proceedings.¹⁰⁴

The courts' power and the decision to review the tribunal's decision on its jurisdiction offered by the New York Convention and in *Dallah Real Estate* highlighted the distrust in arbitration as a mechanism which is able to make the correct decisions. The English courts are of the opinion that the tribunal's power to determine its own jurisdiction can be challenged under s. 30(2) of the English Arbitration Act 1996. With parties' agreement and the court's satisfaction of the importance of the issue of jurisdiction, the courts are given the power to determine any preliminary points on jurisdiction. Furthermore, the issue of jurisdiction can still be reviewed by the English court at the challenge stage by means of s. 67 of the Act. In other words, the court is the ultimate decision maker in deciding whether the tribunal's self-determined jurisdiction can be upheld. Such distrust can be seen in the parallel proceedings between arbitration and court proceedings as well as at the stages of challenge, recognition or enforcement of arbitral awards. In short, English courts view themselves as gatekeepers who have a duty and are empowered to decide whether an award can score at the enforcement stage. As the UK Supreme Court stated:

The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, e.g., *Peterson Farms Inc. v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603) and is plainly right.¹⁰⁵

Code, Sixth Part: Arbitration (Adopted 4 July 1972, amended 27 March 1985 and 19 May 1998) and DTI Departmental Advisory Committee Report Ch III, pp. 4–5.

¹⁰⁴ *Caledonian Railway Company v Greenock & Wemyss Bay Railway Company* (1872) 10 M 892; s.30 of the English Arbitration Act 1996, r.19 of the Scottish Arbitration Rules.

¹⁰⁵ Note 103, *Dallah Real Estate*, [96].

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Such distrust allows the courts to review the tribunal's decisions in two ways, as ruled in *Dallah*; thus: 'in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement.'¹⁰⁶ This is because an arbitral tribunal's decision as to the existence of its own jurisdiction could not bind a party who had not submitted the question to the tribunal; consequently, a party who had not submitted to the tribunal's jurisdiction was entitled to a full determination by the court (the English courts in this case) on an application under annulment or enforcement proceedings.

On the issue of parallel proceedings, during the arbitration proceedings, unless stipulated in the domestic legislation, nothing in the New York Convention or international agreement prevents parties from initiating court proceedings to challenge the tribunal's jurisdiction alongside the arbitration proceedings. In the case of parallel proceedings between national courts, it can clearly be seen in *Dallah* where the Government of Pakistan was free to raise the annulment proceeding in both England and France while the enforcement claim was entertained by the English courts. Similarly, the UK Supreme Court was happy to hear the jurisdiction issue and refused to stay its court proceedings and waited for the *French Cour d'Appel* decision. The Court explicitly pointed out that the English court will only consider staying court proceedings if there is a valid arbitration agreement between the parties. In the current case, the Court was of the opinion that no arbitration agreement existed between the parties because the Government of Pakistan was never privy to the arbitration agreement. In other words, the tribunal decided the case without proper jurisdiction. Consequently, the application of stay of court proceeding pending the result of the French court was dismissed.

The conflicting decisions in *Dallah* made by both English and French courts demonstrate that it is highly likely in international arbitration that an award may have a different fate depending on how the courts of the seat of arbitration and the enforcing courts view their role in dealing with arbitration and interpret the issues. Irreconcilable judgments delivered by both English and French courts can also see different interpretations of the same jurisdiction issues and principles, which were attributed to the

¹⁰⁶ *Ibid.* [98]. Also see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886, para. 104; *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 48 (Kaplan J).

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difference between common law and civil law courts in fact determination.¹⁰⁷ Regardless of the legal basis for conflicting judgments on the same issue, it has been proven that nothing in the New York Convention or international agreements would be able to stop parallel proceedings or conflicting judgments in arbitration.

WHAT IF THE ARBITRATION EXCEPTION WERE DELETED?

When arbitration and court proceedings meet, tension arises. Such tension has always been pointed out in matters of anti-suit injunction, jurisdiction and appointment of arbitrators, recognition and enforcement of arbitral awards, and inconsistent awards and judgments. Due to the tension, a call to remove arbitration exception was made during the consultation of the recast of the Regulation. In accordance with the Commission's Green Paper issued in 2009,¹⁰⁸ the Commission recognises the importance of arbitration to international commerce; therefore, '[a]rbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged'.¹⁰⁹ In seeking answers to the questions of whether strengthening the effectiveness of arbitration agreements, ensuring a good coordination between judicial and arbitration proceedings or enhancing the effectiveness of arbitration awards should be addressed on the Community level, the Commission seemed to hold the opinion that arbitration exemption should be removed from the Regulation to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings. The Commission stated:

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

¹⁰⁷ Different approaches in the interpretation of the doctrine of privity of contract to arbitration agreements were also pointed out as the reason for conflicting judgments. See Elie Kleiman and Julia Spinelli, 'Arbitration France', <http://www.internationallawoffice.com/newsletters/detail.aspx?g=11cc3a38-e17b-47f1-b8f7-cede75cd177b>. Accessed 14 August 2013.

¹⁰⁸ Green Paper on the review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21.4.2009 (COM(2009) 175 final).

¹⁰⁹ Note 108, Section 7, p. 8.

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allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties.

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

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

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

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).¹¹⁰

Nevertheless, the Commission had a change of heart on the idea of deletion of arbitration exemption and expressed a much more modest version of the Proposal to address the interface between arbitration and

¹¹⁰ Note 108, Section 7, p. 9. The copyright of the European Union in the Green Paper is hereby acknowledged.

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litigation proceedings.¹¹¹ The Proposal obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. This modification is said to be able to re-address the relationship between arbitration and litigation as well as enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics.¹¹²

However, the final decision to exclude arbitration from the application of the Regulation means unavoidable delay in arbitration if it is tangled up with the unplanned court proceedings. As Calster pointed out, '[a]rbitration designed for businessmen to avoid the slow delay in the court proceedings, can become a legal nightmare when it becomes tangled up with court proceedings. This is especially evident when arbitrator's jurisdiction is questioned and parties lodge anti-suit injunctions in the relevant court.'¹¹³

HOW WOULD *DALLAH REAL ESTATE* AND *WEST TANKERS* BE INTERPRETED IF THE ARBITRATION EXEMPTION WERE REMOVED FROM THE REGULATION?

The above examination illustrates that nothing in the New York Convention or international agreement would be able to stop parallel proceedings or conflicting judgments involving arbitration as the Commission would like to believe. *Dallah Real Estate* further proved that the judgments delivered by the English and French courts are in fact in conflict. How should other signatory countries approach such an issue when both judgments are presented before the courts? Should they accept the French or the English judgment based on their obligations imposed by Article I of the New York Convention? Similarly, the impacts of *West Tankers* and the Regulation also demonstrate a very high probability of conflicting

¹¹¹ Proposal for a Regulation to the Commission's Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) of 14.12.2010 (COM(2010) 748 final).

¹¹² Note 111, s.3.1.4, p. 9.

¹¹³ Note 50, 212.

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judgments. As noted by Rubino-Sammartano in his comments on *West Tankers*:

Irreconcilable judgments could arise. Entry of judgment produces an outcome similar in substance to that of an injunction, even if through a very different mechanism. Perhaps entry of judgment in respect of the arbitral award should have been stayed pending the Italian judgment. The tanker should really not have been turned in that way.¹¹⁴

Business persons who place certainty of the result of dispute resolution high on their agenda when arbitration is chosen as the way to resolve their dispute understandably would not want to see the awards being overturned in any way. Both *West Tankers* and the Regulation sent arbitration back to the battle-field where lawyers were allowed to drag the other unwilling parties through court proceedings which were intended to be excluded by the arbitration agreement. If the first seised principle had been adopted in both *Dallah* and *West Tankers*, as well as the arbitration exemption being removed from the Regulation, in accordance with *lis pendens*, Articles 27–30 of the Regulation, the second seised jurisdiction, though at the potential possibility of inefficiency, the English court in *Dallah* and *West Tankers* would have had to respect the jurisdiction of the first seised jurisdiction and stay its proceedings. As arbitration proceedings can still take place under the doctrine of competence-competence, the removal of the arbitration exemption will certainly eliminate the possibility of conflicting court judgments which would put the enforcing court in a dilemma. On the other hand, the national courts would have to apply mutual trust and believe that other jurisdictions would have the ability and knowledge to make the correct decisions as the Commission would like to see.

Although the application of the principle of *lis pendens* and the removal of arbitration exemption would avoid inconsistent judgments on the same issues, the question to be asked is whether *West Tankers*'s concern over long delay in the Italian court could become a reality threatening the efficiency of arbitration. Putting it boldly, the question is whether the first seised principle in cases involving arbitration should be replaced by a designated jurisdiction principle such as the court of the place of arbitration as the suggested Regulations or the enforcing courts.

The arguments in favour of setting the courts of the place of arbitration as the designated jurisdiction as the first seised jurisdiction can be made in terms of convenience and reflection of Article V(1)(e) of the New York

¹¹⁴ Note 32, 16.

Convention. For the sake of convenience, it can be said that the place of arbitration is the most suitable jurisdiction to provide assistance to the arbitrating parties since both parties and the tribunal would take part in the arbitration proceedings at that place. Hence, it would be easier for the parties to litigate at the place of arbitration if one of the parties questions the validity of the arbitration agreement or the issue of jurisdiction. This argument would offer the parties an easy predication of which courts have jurisdiction as *Gasser* highlighted,¹¹⁵ as well as hold up to the application of Article V(1)(e) since the provision allows other signatory countries to refuse the recognition and enforcement of an arbitral award if it has been set aside by the court where arbitration takes place. However, such a designation may experience challenge in terms of parties' choice of place arbitration. Consequently, it would not only make the parties re-consider their choice of neutral forum but also educate the parties to choose a place which has a more efficient court system to avoid unwanted delay as expressed in *West Tankers*.

The designated court principle can also be extended to give the enforcing court the exclusive jurisdiction. This idea can find support in the delocalisation theory which argues for the idea that control over arbitral awards should be exercised by the enforcing courts in order to avoid different restrictions imposed by the local laws. The delocalisation theory¹¹⁶ is an idea seeking to detach international commercial arbitrations from controls imposed by the law of the place of arbitration (the *lex fori*).¹¹⁷ Proponents of the delocalisation theory maintain that international commercial arbitration should not be subject to legal controls

¹¹⁵ *Gasser*, para. 72.

¹¹⁶ J. Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin', (1981) 30 I.C.L.Q. 358. J. Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 I.C.L.Q. 53. G. Bernini, 'The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trail of the New York Convention's Ambit and Workability in The Art of Arbitration' (Liber Amicorum for Pieter Sanders (ed.)) (1982), 50, 58; P. Lalive, 'Les regles de conflict de lois appliquees au fond litige par l'arbitre international siegeant en Suisse', Rev. Arb. (1976), 155, 159.

¹¹⁷ Accordingly, the delocalisation theory can be applied at two stages of the arbitration procedure. One is delocalising the arbitral procedure from the controls of the *lex fori*. The other is delocalising arbitral awards. Delocalising the arbitral procedure refers to removing the supervisory authority of the *lex fori* and the local courts where the arbitration is held. As far as delocalised arbitral awards are concerned, it means removing the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity. See J. Paulsson, 'The Extent of Independence of International Arbitration from the Law

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which vary from country to country. In particular, the controls may not suit the fast development and practice of international commercial arbitration. With an intention to eliminate the compulsory controls of the *lex fori*, they maintain that the control mechanism should be exercised by the country where the recognition or enforcement of arbitral awards is sought. They believe that the development of international commercial arbitration can be impeded because of the different restraints imposed on the arbitration procedure by the different national courts, since arbitrators not only have to be aware of more than one national law but also have to juggle with the different restraints imposed by different laws.¹¹⁸ In their opinion the best way to eliminate these potential obstacles is to free the arbitration procedure from the control of the place of arbitration and designate the review power to the enforcing courts. Thus, they argue, the arbitration procedure should be 'delocalised' and completely freed from the mandatory rules and public policy of the place of arbitration. In accordance with this theory, the arbitrators do not need to look over their shoulders at the different national mandatory rules and public policy imposed by the laws of the place of arbitration, the place making the contract, the place of performance, the place of enforcement, and so on. One of their arguments is based on the difference between arbitrators and judges sitting in national courts. Observing the different nature of a national court's judge from a private arbitrator, they claim that arbitrators are under no duty to apply the *lex fori* to the arbitration. As Paulsson said:

The international arbitrator is in a fundamentally different position. Whatever one might think of the contractual source of an arbitral tribunal's authority as a purely internal matter, it is difficult to consider the international arbitrator as a manifestation of the power of a State. His mission, conferred by the parties' consent, is one of a private nature, and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration.¹¹⁹

Following the suggestion that arbitrators do not have to follow the *lex fori*, it is therefore unnecessary for them to consider the mandatory rules of the *lex fori* when they deal with an international commercial dispute.

of the Situs', in J. Lew (ed.), *Contemporary Problems in International Arbitration* (1986), Kluwer, 141.

¹¹⁸ W. Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration', (1989) 63 Tul. L.R. 647, 667.

¹¹⁹ Note 116, J. Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 I.C.L.Q. 358, 362.

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As a result, they recommend that the supervisory powers should only be exercised by the courts where the recognition or enforcement is sought. Nevertheless, the purpose of this theory is not to try to escape from the national court's control, as Paulsson states: 'To seek completely to avoid national jurisdictions would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdiction could be called upon to recognise and enforce awards.'¹²⁰ Furthermore, 'the delocalised award is not thought to be independent of any legal order. Rather the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin.'¹²¹

However, the problem with the argument for designating the enforcing court as the first seised jurisdiction is the uncertainty of the place of enforcement. In reality, the losing party may not be in a position to predict where the enforcement claim will be lodged unless all his assets are located within one jurisdiction. Consequently, it was criticised as a fallacy to place the enforcing court as the designating court. However, with the application of the New York Convention not affected by the Regulation,¹²² the Commission's opinion in applying the lesser restrictions concerning the recognition and enforcement of arbitral awards to the extent allowed by the law or the treaties of the enforcing country under Article VII of the New York Convention would ensure the enforceability of arbitral awards to the extent allowed by the enforcing courts. Making the enforcing court the designated court also corresponds with Article 5 of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards,¹²³ which invokes the removal of the place of arbitration from the equation of recognition and enforcement, across all jurisdictions. Although only a handful of jurisdictions have allowed such a practice, such as France,¹²⁴

¹²⁰ Note 116, Paulsson, 'Delocalisation of International Arbitration: When and Why It Matters', (1983) 32 I.C.L.Q. 53, 54.

¹²¹ *Ibid.*

¹²² Article 73(2) of the Regulation.

¹²³ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*,; http://www.arbitration-icca.org/media/0/12133674097980/hypothetical_draft_convention_ajbrev06.pdf. Accessed 24 September 2014.

¹²⁴ Chapter III, French Decree No. 2011-48 of 13 January 2011. Also see *Société Hilmarton Ltd v Société OTV* (Cour de cassation, 2 March 1994) YB Comm Arb, XX (1995) 66; *Chromalloy Aeroservices Inc. v Ministry of Defence of the Republic of Egypt* 939 F. Supp. 907 (D.D.C.1996); *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* (2007) Revue

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Belgium¹²⁵ and Switzerland,¹²⁶ the real difficulty in designating the enforcing court lies in the limited acceptance of delocalisation theory among most jurisdictions. Under these circumstances, the results of arbitration and all proceedings related to arbitration are being left to the mercy of individual national courts. This would never be the parties' intention when they first choose arbitration to resolve disputes. To make matters worse, parties are indirectly told by *West Tankers* and the Regulation that they can race to courts to seek the declaration of the validity of arbitration agreements.

A RACE TO COURT?

The relationship between court and arbitration proceedings has often been described as a partnership. Due to lack of coercive powers invested in the tribunal, smooth arbitration proceedings can only be ensured with the full support of national courts. However, as with any good relationship, the balance between court and arbitration needs to be addressed carefully to avoid unnecessary negative competition between the two.¹²⁷

With the European Court's judgment on *West Tankers* and the promulgation of the Regulation, the old practice of parallel proceedings and conflicting judgments within the European courts has come to a stop. The Regulation may manage to achieve coordination between national courts of the Member States; however, the maintaining of arbitration exemption in Article 1(2)(d) could not be said to have done the same for arbitration and its relationship with court proceedings as highlighted above. The exclusion of arbitration from the scope of application of the Regulation expressly rules out the application of *lis pendens* principles in any European court proceedings dealing with arbitration issues, especially the issue of jurisdiction. Now, what one would see is arbitrating parties' race to court caused by the Commission's refusal to remove arbitration

de l'Arbitrage 507, English translation in Bertrand Derains and Yves Derains, 29 June 2007 *Cour de cassation – Première chambre civile Cour de cassation – Première chambre civile 29 June 2007*, available at <http://www.kluwerarbitration.com/document.aspx?id=ipn80892&query=content%3A%22putrabali%22>. Accessed 14 August 2013.

¹²⁵ Judicial Code, Sixth Part: Arbitration (adopted 4 July 1972 and last amended on 19 May 1998).

¹²⁶ Article 192 of the Swiss Private International Law Act 1987.

¹²⁷ *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

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exclusion from the application of the Regulation. Consequently, a race to court has started for the parties who wish to challenge the tribunal's jurisdiction and the validity of arbitration agreements. By pushing arbitration out of the scope of the Regulation, the potential possibility of parties being stuck in less efficient court proceedings was underestimated by the Commission. Holding the principle of competence-competence high in defending the decision to exclude arbitration, the Commission pointed out that arbitration proceedings would not be delayed because tribunals have the power to determine jurisdiction and make awards. Nevertheless, rulings by English courts in cases such as *Christopher Brown Ltd. v Genossenschaft Oesterreichischer Waldbesitzer*¹²⁸ and *Dallah*¹²⁹ have indicated that a tribunal's ruling on its own jurisdiction is only the first step, and such a step is subject to the final decision of the English courts. These reflect a long-established practice adopted by most jurisdictions within or beyond Europe.¹³⁰

Considering the international nature of commercial arbitration, the impact of anti-suit injunction practice in non-European jurisdictions is also worth mentioning. While the English courts are no longer allowed to tell other European courts not to interfere with cases involving arbitration, the English courts are consistently willing to order anti-suit injunctions to interfere in foreign proceedings outside of Europe. This can be observed in the recent case of *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower*¹³¹ involving Kazakhstan and England respectively. In an action for disclosure of information in the Kazakh court, the appellant's application to stay court proceedings on the basis of arbitration agreement and an anti-suit injunction order given by the English courts was dismissed. The Kazakh court expressly pointed out that, though the appellant was successful in obtaining an interim measure, later made final, from the English court, nevertheless the Kazakh court was under no obligation to recognise the injunction and stay the proceedings as requested. The Kazakh court was of the opinion that it was free to declare the invalidity of the arbitration agreement in the Concession agreement.¹³²

¹²⁸ [1954] 1 QB 8.

¹²⁹ *Dallah*, para. 97 and *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd's Rep 716, [32].

¹³⁰ Ch III, pp. 4–5, DTI Departmental Advisory Committee Report on draft Arbitration Bill (February 1994).

¹³¹ [2013] UKSC 35.

¹³² [2013] UKSC 35 [12].

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While the interim injunction issued by the English court failed to prevent the parallel proceedings, and ultimately was ignored by the Kazakh court, the English Court of Appeal¹³³ also refused to take the Kazakh court's judgment into consideration and proceeded to declare that the English courts were not bound by the Kazakh court's ruling as the grounds relied upon by the Kazakh court were unsustainable under English law.¹³⁴ This decision was later confirmed by the Supreme Court, which ruled that the power allowing courts to grant injunctions in Section 37 of the Senior Courts Act 1981 should be exercised sensitively and with due regard to the principles underpinning the Arbitration Act 1996, but under the circumstances of the present case, it was reasonable for the English court to intervene in foreign court proceedings.¹³⁵

Similar to the high possibility of irreconcilable judgments caused by the arbitration exemption in the Regulation, conflicting judgments have been seen in arbitration practice involving non-European jurisdictions. When Seriki¹³⁶ criticised the English courts' willingness to injunct the party and non-EU court proceedings in order to 'uphold the sanctity of arbitration agreement',¹³⁷ it is essential to recognise that such a willingness is not restricted to English courts but also courts of most jurisdictions, as seen in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower*.¹³⁸

CONCLUSION

This examination has clearly demonstrated that the practice of granting anti-suit injunction is not just a European issue but also an international issue. Consequently, the level of consideration on how to address such an issue has to be raised to international level. Unfortunately, instead of addressing the culture of race to court litigation on a European level, in the hope of being followed by other jurisdictions, the Commission actually passively encourages such practice by refusing to remove the arbitration exclusion. Consequently, no good balance between arbitration and court proceedings is achieved on either a European or an international level. The parties' wishes to use arbitration as the means of

¹³³ [2011] EWCA Civ 647.

¹³⁴ [2013] UKSC 35, [10].

¹³⁵ [61].

¹³⁶ Hakeem Seriki, note 102.

¹³⁷ *Ibid.*

¹³⁸ [2013] UKSC 35.

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dispute resolution have been left to the mercy of relevant national courts which adopt different approaches such as localisation or delocalisation. While both approaches have been criticised for undesirable interference and failing to reflect the reality of the practice, raising the discussion to the international level may allow the consideration of the new proposed approaches of designated first seised jurisdiction, either the place of arbitration or the enforcing court alongside the Hypothetical Draft Convention to provide a better balance between arbitration and court proceedings, and further address parties' intention and needs in their choice of arbitration as the method of dispute resolution.