Brussels I and Arbitration Revisited

– The European Commission's Proposal COM(2010) 748 final –

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Contents

* Materials cited in *abbreviated form: Burkhard Hess/Thomas Pfeiffer/Peter Schlosser*, The Brussels I-Regulation (EC) No. 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03) (cited: Heidelberg Report); Data Collection and Impact Analysis (Final Report) of 17 December 2010, accessible at <http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_CSES_brussels_i_final_17_12_10_en.pdf> (cited: Impact Assessment; IA).

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A. Introduction

Arbitration has become an industry sector generating considerable turnover[1] at the preferred arbitral seats around the world.[2] Against this background it does not come as a surprise that competition for the best place to arbitrate is increasingly played hardball. Not only stakeholders, but even national courts[3] are seeking to protect particular features of the *lex arbitri* against external invasion, in the European Union (EU) namely that of the Brussels I Regulation.[4]

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[1] In its Impact Assessment (conducted by the English consultancy firm CSES) the European Commission estimates the total value of the fees generated by the main European arbitration centres not including ad hoc arbitration at around EUR 4 billion per year (Section 5.1.2 at p. 93).

[2] The seat of the arbitration as a legal concept (embedding the arbitration within a national legal order – the *lex arbitri*) is not tantamount to the venue of the arbitration as a factual concept with reference to the venue where the arbitration proceedings actually take place; nevertheless, seat and venue often go together. But even if they do not, counsel will often be those admitted at the seat of the arbitration since they are familiar with the supportive and supervising powers of the seat courts as well as the applicable arbitration rules.

[3] See most prominently the House of Lords in its reference to the ECJ in *West Tankers Inc.* v. *RAS Riunione Adriatica di Sicurta SpA and others (The Front Comor)*, [2007] UKHL 4, paras. 19f. (per Lord Hoffmann).

[4] Council Regulation (EC) No. 44/2001 of 22. 12. 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. 2001 L 12/1 (hereinafter Brussels I).

Under the existing arbitration exclusion in Art. 1(2)(d) of the Regulation, the interface of the Brussels I Regulation with arbitration did not prove particularly problematic until its major deficiency surfaced in the *West Tankers* case:[5] parallel proceedings resulting from a torpedo action. Such proceedings lead to considerable legal uncertainty for the parties and the risk of conflicting judgments/awards on the arbitration agreement's validity as well as on the merits of the case.

The European Commission has now presented a solution for this deficiency in its Proposal[6] for a reformed Brussels I Regulation.[7] Whereas the authors of the Heidelberg Report had proposed deleting the arbitration exclusion altogether,[8] several players of the arbitration community had suggested keeping and possibly even extending the arbitration exclusion.[9] The Commission steers a middle course between those extremes: the arbitration exclusion in Art. 1(2)(d) CP is partially abandoned to allow for a special *lis pendens*-mechanism in Art. 29(4) CP. For the purposes of this mechanism, the term "seizure" is defined in relation to arbitral tribunals in Art. 33(3) CP. Recitals 11 and 20 provide clarifying background on the partial deletion of the arbitration exclusion. Finally, the rule on provisional measures in Art. 36 CP is brought in line with ECJ case law[10] by explicitly including

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[5] ECJ 10. 2. 2009 – Case C-185/07 *(Allianz ./. West Tankers)*, E.C.R. 2009, I-663; noted *Martin Illmer*, Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa: IPRax 2009, 312–318 (cited: Anti-suit injunctions); *Ben Steinbrück*, Englische Prozessführungsverbote zum Schutz von Schiedsvereinbarungen im europäischen Zivilprozess: ZEuP 2010, 168–185; *Stephan Balthasar/Roman Richers*, Europäisches Verfahrensrecht und das Ende der anti-suit injunction: RIW 2009, 351; *Sebastian Seelmann-Eggebert/Philip Clifford*, Lost at sea?, Anti-suit injunctions after West Tankers: Zeitschrift für Schiedsverfahren (SchiedsVZ) 2009, 139; *Jacob Grierson*, Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A.: J. Int. Arbitr. 26 (2009) 891; *Richard Fentiman*, Arbitration and antisuit injunctions in Europe: Cambridge L.J. 68 (2009) 278–281; *Edwin Peel*, Arbitration and anti-suit injunctions in the European Union: L.Q.Rev. 125 (2009) 365; *Bernard Audit*, Note: Clunet 136 (2009) 1285; for a detailed analysis see *Ingrid Naumann*, Englische anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen (2008) 123ff.

[6] Commission Proposal, hereinafter CP.

[7] COM(2010) 748 final.

[8] See Heidelberg Report paras. 106ff.

[9] While German arbitration stakeholders were rather in favour of deleting or at least partially deleting the arbitration exclusion, English stakeholders were split and French stakeholders were largely opposed to any changes to the arbitration exclusion; for the opposing view see, inter alia, the submissions during the public consultation following the Commission's Green Paper by the IBA Arbitration Committee Working Group (strongly influenced by the French position), the Association of International Arbitration, the Bar Council of England and Wales (para. 7.4), the Chamber of National and International Arbitration of Milan, the Comité Français de l'Arbitrage, Emmanuel Gaillard (President) (all accessible at <http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm>).

[10] This refers namely to ECJ 17.11. 1998 – Case C-391/95 *(Van Uden ./. Deco Line)*, E.C.R. 1998, I-7091 (for further details see below at B.II.2.).

scenarios in which an arbitral tribunal has jurisdiction over the substance of the matter.

B. The Exclusion of Arbitration in Art. 1(2)(d) Brussels I

I. The concept of the exclusion

The exclusion of arbitration from the substantive scope of the Brussels Convention, identical to the current exclusion in the Brussels I Regulation, was motivated by the New York Convention (hereinafter NYC)[11] and the European Convention on International Commercial Arbitration.[12] The Brussels Convention, concerning jurisdiction as between state courts as well as the recognition and enforcement of state court decisions in civil and commercial matters, was to be kept separated from the domain of international commercial arbitration.[13]

Accordingly, the Regulation neither applies to jurisdiction in respect of arbitration-related state court proceedings nor to recognition and enforcement of arbitral awards (which is the primary subject matter of the NYC) or judgments given in proceedings to set aside an arbitral award. Form, existence, validity and the effects of arbitration agreements as well as the procedure before the arbitral tribunal and the powers of the arbitrators are also outside the Regulation's scope. While this was formerly only stated in the Reports on the Brussels Convention (*Jenard*,[14] *Schlosser*[15] and *Evrigenis/Kerameus* Report[16]), the issues listed above are now explicitly excluded ("in particular") from the Regulation's scope by virtue of a new Recital 11 CP. The recital reassures the arbitration community that those areas remain outside the Regulation's scope despite the partial deletion of the arbitration

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[11] (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10. 6. 1958, UNTS Vol. 330, p. 3.

[12] European Convention on International Commercial Arbitration of 21. 4. 1961, UNTS Vol. 484, p. 349.

[13] See *Jenard*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: O.J. 1979 C 59/1 (13); *Evrigenis/Kerameus*, Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, O.J. 1986 C 298/1 (10); likewise the Commission in its Report to the European Parliament, Council and the European Economic and Social Committee accompanying the Green Paper, COM(2009) 174 final at 3.7.

[14] *Jenard* Report (previous note) 13 (despite its publication in 1979, this is the initial report to the Brussels Convention).

[15] *Schlosser*, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 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, O.J. 1979 C 59/71 (92f.).

[16] *Evrigenis/Kerameus* Report (supra n. 13) 10.

exclusion. They are governed either by international conventions, most prominently the NYC, or national arbitration laws.

II. Disputed issues

As several interfaces between state court proceedings and arbitration proved undeniable, the application of Brussels I to these state court proceedings became disputed.

1. Ancillary proceedings

The first of these disputed issues was that of state court proceedings ancillary to arbitration proceedings under the state courts' supportive powers (such as appointment of arbitrators, determination of the seat of the arbitration and extension of time limits). These state court proceedings form an integral part of the arbitration proceedings since the state courts step in (often as a last resort) where the arbitral tribunal is not yet constituted or where it lacks the respective powers.

The Reports' answer to the problem of ancillary proceedings is clear. While the *Jenard* Report had already generally excluded jurisdiction in respect of proceedings relating to arbitration from the Convention's scope, the *Schlosser* Report explicitly states that ancillary proceedings are covered by the arbitration exclusion. The *Evrigenis/Kerameus* Report confirms this view by removing from the Convention's scope all proceedings which directly concern arbitration as the principal issue. Nevertheless, in the *Marc Rich* case the issue of ancillary proceedings, specifically the appointment of an arbitrator (an example even listed in the *Schlosser* Report), was referred to the European Court of Justice (ECJ) for a preliminary ruling in the early 1990's.[17] According to the ECJ, state court proceedings for the appointment of an arbitrator are covered by the arbitration exclusion. Far more important than this predictable outcome was, however, the ECJ's reasoning: In order to determine whether state court proceedings are covered by the arbitration exclusion, reference must solely be made to the (principal) subject matter of the proceedings, whereas the classification of a preliminary issue such as the existence and validity of an arbitration agreement (an issue that will often be raised by the defendant in such ancillary proceedings since it attacks their very basis) is irrelevant.[18]

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[17] ECJ 25.7. 1991 – Case C-190/89 *(Marc Rich ./. Impianti)*, E.C.R. 1991, I-3855 (AG opinion) and I-3894 (ECJ judgment).

[18] ECJ 25.7. 1991 (previous note) I-3894, para. 26.

2. Provisional measures

The second of the disputed issues was that of provisional measures taken by state courts in relation to disputes covered by an arbitration agreement. While the issue is not dealt with in the Reports, it came up in the *van Uden* case.[19] Arbitration proceedings regarding a contractual claim for an unpaid debt had already been initiated in the Netherlands when the claimant applied to the Dutch state courts for an interim injunction securing this debt. The Hoge Raad asked the ECJ by way of a request for a preliminary ruling whether the fact that the claim for the debt was subject to an arbitration agreement affected the jurisdiction of the Dutch state court under Art. 24 of the Convention (now Art. 31 Brussels I) to grant interim relief. The ECJ distinguished between provisional measures concerning the arbitral proceedings on the one hand and provisional measures concerning the (usually contractual) claim on the merits on the other hand. While the former are ancillary state court proceedings covered by the arbitration exclusion (in line with the earlier *Marc Rich* decision), the ECJ regarded the latter as being parallel to the arbitration proceedings and thus not covered by the arbitration exclusion.[20] The criterion for determining whether a provisional measure is ancillary or parallel is the nature of the rights pursued. Since protective measures securing the enforcement of money claims (as the one applied for in the case at hand) concern the protection of a contractual right, they are not ancillary but parallel to the arbitration proceedings.

3. Parallel proceedings

The third and most problematic of the disputed issues is that of parallel proceedings before two state courts and possibly also an arbitral tribunal resulting from a torpedo action. The proceedings may relate to the existence, validity, scope or effects[21] of the underlying arbitration agreement as well as the merits of the case with the consequential problem of reciprocal recognition and enforcement of conflicting decisions. The party aiming at frustrating the arbitration initiates proceedings before a state court which would be competent but for the arbitration agreement (hereinafter torpedo court); under Brussels I this will often be jurisdiction pursuant to Art. 5(1) or Art. 5(3) Brussels I. Usually this will be an action for negative declaratory relief on the merits, raising the validity of the arbitration agreement as a preliminary question in relation to the court's jurisdiction.

The party adhering to the arbitration agreement, however, has a varied arsenal for striking back.

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[19] ECJ 17. 11. 1998 (supra n. 10) paras. 23ff.

[20] ECJ 17. 11. 1998 (supra n. 10) para. 33.

[21] Unless specified otherwise, this triad is referred to as "validity".

a) Anti-suit injunctions

The first, counter-measure is – among Member States – offered foremost by the English courts: anti-suit injunctions. By way of an anti-suit injunction, which may be interim or final, the English court restrains a person from initiating or continuing proceedings before a foreign court. Due to its origins in the law of equity, anti-suit injunctions are a discretionary remedy.[22] In the case of arbitration (and jurisdiction) agreements the court's discretion is, however, limited: anti-suit injunctions are regularly granted for a breach of the legal right to not be sued before the state courts.[23] An anti-suit injunction is not directed at the foreign court, but at the plaintiff in the foreign proceedings. Nevertheless, it (indirectly) interferes with the power of the foreign court to determine its jurisdiction. Due to the sanctions for contempt of court, anti-suit injunctions have proven to be an effective tool for avoiding parallel proceedings. Once the foreign proceedings are restrained, the arbitration can commence or continue without the ongoing threat of conflicting decisions on either the arbitration agreement's validity or on the merits.

According to the ECJ in the *West Tankers* decision, anti-suit injunctions in support of arbitration agreements are, however, incompatible with the Brussels I Regulation so that they are no longer available in order to counter-attack a torpedo action brought before the courts of a Member State. The ECJ distinguished between proceedings for the grant of an anti-suit injunction on the one hand and foreign proceedings for negative declaratory relief on the other hand. While it regarded the anti-suit proceedings as being covered by the arbitration exclusion, it took the opposite view in relation to the foreign proceedings on the merits. Applying the rationale of the decision in *Marc Rich*, it held that reference must be made to the (principal) subject matter of the proceedings alone – in the given case a damages claim in tort/delict. The classification of a preliminary issue – in the given case the existence and validity of an arbitration agreement – is irrelevant.[24] With the

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[22] See the – now statutory – basis in Section 37(1) Supreme Court Act 1981 ("… may by order … grant an injunction … in all cases in which it appears to the court to be just and convenient to do so") and Section 44 Arbitration Act 1996 as well as the leading cases *Société Nationale Industrielle Aérospatiale* v. *Lee Kui Jak*, [1987] A.C. 871, 892 (P.C.); *Airbus Industrie* v. *Patel*, [1999] 1 A.C. 119, 133 and 138 (H.L.); *Donohue* v. *Armco Inc*, [2002] 1 All E.R. 749 paras. 19, 23, 53 (H.L.); for further details see *Thomas Raphael*, The Anti-suit injunction (2008) paras. 3.03 ff., 4.10 ff. and 7.08 ff.

[23] See the *The Angelic Grace*, [1995] 1 Lloyd's Rep. 87, 96 (C.A.); *Donohue* v. *Armco Inc* (previous note) paras. 24, 45; *Turner* v. *Grovit*, [2002] 1 W.L.R. 107 paras. 24 f. (H.L.); *West Tankers Inc* v. *RAS Riunione Adriatica di Sicurta SpA*, [2007] UKHL 4 para. 8.

[24] The diverging opinions on the interpretation of the arbitration exclusion in that regard were already noted in the *Schlosser* Report (supra n. 15). They concerned the question whether the arbitration exclusion covered any state court proceedings relating to a dispute covered by an arbitration agreement (view taken by the United Kingdom) or whether the arbitration

foreign proceedings coming within the substantive scope of the Regulation, it is exclusively for the court seised to determine its jurisdiction. This includes any preliminary issue such as the validity of the arbitration agreement. By obstructing this determination, the anti-suit injunction undermines the effectiveness of the Regulation (*effet utile*). Since even national procedural devices must not undermine the *effet utile* of European Union law, the question whether the anti-suit proceedings are in- or outside the substantive scope of the Regulation is irrelevant.

Anti-suit injunctions issued by an arbitral tribunal (e.g. under Section 48(5)(a) Arbitration Act 1996, assuming that the ECJ's *West Tankers* decision is not binding upon an arbitral tribunal), are not a viable alternative. On the one hand they are not available before the tribunal's constitution when they may be most needed. On the other hand, they are not very effective since they lack the coercive powers of contempt of court.[25]

b) Declaratory (counter-) relief

The second, counter-measure is an application to the state courts at the seat of the arbitration (hereinafter seat court) for positive declaratory relief concerning the arbitration agreement's validity. Under the current regime, such declaratory counter-relief is rather inefficient. It does not prevent parallel proceedings since there is no mechanism entailing either exclusive jurisdiction or mandatory stay/dismissal. Hence, the battleground is moved to the field of recognition of the declaratory judgment. Recognition, however, is characterised by a severe imbalance, as recently demonstrated by the English Court of Appeal in the *National Navigation* case,[26] applying the rationale of the ECJ's judgment in *West Tankers* to the declaratory relief scenario.[27] It differs depending on the type and corresponding subject matter of the proceedings:

The seat court determines the validity of the arbitration agreement as the principal subject matter so that the proceedings are excluded from the Reg-

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exclusion was limited to ancillary state court proceedings forming an integral part of the arbitral process (view taken by the contracting states). The single case where it was said to make a difference in practice was the one now at stake: the existence, validity and effect of an arbitration agreement as a preliminary matter before a foreign court when determining its jurisdiction. The diverging views could not be reconciled and the issue was left unresolved (*Schlosser* Report [supra n. 15] 92f.). In the *West Tankers* case (supra n. 5), the ECJ now took the view taken by the contracting states.

[25] *Stuart Dutson/Mark Howarth*, After *West Tankers* – Rise of the "Foreign Torpedo"?: Arbitration 75 (2009) 334–348 (345f.).

[26] *National Navigation Co* v. *Endesa Generacion SA*, [2009] EWCA (Civ) 1397.

[27] For a detailed analysis see *Martin Illmer*, Schieflage unter der Brüssel I-VO – die Folgen von West Tankers vor dem englischen Court of Appeal: Internationales Handelsrecht 2011, forthcoming in iusse 3) (cited: Schieflage).

ulation's scope by its Art. 1(2)(d). As a result, the decision does not benefit from the Regulation's recognition regime. The torpedo court is therefore not bound by the decision of the seat court but may determine the validity of the arbitration agreement afresh. The resulting parallel proceedings inevitably carry the risk of potentially conflicting decisions.

The torpedo court determines the arbitration agreement's validity merely as a preliminary matter. The proceedings are therefore comprehensively within the Regulation's substantive scope including the decision rendered on the preliminary matter (even if rendered as a separate, preliminary decision). As a result, the decision does benefit from the Regulation's regime of recognition. The seat court seised for positive declaratory relief is bound by the decision of the torpedo court.

This lack of reciprocity in relation to recognition makes torpedo actions very attractive. If the party aiming at frustrating the arbitration agreement manages to obtain an "early" decision on the validity of the arbitration agreement by the torpedo court before the seat court delivers its decision, as happened in the *National Navigation* case, the seat court has to recognise the torpedo court's decision according to Art. 33 Brussels I[28]. Even if the seat court's decision is delivered prior to the torpedo court's decision (which will often be the case when the torpedo court's decision forms part of the judgment on the merits), the latter reigns supreme: The torpedo court does not have to recognise the seat court's decision while the proceedings before it last and, applying the *ratio decidendi* of the *West Tankers* judgment, the torpedo court's view on the arbitration agreement's validity continues to prevail over the conflicting seat court's decision via recognition of the torpedo court's judgment on the merits.[29]

(Positive) declaratory relief by the arbitral tribunal, which may issue a partial award on the jurisdiction issue, shares the weaknesses of state court declaratory relief. There is no mechanism providing for mandatory stay/dismissal of the torpedo action and the (state court) decision recognising the arbitral award on the jurisdiction issue will not be recognised under Brussels I since its principal subject matter is arbitration.

c) Challenge of jurisdiction

The third defensive weapon (usually used in combination with the first two weapons) is that of a challenge of the torpedo court's jurisdiction based on the arbitration agreement under the respective national mechanism incorporating Art. II(3) NYC. In theory, it is the most effective and straight-

[28] It is important to note that recognition is not subject to any procedural requirements or preconditions such as an *exequatur* (still) applying to enforcement; consequently, the declaratory decision is *eo ipso* binding upon any other Member State court.

[29] *Illmer*, Schieflage (supra n. 27).

forward solution since it prevents parallel proceedings provided that the torpedo court determines its jurisdiction timely. In practice, however, the challenge does not operate satisfactorily since the courts of the states regularly chosen for a torpedo action are those known for their lengthy proceedings on jurisdiction issues. Thus, the party adhering to the arbitration agreement faces an enduring period of uncertainty. He may commence or proceed with the arbitration and finally even obtain an award, but if the court seised regards the arbitration agreement as invalid, this may result in a state court judgment conflicting with the arbitral award.

d) Action for damages

The fourth, rather remedial weapon is an action for damages for breach of the arbitration agreement.[30] This action may be brought either before the seat courts or before the arbitral tribunal.[31] Whether such a damages action is compatible with the Brussels I Regulation is still unsettled. The odds lie rather against compatibility: if specific performance of the obligations under the arbitration agreement by way of an anti-suit injunction is incompatible with the Regulation, damages for breach of that obligation are *prima facie* incompatible with it as well.[32]

In any event, a damages action has several downsides: it may not be available under all national laws since some of these laws do not regard the breach of a procedural agreement as giving rise to a damages action. If it is available – as is the case under English law – it is difficult to establish. In particular, the calculation of the actual damage will be very difficult and time consuming, carrying a considerable degree of uncertainty.[33] Penalty clauses face

[30] For the English practice see *Discount Co Ltd.* v. *Zoller*, [2001] EWCA (Civ) 1755 (C.A.); *Donohue* v. *Armco Inc* (supra n. 22), *Sunrock Aircraft Corp. Ltd.* v. *Scandinavian Airlines System*, [2007] EWCA (Civ) 882 (C.A.); *National Westminster Bank Plc* v. *Rabobank Nederland (No. 3)*, [2007] EWHC 1742 (Comm); *A* v. *B*, [2007] EWHC 54 (Comm); for a more detailed analysis see *Adrian Briggs/Peter Rees*, Civil Jurisdiction and Judgments[5] (2009) paras. 5.57 ff.; *Justin Michaelson/Gordon Blanke*, Anti-Suit Injunctions and the Recoverability of Legal Costs as Damages for Breach of an Arbitration Agreement: Arbitration 74 (2008) 12–27 (23 ff.); *Patrizio Santomauro*, Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001: J. Priv. Int. L. 6 (2010) 281–325 (310 ff.).

[31] For a recent example of the latter post-*West Tankers* see *CMA CGM SA* v. *Hyundai Mipo Dockyard Co Ltd*, [2008] EWHC 2791 (Comm).

[32] See in particular *Peter Mankowski*, Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?: IPRax 2009, 23–35 (30); *Illmer*, Anti-suit injunctions (supra n. 5) 316; *Adrian Briggs*, Agreements on Jurisdiction and Choice of Law (2008) para. 8.76.

[33] See for a more detailed analysis (mainly in relation to jurisdiction agreements) *Koji Takahashi*, Damages for Breach of a Choice-of-court Agreement: Yb. Priv.Int.L. 10 (2008) 57 (82 ff.) (comparing the anti-suit injunction with a damages claim); *C.J.S. Knight*, The Damage of Damages: Agreements on Jurisdiction and Choice of Law: J. Priv. Int. L. 4 (2008) 501;

severe problems of enforcement under common law, and liquidated damages clauses can only lighten the burden of establishing the respective damage. Moreover, the courts may also invalidate the latter under the specific circumstances of the case. Furthermore, it may be very difficult to assess in advance the amount of the penalty or liquidated damages sum without knowing where the torpedo action will be brought. For all these reasons, compensation by way of a damages action is not a viable alternative to a mechanism effectively preventing parallel proceedings *ab initio*.

III. The remaining problem on the eve of the Brussels I Reform

While the ECJ's solutions on the interface issues of ancillary proceedings and provisional measures are satisfactory and work well in practice, the effect of the ECJ's decision in *West Tankers* on the interface issue of parallel proceedings is highly unsatisfactory.[34] There is currently no effective mechanism in place to avoid parallel proceedings. As a result, arbitration agreements are frustrated by torpedo actions, with the *National Navigation* case offering the instruction manual on how it is best done. This is a considerable handicap for arbitral seats in the Member States in the global competition for arbitration.

It would be wrong to blame the ECJ for having left arbitration agreements within the EU vulnerable to attack. As a matter of law, its decision in *West Tankers*, as unsatisfactory as its result may be, was correct. For the reasons given by the ECJ, anti-suit injunctions are incompatible with the Brussels I Regulation. The real problem at the heart of the issue is parallel proceedings in relation to the arbitration agreement's validity. This problem, however, has to be solved by the European legislature in the course of the Regulation's reform. It was not for the ECJ to predetermine this reform one way or the other. Hence, the ECJ's decision in *West Tankers* is rather an expression of judicial self restraint than ignorance.

Richard Fentiman, Parallel Proceedings and Jurisdiction Agreements in Europe, in: Forum shopping in the European judicial area, ed. by *Pascal de Vareilles-Sommières* (2007) 27–54 (43 ff.); *Raphael* (supra n. 22) Chap. 14; *David Joseph*, Jurisdiction and Arbitration Agreements and their Enforcement[2] (2010) para. 12.75 and Chap. 14.

[34] This conclusion is supported by the Impact Assessment (see Section 5.3.3, p. 111; Section 5.4.1, p. 113, and Section 5.4.2, p. 114): stakeholders argued for a cautious approach not intruding into the realm of the NYC and identified the *West Tankers* issue of parallel proceedings as the real, but at the same time only, problem that needs to be addressed by the reform.

C. The European Commission's Proposal

I. Genesis

1. Heidelberg Report

The Heidelberg Report, prepared in 2007 by the German law professors Hess, Pfeiffer and Schlosser at the request of the Commission, suggested completely deleting the arbitration exclusion[35] so as to bring any arbitration-related state court proceeding within the scope of the Regulation. Decisions by Member State courts in arbitration-related proceeding would have to be recognised and enforced throughout the EU under Arts. 32 ff. Brussels I, no matter whether jurisdiction was based on the Regulation or on national law.[36] In relation to ancillary, supportive court proceedings, the Heidelberg Report provided for a new head of exclusive jurisdiction for the courts at the seat of the arbitration, given that the general head of jurisdiction under Art. 2 Brussels I would be inappropriate.[37] To avoid parallel proceedings *ab initio*, the Report proposed a *lis pendens*-mechanism granting priority to the seat courts in deciding on the arbitration agreement's validity.[38] A new ground for the non-recognition of state court judgments rendered on the merits in spite of an arbitration agreement, whether valid or void, was, however, rejected. Recognition and enforcement of arbitral awards are kept outside the Regulation's scope, giving full effect to the prevalence of the NYC.[39]

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[35] A total deletion in addition to positively addressing arbitration even further had been advanced by *Hans van Houtte*, Why Not Include Arbitration in the Brussels Jurisdiction Regulation?: Arbitration Int. 21 (2005) 509–521 (516 ff.).

[36] For the latter aspect see *Thomas Rauscher (-Leible)*, Europäisches Zivilprozeßrecht[3] (2011) Art. 32 Brüssel I-VO para. 20 and Art. 35 Brüssel I-VO para. 2; *Jan Kropholler*, Europäisches Zivilprozeßrecht[8] (2005) Art. 32 para. 4 and Art. 35 para. 1.

[37] This would be in contrast to the vast majority of the Member States' national arbitration laws which provide for the exclusive jurisdiction of the courts at the seat of the arbitration in relation to arbitration-related proceedings except provisional measures (jurisdiction lies regularly with the courts at the place where the provisional measure takes effect, e.g. where the evidence is located) by way of a unilateral conflict rule; cf. Section 2(3) and (4) (English) Arbitration Act 1996; § 1025(1) and (2) German Code of Civil Procedure; § 577 Austrian Code of Civil Procedure; see also (outside the EU) Art. 176(1) Swiss Private International Law Act; a different (delocalised) approach is pursued by French arbitration law.

[38] See paras. 106 to 136 of the Heidelberg Report; for additional details see *Peter Schlosser*, "Brüssel I" und Schiedsgerichtsbarkeit: SchiedsVZ 2009, 129–139; for a modification of the proposal see *Ben Steinbrück/Martin Illmer*, Brussels I and Arbitration – Declaratory Relief as an Antidote to Torpedo Actions under a Reformed Brussels I Regulation: ibid. 188–196.

[39] Note, however, that the Heidelberg Report considers a separate instrument supplementing the NYC in relation to recognition and enforcement of arbitral awards providing for a uniform procedural mechanism of recognition and enforcement, basing the grounds for non-recognition, however, on Art. V NYC (para. 130).

2. Green Paper and Expert Group

In April 2009, the Commission published a Report[40] and a Green Paper[41] based on the Heidelberg Report. It envisaged a total or merely partial deletion of the arbitration exclusion. To solve the parallel proceedings problem, the Commission considered giving priority to the seat courts in deciding on the arbitration agreement's validity, potentially supplemented by a time limit and a uniform conflict rule on the law applicable to the arbitration agreement's validity. Finally, the Commission raised the issue of enhancing recognition and enforcement of arbitral awards across the EU supplementing the NYC. The Green Paper fuelled a lively debate on the reform and triggered approximately 100 contributions in the public consultation process, many of them specifically addressing the interface of Brussels I and arbitration.[42]

In June 2010, the Commission appointed an international expert group on the interface of Brussels I and arbitration.[43] The still-existing group consists of practitioners and academics alike (all of them with a practical background in the field). After a very intense debate, which was led by DG Justice, the group, despite some diverging views on specific aspects, agreed on a joint recommendation and proposal in October 2010. The Commission Proposal has adopted the proposal advanced by the expert group.

II. The Commission proposal's new mechanism

1. Overview

a) Structure

The Commission proposes a minimalist approach limited to remedying the open flank of arbitration agreements in relation to torpedo actions brought before state courts, thereby preventing parallel proceedings and the resulting, potentially conflicting decisions on the arbitration agreement's validity and/or on the merits.

The core of the new regime is a special *lis pendens*-mechanism in Art. 29(4) CP. It provides that once the arbitral tribunal or the state courts at the seat are seised of proceedings to determine the validity of the alleged arbitration agreement, whether as their main object or as an incidental question, the

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[40] COM(2009) 174 final.

[41] COM(2009) 175 final.

[42] For a list of all contributions see <http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm>.

[43] The author is a member of the Expert Group; for a list of all its members see <http://ec.europa.eu/transparency/regexpert/detailGroup.cfm?groupID=2467>.

courts of any other Member State, i.e. the torpedo courts, whose jurisdiction is challenged on the basis of this arbitration agreement have to stay proceedings or, if their national law so prescribes, decline jurisdiction. If stayed, the torpedo court has to decline jurisdiction once the validity of the arbitration agreement is established by the seat courts or the arbitral tribunal.

It is not only the French concept of the negative effect of *Kompetenz-Kompetenz* to which the incorporation of arbitration proccedings into the *lis pendens*-mechanism is attributable. Parallel proceedings as between an arbitral tribunal and a torpedo court may also arise under the positive effect of *Kompetenz-Kompetenz*, affording the arbitral tribunal with the power to determine its own jurisdiction (but not excluding the state courts from doing so as under the negative effect doctrine), which is pursued by most national arbitration laws.[44]

The CP does not provide for a new head of exclusive jurisdiction for ancillary arbitration-related state court proceedings. This is the case for two reasons. First, under the CP ancillary proceedings are kept outside the Regulation's scope. The parallel proceedings interface, however, does not require a head of exclusive jurisdiction. It is *de facto* achieved by the *lis pendens*-mechanism: once a party brings proceedings before the seat courts, it is exclusively for these courts to determine the validity of the arbitration agreement. Secondly, an exclusive head of jurisdiction would monopolise the decision on the arbitration agreement's validity in the state courts (of the seat), which would be incompatible with the French concept of the negative effect of the *Kompetenz-Kompetenz* of the arbitral tribunal.

b) Concurrent mechanism regarding choice of court agreements

The *lis pendens*-mechanism in relation to arbitration agreements in Art. 29(4) CP accords with the proposed *lis pendens*-rule in relation to choice of court agreements in Art. 32(2) CP. In both instances it is for the court or respectively the arbitral tribunal designated in the choice of court or arbitration agreement (or in the latter case, alternatively, the seat courts) to determine the agreement's existence, validity or effects. The torpedo court has to stay the proceedings (or even decline jurisdiction) on the pure (formal) ground of an alleged choice of court or arbitration agreement. In contrast to the status quo, such a stay is not dependant on the torpedo court itself examining the validity of the choice of court or arbitration agreement.

[44] See to that effect, e.g. Section 32(3) Arbitration Act 1996 and § 1040(3) of the German Code of Civil Procedure.

2. Territorial limitations

a) Agreed or designated seat in a Member State

Article 29(4) CP applies only if the agreed or designated seat of the arbitration is located *in a Member State*. The *lis pendens*-mechanism affords a high degree of trust to the seat courts and the arbitral tribunal (eventually supervised by the seat courts upon a challenge of the award by one of the parties) since the determination of the arbitration agreement's validity is binding upon the torpedo court and potentially any other Member State court.[45] This accords with the Regulation's underlying principle of mutual trust among the Member States' courts. It appears unjustified to afford the same degree of trust to any seat court outside the EU. An extension of the *lis pendens*-mechanism to arbitrations with a third state seat is therefore out of the question. The proposed extension of the Regulation's jurisdiction rules to third state defendants pursues an entirely different goal.[46]

b) Cross-border situations

In accordance with the Regulation's general approach, Art. 29(4) CP is limited to cross-border cases since it requires a challenge of the jurisdiction before the court of *another* Member State. Purely domestic cases are still governed by the respective national mechanism on parallel proceedings.

c) Third state torpedos

Since Art. 29(4) CP only applies in relation to actions before the courts of another *Member State*, torpedo actions before Non-Member State courts are not subject to the *lis pendens*-mechanism. The EU's competence to demand a stay of proceedings does not extend to third state courts. Since, however, the ECJ's *West Tankers* rationale does not apply, national devices to avoid parallel proceedings, such as anti-suit injunctions, are still available in relation to third state torpedos.[47]

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[45] For further details on the binding effect see infra C.II.5.

[46] See *Johannes Weber*, in this issue, p. 619 ff.

[47] See from the English case law post *West Tankers* e.g. *Shashoua* v. *Sharma*, [2009] EWHC 957 (Comm); *Skype Technologies SA* v. *Joltid Ltd*, [2009] EWHC 2783 (Comm); *Midgulf International Ltd* v. *Groupe Chimique Tunisien*, [2010] EWCA (Civ) 66; concurring *Martin Illmer*, Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers: IPRax 2011 (forthcoming in issue 5); *Richard Fentiman*, International Commercial Litigation (2010) paras. 15.109 f.; *Joseph* (supra n. 33) para. 12.74; sceptical, however, *C. J. S. Knight*, Owusu and Turner, The Shark in the Water?: Cambridge L. J. 66 (2007) 288–301 (297 ff.).

3. Key prerequisites

Article 29(4) CP consists of two key prerequisites that have to be fulfilled in order to activate the *lis pendens*-mechanism.

a) Challenge of the torpedo court's jurisdiction based on an arbitration agreement

First, the defendant in the torpedo proceedings has to challenge the torpedo court's jurisdiction based on an alleged arbitration agreement. The procedural prerequisites (such as time limits for the challenge and presentation of a document alleged to be an arbitration agreement) are not governed by Art. 29(4) CP, but by the respective national law, i.e. the national mechanism incorporating Art. II(3) NYC. Artocle 29(4) CP merely modifies the consequences of such a challenge in the European cross-border context.[48]

b) Seising of seat courts or arbitral tribunal

Secondly, the defendant in the torpedo proceedings has to seise the seat courts or the arbitral tribunal, raising the arbitration agreement's validity as the main question (regularly the case in declaratory relief proceedings before the seat courts) or an incidental question (regularly the case in the main action before the arbitral tribunal). While seising a state court is generally defined in Art. 33(1) CP, Art. 33(3) CP specifically defines the "seising" of an arbitral tribunal for the purposes of the *lis pendens*-mechanism. Aiming at an early activation of the *lis pendens*-mechanism, the nomination of an arbitrator by one party or the request of the support of an institution, authority or state court for the arbitral tribunal's constitution are deemed as a seising of the arbitral tribunal.

If the defendant in the torpedo proceedings challenges the court's jurisdiction without seising the seat courts or the arbitral tribunal, the *lis pendens*-mechanism of Art. 29(4) CP does not apply. Should the torpedo court come to the conclusion that the arbitration agreement is invalid, its decision on the merits will have to be recognised and enforced under the Regulation in accordance with the principles laid down by the ECJ in *West Tankers* as interpreted in the *National Navigation* case. This includes the part of the decision invalidating the arbitration agreement, even if rendered as a preliminary decision as in the *National Navigation* case. There are no grounds for non-recognition under the Regulation, and the decision is clearly within the scope of the Regulation.[49]

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[48] See infra C.II.4.

[49] Cases such as Cour d'Appel Paris 15. 6. 2006, Rev. Arb. 2007, 90 *(Fincantieri)* and *ABCI* v. *Banque Franco-Tunisienne*, [1996] 1 Lloyd's Rep. 485, 488 f. rejecting the application of the

c) Lack of an agreed or designated seat

If the parties have not designated a seat of the arbitration in their arbitration agreement, a seising of the seat courts is not available to activate the *lis pendens*-mechanism. Neither the proposed fallback rule in the Heidelberg Report[50] nor alternative suggestions[51] were adopted by the Commission. However, under the CP, the matter is less pressing than it may appear at first sight. On the one hand, many national arbitration laws provide for the appointment of arbitrators by their state courts even if a seat of the arbitration has not yet been determined.[52] The second alternative of Art. 29(4) CP will thus often be available even if the parties have not agreed upon or designated a seat. On the other hand, parties can easily ensure the application of Art. 29(4) CP by simply agreeing on or designating a seat when drafting the arbitration agreement, which is recommended in any case not only by most arbitral institutions but even in case of ad hoc arbitration.

4. *Lis pendens*-mechanism

a) Priority as a matter of principle

The *lis pendens*-mechanism in Art. 29(4) CP is an atypical one. It does not confer priority by way of chronology but as a matter of principle, expressed by the word "once": it is not the court seised first in time that is exclusively competent to determine the arbitration agreement's validity but, regardless of timing, the seat courts or alternatively the arbitral tribunal. Consequently, the *lis pendens*-mechanism applies regardless of whether the seat court or arbitration proceedings are commenced before or after the torpedo court proceedings. Hence, even pro-active declaratory relief proceedings before the seat courts activate the *lis pendens*-mechanism.

The *lis pendens*-mechanism does not provide for a time limit for the seising of the seat courts or the arbitral tribunal after the torpedo proceedings have been initiated. In theory, this could invite a "wait-and-see" approach by the defendant in the torpedo action, delaying the seising of the seat court or the arbitral tribunal in order to ascertain if a favourable result is likely in the torpedo court. This would be contrary to the Proposal's aim of promoting efficiency and could even risk a decision by the torpedo court on the arbitra-

Regulation's recognition and enforcement regime in such cases by virtue of Art. 1(2)(d) of the Regulation are no longer good law in the light of the ECJ's decision in *West Tankers*.

[50] Paras. 135 f. (referring to the head of jurisdiction under Brussels I but for the arbitration agreement).

[51] See *Steinbrück/Illmer* (supra n. 38) 194 ff. (reverting to the jurisdiction of the courts of the country whose law applies to the main contract).

[52] See e.g. §§ 1025(3), 1035 of the German Code of Civil Procedure, Sections 2(4), 18 of the English Arbitration Act 1996; Arts. 1452 ff., 1506(2) of the French Code of Civil Procedure.

tion agreement's validity before the seat courts or the arbitral tribunal are seised. In practice, however, such room for party manoeuvering does not exist considering the double prerequisite of Art. 29(4) CP (challenge plus seising). Most national laws governing the prerequisites for the challenge of a torpedo court's jurisdiction provide for time limits to do so. Hence, the challenge cannot be delayed for tactical reasons. Once the torpedo court's jurisdiction is challenged, there is, however, no incentive to delay the seising of the seat court or the arbitral tribunal. To the contrary, it is then in the interests of the challenging party to activate the *lis pendens*-mechanism as quickly as possible.

b) Obligation of the torpedo court

The *lis pendens*-mechanism's core element lies in modifying the consequences of the challenge of the torpedo court's jurisdiction based on an alleged arbitration agreement: upon the challenge and the proof of a seat court's or the arbitral tribunal's seising, the torpedo court is not allowed to determine its jurisdiction with respect to the validity of the alleged arbitration agreement.[53] Instead, it has to stay the proceedings and await the seat court's or arbitral tribunal's determination of the alleged arbitration agreement's validity. If its national law so prescribes, the torpedo court may even decline jurisdiction; this applies in particular to France as a consequence of the doctrine of the negative effect of the *Kompetenz-Kompetenz* of the arbitral tribunal. Proof of seising is easily furnished by presenting to the torpedo court documents evidencing that the requirements of Art. 33 CP are met. This will regularly be a notification of receipt of the documents filed with, as the case may be, either the seat courts or arbitral tribunal and ideally also a documentation of the steps taken to effect service upon the other party.

This modification of the consequences of the challenge remedies the major practical weakness presently inherent to a challenge of the torpedo court's jurisdiction based on the arbitration agreement: delay resulting in parallel proceedings and uncertainty carrying the potential consequence of conflicting decisions.

Article 29(4) CP does not provide for a sanction in the event that the torpedo court breaches its obligation to stay or decline. This owes to the Regulation's underlying notion of mutual trust among the Member States' courts that the Regulation will be correctly applied.[54] In relation to the *lis pendens*-mechanism, such trust appears all the more justified since the mech-

[53] The words "contested on the basis of an arbitration agreement" in Art. 29(4) CP do not confer the right upon the torpedo court to postpone its stay or decline until it has itself determined the arbitration agreement's validity. Their effect is limited to stating the (only) basis of the challenge upon which the obligation to stay or decline is activated.

[54] For the concept of mutual trust in relation to the jurisdictional rules of the Regulation

anism is activated simply by a challenge and a seising without involving any legal analysis by the torpedo court in relation to the arbitration agreement. But even considering the remote possibility of a breach resulting in conflicting decisions on the arbitration agreement's validity or on the merits of the dispute, such an unlikely "accident" does not justify introducing a sanction in the form of a new ground for non-recognition in Art. 43 CP. In light of the Commission's general reform agenda and its aim to reduce the grounds of non-recognition, a new arbitration-related ground would be an anachronism.

c) Obligation of the seat court or arbitral tribunal

Seised with an action for declaratory relief or on the merits, the seat courts or the arbitral tribunal will determine the validity of the arbitration agreement either as the action's main object or as an incidental question. This determination is neither governed by a uniform European substantive law rule nor by a uniform European conflict of law rule.[55] Rather, before the seat courts the validity of the arbitration agreement is governed by the private international law of the seat; before the arbitral tribunal it is governed by the law applicable under the respective *lex arbitri*.

The newly introduced time limit in Art. 29(2) CP that applies to the general *lis pendens* situation does not apply in relation to the determination of the arbitration agreement's validity by the seat courts or the arbitral tribunal under Art. 29(4) CP. This disparity does not appear to be intentional. At least the Expert Group was not aware of the details of the remainder of Art. 29 CP when drafting its proposal for Art. 29(4) CP. A time limit for the competent court appears sensible, and the general *lis pendens*-rule, choice of court agreements and arbitration agreements should be governed by concurrent principles in this regard. To this end, the time limit of Art. 29(2) CP should be extended to the seat courts and the arbitral tribunal for the purposes of Art. 29(4) CP and to choice of court agrements under Art. 32(2) CP. The proposed time limit's major weakness, i.e. the lack of a sanction for disregard of the time limit by the competent court, remains and needs to be addressed generally. A feasible sanction appears to be that the competence to determine the jurisdictional issue reverts back to the court initially not competent to make this determination.[56]

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see e.g. ECJ 27. 4. 2004 – Case C-159/02 *(Turner ./. Grovit)*, E. C. R. 2004, I-3565, paras. 25 f.; 9. 12. 2003 – Case C-116/02 *(Gasser ./. Misat)*, E. C. R. 2003, I-14693, para. 72.

[55] Art. 1(2)(e) Rome I excludes arbitration agreements from its substantive scope.

[56] See generally *Christian Heinze*, in this issue, p. 581–618 (599).

5. Effect of a seat court's or an arbitral tribunal's decision

a) Effect on the torpedo proceedings

A seat court's or an arbitral tribunal's decision on the arbitration agreement's validity is binding upon the torpedo court. Although the third sub-paragraph of Art. 29(4) CP only refers to a positive decision by the seat courts or the arbitral tribunal upholding the arbitration agreement, it applies *mutatis mutandis* to a negative decision denying the arbitration agreement's validity. Otherwise, the defendant in the torpedo proceedings who is usually the plaintiff on the merits would be subject to a denial of justice since neither the torpedo court (which is usually the court competent under Brussels I but for the arbitration agreement) nor the arbitral tribunal would take "jurisdiction".

The binding effect has the following consequences: if the torpedo court stayed the proceedings, it has to decline jurisdiction and dismiss the claim upon a positive decision by the seat courts or the arbitral tribunal; if the torpedo court has already declined jurisdiction under the doctrine of negative effect of *Kompetenz-Kompetenz*, this dismissal is perpetuated into the post-arbitral award stage upon a positive decision by the seat courts or the arbitral tribunal. In case of a negative decision by the seat courts or the arbitral tribunal, the torpedo court has to lift the stay; in case of a dismissal under the second sub-paragraph of Art. 29(4) CP, this initial dismissal based on jurisdiction grounds does not bar a second action on the merits in which jurisdiction can no longer be challenged on the basis of the arbitration agreement.

The binding effect of the arbitral tribunal's decision comes close to introducing a negative effect of *Kompetenz-Kompetenz*. While the torpedo court is not obliged to dismiss the action, but may merely stay the proceedings, the arbitral tribunal's decision on the arbitration agreement's existence, validity or effects is binding upon the torpedo court (which, in the national context, is not the case in the English or German system). The arbitral tribunal's decision is, however, not binding upon the seat courts in subsequent proceedings for the setting aside of the arbitral award or for its enforcement. Such up-front certainty on the arbitration agreement's existence, validity or effects extending to the post-arbitral award stage may only be achieved by seising the seat courts at an early stage with an action for positive declaratory relief.

b) Effect beyond the torpedo proceedings

Although the *lis pendens*-mechanism effectively prevents parallel proceedings in the pre-arbitral award stage in relation to torpedo proceedings, it cannot rule out that the arbitration agreement's validity becomes (again)

relevant in state court proceedings in the post-arbitral award stage. As to the effect of the seat courts' or arbitral tribunal's decision on the validity of the arbitration agreement in such post-arbitral award proceedings before the state courts, the following guidelines apply.

A decision of the seat courts on the validity of the arbitration agreement rendered under the *lis pendens*-mechanism is to be recognised in subsequent setting aside proceedings. Such recognition is regularly not problematic since it is usually only for the seat courts to set aside an arbitral award[57]. In proceedings regarding the recognition and enforcement of a foreign arbitral award (rendered by an arbitral tribunal with its seat in another Member State), the enforcing Member State court acting under the NYC should also be obliged to recognize the seat court's decision. In this context, the EU should be regarded as a single contracting party to the NYC[58].

A decision of the arbitral tribunal on the validity of the arbitration agreement is, however, neither binding in setting aside proceedings nor in proceedings regarding the recognition and enforcement of an arbitral award. Otherwise, the arbitral award would be exempt from any control by the state courts which is even under the French doctrine of the negative effect of *Kompetenz-Kompetenz* not the case.

D. The European Parliament's Current Position

In its resolution on the implementation and review of the Brussels I Regulation of 7 September 2010,[59] the European Parliament firmly rejects even a partial deletion of the arbitration exclusion. Instead, it proposes to restore the situation pre-*West Tankers* by extending the arbitration exclusion and specifically demanding that all national devices supporting the arbitration proceedings and the enforcement of an arbitration agreement remain at the parties' disposal. It further demands that the recognition and enforcement of any decision rendered in such arbitration-related proceedings not fall under the Regulation's regime. This relates in particular to anti-suit injunctions in

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[57] See under German law, contrary to the wording of § 1062 German Code of Civil Procedure, BGH 12. 2. 1976, WM 1976, 435, 437 (under IV. at the end); concurring *Jens-Peter Lachmann*, Handbuch für die Schiedsgerichtspraxis[3] (2009) para. 2169; under English law see Sections 2(1), 66 ff. Arbitration Act 1996 ("… where the seat of the arbitration is in England and Wales or Northern Ireland."); under French law see Art. 1518 ff. (being limited to "sentences rendues en France"), in particular Art. 1520 (1) of the new French arbitration law (in force as of 1 May 2011) in Décret no. 2011–48 du 13 janvier 2011 portant réforme de l'arbitrage.

[58] *Santomauro* (supra n. 30) 323; critical in that regard the submission by the *IBA Arbitration Committee Working Group* to the Commission, paras. 21–24.

[59] P7_TA-PROV(2010)0304, paras. I-M and 9–11 (accessible at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010–0304>).

England, the doctrine of the negative effect of *Kompetenz-Kompetenz* in France and declaratory relief in Germany, England and some other Member States. In effect, the European Parliament rejects any European solution in favour of national solutions.

E. Evaluation

The minimalist approach pays due respect to the nature of international commercial arbitration which pursues its own concepts and principles. It is limited to a solution for the parallel proceedings scenario which stands as the core problem at the *interface* of Brussels I and arbitration. Anything beyond is left for the (competing) national arbitration laws and international conventions such as the NYC. In a nutshell, one may summarise: arbitration is (still) outside the scope of Brussels I as is evidenced by the merely clarifying Recital 11. Even most arbitration-related state court proceedings, such as all forms of ancillary proceedings are outside the scope of Brussels I.[60] Only the issue of parallel proceedings at the interface of Brussels I and arbitration is now uniformly regulated by way of a *lis pendens*-mechanism. This *lis pendens*-mechanism modifies the consequences of a challenge to a torpedo court's jurisdiction based on an arbitration agreement in the European cross-border context. Such a challenge's major practical weakness is remedied. Considering that the challenge of a torpedo court's jurisdiction is conceptually the most efficient mechanism to avoid parallel proceedings, and further considering that such a challenge is common to all Member States' arbitration laws due to its origin in Art. II(3) NYC, the *lis pendens*-mechanism is the most effective and easily applicable solution for the issue of parallel proceedings.

The alternative of extending the exclusion of arbitration so as to effectively restore the *status quo ante West Tankers* is inferior to the proposed *lis pendens*-mechanism.

Merely extending the arbitration exclusion would create what might be called a "super-torpedo": the mere allegation of an arbitration agreement would take the proceedings outside the Regulation's scope. A party faithfully challenging the validity of the arbitration agreement would find itself in an odd situation: the price for the challenge would inevitably be the inapplicability of Brussels I. Jurisdiction as well as recognition and enforcement would be re-nationalised. This result is unacceptable in light of individual justice as it would, particularly, take away the benefit of an automatic circu-

[60] Since anti-suit injunctions are incompatible with Brussels I as a consequence of their effect on the torpedo proceedings, they are not available under the CP in relation to torpedo proceedings before Member State courts.

lation of declaratory judgments and would contradict the very idea of the Brussels I Regulation fostering the internal market. Even worse, it would increase the risk of multiple parallel proceedings as the lack of recognition for any decision on the arbitration agreement's validity might provoke multiple torpedos. This would inevitably result in chaos and uncertainty. Arbitration in the EU would be considerably weakened.

Extending the arbitration exclusion and reviving the national devices in order to prevent parallel proceedings would in effect amount to nothing more than a reintroduction of anti-suit injunctions – a "Reverse of *West Tankers* Act" basically serving a peculiarity of English law and London as an arbitral seat. From the existing national devices addressing the parallel proceedings problem, both declaratory relief (as available in Germany and several other continental systems, but also in England) and the negative effect of *Kompetenz-Kompetenz* (as pursued in France) are accommodated and built upon by the proposed *lis pendens*-mechanism. Their revival is thus not necessary. A rebirth of anti-suit injunctions in intra-Community cases is neither needed nor desirable. It is not needed since the *lis pendens*-mechanism is as effective as an anti-suit injunction with the advantage of a uniform application throughout the EU. It is not desirable for a number of reasons that can only be briefly touched upon here. First, from a systematic point of view, anti-suit injunctions are alien to the Brussels I Regulation since they interfere with proceedings before another court. Secondly, they are effective and produce legal certainty only as long as they are not provided for by all national laws involved; if used in all states, the result would be chaos.[61] Thirdly, anti-suit injunctions face difficulties when it comes to their recognition in other Member States.[62] Fourthly, their compatibility with Art. II(3) NYC is at best doubtful.[63] Fifthly, reviving anti-suit injunctions in relation to arbitration agreements would be at odds with the ECJ's decision in *Turner* and would interfere with the sensible concurrence of choice of court and arbitration agreements under the CP.

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[61] See ECJ 27. 4. 2004 (supra n. 54) para. 30; *Ben Steinbrück*, The Impact of EU Law on Anti-suit Injunctions in aid of English Arbitration Proceedings: Civil Justice Quarterly 26 (2007) 358–375 (372). This is demonstrated by the conflict between English and US courts in the *Laker Airways* litigation; see *British Airways Board* v. *Laker Airways Ltd*, [1985] A.C. 58 (H.L.); *Trevor C. Hartley*, Comity and the Use of Antisuit Injunctions in International Litigation: Am. J. Comp. L. 35 (1987) 487.

[62] Burgerlijke Rechtbank Brussel 18. 12. 1989, Rechtskundig Weekblad (RW) 1990/1991, 676 and Oberlandesgericht Düsseldorf 10. 1. 1996–3 VA 11/95, ZIP 1996, 294 denied recognition whereas the Cour de Cassation 14. 12. 2009 – Arrêt no. 1017, unpublished but noted by *Martin Illmer*, La vie après Gasser, Turner et West Tankers: IPRax 2010, 456–464 approved recognition.

[63] For further details see *Naumann* (supra n. 5) 111 ff.

F. Impact Assessment

Preparing its reform proposal, the Commission launched an Impact Assessment based on a stakeholder survey that was published on 17 December 2010. The Impact Assessment contains findings in relation to the general approach to the interface of arbitration and Brussels I as well as to the specific policy options at hand to address it. It is, however, important to note that only 46 of the 247 survey respondents answered questions on the arbitration interface.[64]

I. Support for the minimalist approach

The survey's findings support the general design of a minimalist approach as chosen by the Commission. First, large segments of the users of international arbitration called for a cautious approach when regulating the arbitration interface.[65] Secondly, and more specifically, users widely took the view that recognition and enforcement of arbitral awards is best left to the NYC which is considered to be operating well. A European regime in this field, supplementing and building upon the NYC, is regarded as being unnecessary.[66] In contrast, strengthening the effectiveness of arbitration agreements and a better coordination between judicial and arbitration proceedings so as to prevent parallel proceedings were perceived as substantial improvements of the unsatisfactory status quo. This is not so much the case based on past experience, but rather out of the fear that an increasing number of torpedo actions might follow the *West Tankers* and the *National Navigation* judgments.[67] Reliable data is scarce in this respect. There are neither statistics on the number of arbitration clauses challenged before state courts potentially resulting in parallel proceedings nor on the number of cases in which torpedo state courts render a decision on the merits despite an alleged arbitration agreement.[68] Nevertheless, action by the EU in order to disable torpedo actions is justified. It lies in the nature of the arbitration interface that the exceptional cases are the problematic ones. In the ordinary scenario, both parties adhere to the arbitration agreement, so that the issue of parallel proceedings does not arise. If it does arise, however, Brussels I should offer an

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[64] See Section 5.3 (p. 103) IA.

[65] See Section 5.3.3 (p. 109) and Section 5.4.2 (p. 114) IA.

[66] See Section 3.4 of the Executive Summary (p. vii) and Section 5.3.3 (p. 111) IA.

[67] See Section 5.4.1 (p. 113) IA.

[68] See Section 5.1.2 (p. 94 and 96) IA; based on interviews and estimates by arbitral institutions the number of arbitration clauses challenged is estimated at 5% and the number of state court decisions on the merits rendered in spite of an arbitration agreement is regarded as "extremely marginal" (however, with the fear of an increase).

effective mechanism to prevent such parallel proceedings in European cross-border cases.

II. Split as regards a partial deletion versus an extension of the arbitration exclusion

As regards a partial deletion (or partial inclusion, depending on the perspective) versus an extension of the arbitration exclusion in order to solve the parallel proceedings issue, survey participants were more or less split.[69] Asked about the desirability of a partial deletion in this regard, 41% were in favour, 34% opposed and 24% uncertain. Asked about the opposite option of extending the arbitration exclusion, 62% were in favour, 7% opposed and 27% uncertain. Asked whether a uniform European (partial deletion and *lis pendens*-mechanism) or diverging national (extension of the exclusion) solution of the interface issue would be more effective, the responses were evenly split. Likewise, an even proportion of the participants regarded a uniform European mechanism as either positive or negative.

III. Misperception and mischaracterisation of the arbitration interface

The arbitration interface has proven as probably the most heated issue of the Brussels I Reform. From the beginning, the reform debate was characterised by unfounded assumptions and misconceptions about the Heidelberg Report's and the Commission's intentions. Criticism in blogs and discussions was often based on a misguided (or intentionally misleading?) understanding of the reform proposals, fearing that Brussels I would regulate arbitration as such rather than the mere interface issue[70] or that state courts would be vested with additional powers to interfere with the arbitral process rather than providing jurisdiction for powers pre-existing under the national arbitration laws[71]. Against this background, the findings of the stakeholder survey have to be considered with caution. They may indicate a general trend towards the minimalist approach but should not be overestimated.

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[69] See Section 5.3.3 (p. 108 ff.) IA.

[70] Although the Heidelberg Report's proposal and the Green Paper's range of issues were wider than the CP, covering further arbitration-related state court proceedings, a regulation of arbitration including the arbitration agreement as such, the arbitral process and substantive issues concerning arbitral awards was never intended.

[71] This related in particular to the Heidelberg Report's proposal for a new head of exclusive jurisdiction for arbitration-related state court proceedings which was not taken over by the CP.

G. Resumé

The European Commission's reform proposal on the interface of Brussels I and arbitration deserves strong support. It is strictly problem-oriented. It is limited to the core problem of parallel proceedings lying at the interface of arbitration and state court proceedings. It is simple, efficient and effective. It respects the prevalence of the NYC as well as the principle of subsidiarity and procedural autonomy in relation to national arbitration laws. Finally, it is well balanced and tailored to the current state of affairs: on the one hand, European arbitration centres are strengthened vis-à-vis non-European ones by very effectively disabling torpedo actions before other Member State courts. On the other hand, the minimalist approach leaves enough room for competition among the European arbitration centres in relation to many unique aspects of their arbitration laws and practice that are left untouched by the reform proposal. Whether the EU should regulate additional arbitration-related issues, such as recognition and enforcement of arbitral awards, is another matter. Brussels I is, however, not the place for such further regulation.