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# Arbitration/Litigation Interface: The European Debate

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## Arbitration/Litigation Interface: The European Debate

*By Margaret Moses\**

*Abstract: In recent years, there has been a debate in the European Union over the need to provide a transparent and predictable interface between international arbitration and cross-border litigation. That debate has recently culminated in the issuance of the Recast Brussels Regulation (the Recast), effective January 10, 2015. However, the Recast has not provided a method to accomplish this interface because it does not prevent parallel proceedings. Parallel proceedings occur when a party that had agreed to arbitrate nonetheless goes to court while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of increased cost, inefficiency, and delay, as well as the high risk of inconsistent judgments. Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. This Article discusses the background leading to the Recast, interpretive issues arising from the Recast—particularly in light of the explanatory Recital 12 found in the preamble to the Recast—as well as the need for a harmonized consensus on preventing parallel proceedings. It concludes by proposing various means for encouraging flexible solutions to the problem.*

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## I. INTRODUCTION

For the past few years, there has been extensive controversy in Europe about how international commercial arbitration should interface with litigation. For litigated matters, the Brussels I Regulation (Brussels I, the Brussels I Regulation, or the Regulation) deals with the jurisdiction of courts and recognition and enforcement of judgments in the Member States of the European Union.<sup>1</sup> Arbitration, however, is excluded from the Regulation's regime.<sup>2</sup> Arbitration was excluded from the original Brussels Convention in 1968<sup>3</sup> because it was believed that the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>4</sup> and the 1961 European Convention on International Commercial Arbitration<sup>5</sup> already sufficiently regulated international commercial arbitration. Forty-six years later, however, it is apparent that a number of issues are not governed either by the New York Convention or the Brussels I Regulation.<sup>6</sup> The latest efforts of the European Union to deal with the arbitration/litigation interface are contained in the recently promulgated Recast Brussels Regulation (the Recast Regulation, Brussels Recast, or the Recast).<sup>7</sup> Although the Recast

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<sup>1</sup> Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels I].

<sup>2</sup> *Id.* art. 1(2)(d) ("The Regulation shall not apply to . . . arbitration.").

<sup>3</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 O.J. (L 299) 15 (EC), *revised in* 1978 O.J. (L 304) 77, *revised in* 1982 O.J. (L 388) 30. The Brussels I Regulation has superseded the Brussels Convention.

<sup>4</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]. The New York Convention requires courts of contracting states to enforce both arbitral agreements (Article II) and awards (Article V). *Id.* More than 150 countries are parties to the New York Convention. *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Oct. 11, 2014). One of the reasons for the growth of international commercial arbitration is that awards are readily enforceable under the New York Convention because the grounds for non-enforcement are quite narrow. Basically, an award cannot be refused enforcement for a mistake of law or fact by the arbitrator, but rather only if there was a defect in the integrity of the process.

<sup>5</sup> Final Act of the Special Meeting of Plenipotentiaries for the Purpose of Negotiating and Signing a European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349; *see also* Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 13 [hereinafter the Jenard Report] (explaining the 1968 Brussels Convention).

<sup>6</sup> *See infra* Part IV.A.

<sup>7</sup> Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 [hereinafter Brussels Recast]. Although the Brussels Recast was published in the Official Journal, it will not apply until January 10, 2015. *Id.* The "recast" procedure is one in which the only issues put forward by the Commission for review by other European Institutions

clarifies some issues, it does not provide a transparent and predictable interface between arbitration and cross-border litigation; thus, it does not appear to prevent inefficient parallel proceedings<sup>8</sup> with a high risk of inconsistent judgments. Because of the global importance of international commercial arbitration, the significant participation of the European Union in international economic activity,<sup>9</sup> and the increasing role of U.S. counsel in international arbitrations,<sup>10</sup> this Article addresses the major steps along the way toward the Recast Regulation, the conflicting perspectives that were considered, the result that was forged from the input of many different stakeholders, the unresolved issues, and some possible solutions.

As global economic activity has increased, international commercial arbitration has become the generally utilized means to resolve the inevitable disputes that arise between parties to international contracts.<sup>11</sup> The

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are those that have been addressed by the Commission in its Proposal. Other issues can only be discussed if the Commission agrees or if all Member States agree. See P.A. Nielsen, *The State of Play of the Recast of the Brussels I Regulation*, 81 NORDIC J. OF INT'L L. 585, 587 (2012).

<sup>8</sup> Parallel proceedings can occur in either litigation or arbitration when the same parties simultaneously pursue the same dispute in two different venues. It occurs in litigation when the respective parties begin actions on the same facts in two different jurisdictions. See NADJA ERK, PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A COMPARATIVE EUROPEAN PERSPECTIVE 16–24 (2014). With respect to arbitration, it occurs when one party begins an arbitration, while the other files a lawsuit on the same facts in a different jurisdiction. See *id.* The issue of parallel proceedings becomes quite complex under the Brussels Regulation because of the questions of how enforcement will proceed and which laws will govern when there are inconsistent results between arbitration awards and court judgments.

<sup>9</sup> See *The EU in the World - Economy and Finance*, EUROSTAT, [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/The\\_EU\\_in\\_the\\_world\\_-\\_economy\\_and\\_finance](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/The_EU_in_the_world_-_economy_and_finance) (last visited Sept. 18, 2014) (“In 2010, world GDP was valued at EUR 47,570 billion . . . . The EU-27 accounted for a 25.8% share of the world’s GDP in 2010, while the United States accounted for a 22.9% share.”).

<sup>10</sup> Today, U.S. lawyers are involved in arbitrations in all parts of the world. It is not unusual to find U.S. law firms involved on both sides of major international arbitrations in which neither the claimant nor the respondent is a U.S. company. See generally Michael D. Goldhaber, *Arbitration Scorecard*, AM. LAW., July 1, 2013. For example, in a \$48 billion arbitration that is being arbitrated in London between a Bahamas Company as the claimant and Swiss, Russian, and Jersey companies as respondents, the claimant’s counsel is DLA Piper LLP (now a “global” firm, but with many U.S. lawyers) and the respondent’s counsel includes Kirkland & Ellis LLP and Bryan Cave LLP. *Id.* Among treaty disputes, in a \$114 billion treaty arbitration, which is being arbitrated at the Hague and involving companies from the Isle of Man and Cyprus versus the Russian Federation, claimant’s counsel is Shearman & Sterling LLP and respondent’s counsel is Baker Botts L.L.P. and Cleary Gottlieb Steen & Hamilton LLP. *Id.* Moreover, many large U.S. law firms have offices abroad that are representing European companies in arbitrations held in Member States. *Id.* In a \$4.8 billion controversy between a Finnish utility and a Franco-German construction consortium being arbitrated in Stockholm, claimant’s counsel includes Shearman & Sterling LLP and Baker & McKenzie and respondent’s counsel includes White & Case LLP. *Id.* Many international commercial arbitrations are held in major arbitral centers such as London, Paris, and Stockholm where they are subject to European law. *Id.* For these arbitrations, consideration of the Recast Regulation reveals particular concerns and perspectives that Europeans bring to bear on the interface between arbitration and litigation.

<sup>11</sup> Understanding the parameters of the Recast Regulation can help counsel prepare for the impact

concerns in Europe relating to the arbitration/litigation interface were based in large part on the impact of parallel proceedings on the arbitration process and the potential for inconsistent judgments.

Arbitration is attractive in part because the parties do not want to resolve their disputes in the national court of the other party. Instead, they agree to arbitrate. However, once a dispute arises, one party may nonetheless commence an action in court (usually the court of its home country). The other party pursues arbitration in the country the parties have chosen as the seat of the arbitration (usually a neutral third country). The parallel proceedings that result are highly undesirable because of the cost, inefficiency, and delay they cause and because of the risk that inconsistent decisions will result. The party bringing the action in court may have a legitimate reason to challenge the validity of the arbitration agreement, but raising the issue in its home country court—rather than in the agreed-upon arbitration forum—may also be a tactic to delay and harass the other party.

Under the New York Convention, courts are required to refer parties who come before them challenging the validity of an arbitration agreement to arbitration, unless the court finds that the arbitration agreement is “null and void, inoperative, or incapable of being performed.”<sup>12</sup> Nothing in the Convention, however, deals with the timing or priority of individual courts when deciding this issue.

One way to prevent parallel proceedings in arbitration is for the court at the seat of arbitration to issue an anti-suit injunction. This is an order by the court to the party refusing to arbitrate that it must discontinue the other litigation.<sup>13</sup> In common law countries, the courts are willing under certain

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that the Recast will have on international commercial arbitration when it becomes effective in 2015. Arbitration has an increasingly global scope in its application and practice. International caseloads of the major international arbitral institutions nearly doubled between 1993 and 2003 and more than tripled during the same period in the American Arbitration Association and its International Centre for Dispute Resolution. See CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (2005). The European Union and its twenty-eight Member States play a huge role in international commerce and, as a result, have a significant impact on international commercial arbitration. *Id.* In light of this, United States businesses and their counsel should understand the kinds of changes that will accompany the adoption and application of the Brussels Recast Regulation.

<sup>12</sup> New York Convention, *supra* note 4, art. II(3).

<sup>13</sup> See, e.g., *Quaak v. Klyveld Peat Marwick Goerdeler Bedrijfsrevisoren* 361 F.3d 11 (1st Cir. 2004) (enjoining one party from maintaining an action in Belgium in which it was asking the Belgian court to impose penalties on any party seeking its records in Belgium). Anti-suit injunctions in arbitration may also be sought in order to keep a party from vacating an award or from enforcing an award that has been vacated. However, the kind of anti-suit injunction that is the focus of this Article is one to protect an arbitration agreement and to prevent parallel proceedings. Anti-suit injunctions issued at the beginning of a dispute to protect the tribunal’s jurisdiction are generally more favored than anti-suit injunctions issued after the conclusion of the arbitration to prevent enforcement. See S.I. Strong, *Border Skirmishes: the Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 14 (2012) (“[A]nti-suit injunctions sought at the beginning or in the middle of a legal

circumstances to grant anti-suit injunctions.<sup>14</sup> Courts in civil law countries, however, typically do not grant anti-suit injunctions.<sup>15</sup> In the European Union, Member State courts are prohibited from issuing anti-suit injunctions with respect to litigation under Brussels I.<sup>16</sup> Moreover, under *Allianz SpA v. West Tankers Inc. (West Tankers or West Tankers 2009)*<sup>17</sup>—a controversial decision that will be discussed more fully below—that prohibition was extended to arbitration, thereby banning a mechanism that might otherwise limit the undesirable results of parallel proceedings.

In the past few years in Europe, there have been numerous discussions, papers, proposals, and court decisions dealing with parallel proceedings and arbitration.<sup>18</sup> The concern in the European Union is that even though an

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dispute would be presumptively permitted, to the extent that the injunction attempts to enjoin litigation in favor of arbitration.”).

<sup>14</sup> Anti-suit injunctions are used in both litigation and arbitration. In the United States, courts are split on the proper standard for granting an anti-suit injunction. See Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395, 412–15 (2006). The “conservative” standard has been adopted by the District of Columbia, Second, Third, and Sixth Circuits while the “liberal” approach has been endorsed by the Fifth, Seventh, and Ninth Circuits. *Id.* The conservative approach to granting foreign anti-suit injunctions holds that granting the anti-suit injunction would in essence bar a foreign court from hearing a claim, thereby causing serious international comity implications. *Id.* The liberal approach is less concerned about international comity, but rather focuses on whether the duplicative litigation is vexatious and creates unnecessary additional costs or duplicative efforts. *Id.* Although all courts have concerns about comity and therefore some reluctance to grant anti-suit injunctions, U.S. courts are somewhat more likely to grant injunctions in arbitration than in litigation because of the strong federal policy favoring arbitration. See, e.g., Daniel Rainier, *The Impact of West Tankers on Parties’ Choice of a Seat of Arbitration*, 95 CORNELL L. REV. 431, 452–53 (2010) (“[Mitsubishi] was certainly a strong indicator that parties with arbitration agreements would be expected to honor them and compelled to do so if they did not. It is a logical progression for courts to use equitable relief in the form of antisuit injunctions to enforce arbitration agreements and to further the federal policy favoring arbitration.”).

<sup>15</sup> See John J. Barcelo III, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007 107 (Arthur W. Rovine ed., 2008) (“Civil law jurisdictions generally find anti-foreign-suit injunctions offensive, even violative of international law.”).

<sup>16</sup> Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565. However, a Member State, such as England, could issue an anti-suit injunction against a party to an arbitration agreement that brought a court action based on the same matters in a non-Member State court. *Id.*

<sup>17</sup> Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663.

<sup>18</sup> The extensive literature on this subject has been discussed by many commentators. See, e.g., Luca G. Radicati Di Brozolo, *Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?*, 7 J. OF PRIV. INT’L L. 423, 423 n.1 (2011); see also Massimo Benedettelli, *Communitarization of International Arbitration: A New Spectre Haunting Europe?*, 27 ARB. INT’L 583, 585 n.6 (2011); Martin Illmer, *Brussels I and Arbitration Revisited*, 75 RABELSZ BD. 645, 647 n.9 (2011); C. Kessedjian, *Le Règlement 44/2001 et l’Arbitrage [Regulation 44/2001 and Arbitration]*, 4 REVUE DE L’ARBITRAGE: BULLETIN DU COMITÉ FRANÇAIS DE L’ARBITRAGE [REVIEW OF ARBITRATION: BULLETIN FROM THE FRENCH COMMITTEE OF ARBITRATION] 699 (2009); C. Kessedjian, *The Proposed Arbitration Provisions in the Recast of Regulation 44/2001*, in 2011 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 202 (Arthur W. Rovine ed., 2012).

anti-suit injunction only enjoins the parties—not the foreign court—an injunction ordering a party not to continue its lawsuit in a foreign court interferes with that court’s jurisdiction.<sup>19</sup> The European view is that an anti-suit injunction prevents the foreign court from exercising its full power to determine if it has jurisdiction and thereby impairs the mutual trust that Member State courts owe to each other.<sup>20</sup>

A large part of the controversy has concerned whether or not arbitration should be completely excluded from the Brussels I Regulation,<sup>21</sup> meaning that the entire arbitral process—from the agreement to the award and its consequences—will be outside the scope of the Regulation’s regime governing jurisdiction of the courts and recognition and enforcement of judgments. In an earlier case, the European Court of Justice (ECJ) had ruled that the Brussels Convention, the predecessor to the Regulation, did not apply to cases in which arbitration was the principal subject matter of the case (e.g., when the issue was the appointment of an arbitrator).<sup>22</sup>

The question remained, however, about the scope of the exclusion with respect to other situations. In *West Tankers 2009*, the ECJ found that despite the specific exclusion of arbitration in Article 1(2)(d), sometimes arbitration would be governed by the Regulation.<sup>23</sup> In that case, one party was challenging in an Italian court the validity of an agreement to arbitrate in London, and the English court issued an anti-suit injunction to require the matter to be resolved in arbitration.<sup>24</sup> However, according to the ECJ, the anti-suit injunction was improper.<sup>25</sup> In its view, the initial jurisdictional question before the Italian court of whether there was a valid arbitration agreement was incidental to the main claim—in this case a claim for tort

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<sup>19</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶ 28; see also Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565, ¶ 27.

<sup>20</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶ 30; see also Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565, ¶ 28.

<sup>21</sup> Brussels I, *supra* note 1.

<sup>22</sup> See Case C-190/89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-03855 (ruling that proceedings for the appointment of an arbitrator are within the arbitration exclusion and thus are not covered by the Brussels Convention). *But cf.* Case C-391/95, *Van Uden v. Deco-Line*, 1998 E.C.R. I-07091 (deciding that certain interim procedures in a pending arbitration could fall under the Brussels Convention for enforcement purposes).

<sup>23</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663. At the time of *West Tankers 2009*, the highest court in the European Union was known as the European Court of Justice (the ECJ). See *Information Brochures*, CURIA, [http://curia.europa.eu/jcms/jcms/Jo2\\_7004/](http://curia.europa.eu/jcms/jcms/Jo2_7004/) (last visited Sept. 18, 2014). That court is now known as the Court of Justice. *Id.* The Court of Justice of the European Union (the CJEU) includes the Court of Justice, the General Court, and a specialized court, the Civil Service Tribunal. *Id.* The Court of Justice is still sometimes informally referred to as the ECJ and all references to it in this article will be to the ECJ.

<sup>24</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 9-18.

<sup>25</sup> See *id.* ¶¶ 28-32.



damages.<sup>26</sup> The ECJ found that because the tort claim was within the Regulation, the “incidental” issue of the arbitration agreement’s validity was also within the Regulation.<sup>27</sup> In other words, the ECJ determined that since the subject matter of *West Tankers* was the claim for tort damages—the kind of substantive issue clearly covered by the Regulation—then the question of the arbitration agreement’s validity was a preliminary issue equally subject to the Regulation.<sup>28</sup>

Having reached this core conclusion, the ECJ then found that an anti-suit injunction by the English Court to prevent the Italian court from ruling on the arbitration agreement’s validity was incompatible with Brussels I because it would strip the power of the Italian court to rule on its own jurisdiction.<sup>29</sup> To allow the practice would undermine the trust Member States accord to one another’s legal system.<sup>30</sup>

The ECJ’s decision was not, in the view of many, consistent with the exclusion of arbitration set forth in the Brussels I Regulation. Various stakeholders have steadfastly supported complete exclusion of arbitration from Brussels I in order for litigation and arbitration to operate under separate legal frameworks.<sup>31</sup> However, others have called for the deletion of the arbitration exclusion from the Regulation or a partial deletion so that arbitration and litigation would both be regulated by the same regime.<sup>32</sup> Finally in 2012, after many proposals and counterproposals, the European Parliament and the Council agreed upon the text of a revised Regulation known as the Brussels I Recast.<sup>33</sup> The Recast as finally adopted contains some clarifications concerning how arbitration and litigation interface, but

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<sup>26</sup> See *id.* ¶ 26.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* Somewhat less clear is whether the Italian court’s decision on validity, which the ECJ stated was within the scope of the Regulation, would also be enforceable as a judgment under the Regulation’s regime. In a post *West Tankers* case, an English Court of Appeal said yes. *Navigation Co. v. Endesa Generacion SA*, [2009] EWCA (Civ) 1397 (Eng.). It held that a Spanish court’s ruling that there was no valid arbitration clause was a judgment within the scope of Brussels I and was binding on the English court. See *infra* text accompanying notes 83–90.

<sup>29</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 26–28.

<sup>30</sup> See *id.* ¶ 30.

<sup>31</sup> The European Parliament, for example, supported complete exclusion of arbitration from Brussels I. See *Draft Report of the Committee on Legal Affairs of the European Parliament*, COM (2010) 748 final (June 28, 2011) [hereinafter *Draft Report*], available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/pr/869/869709/869709en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/869/869709/869709en.pdf).

<sup>32</sup> See, e.g., Burkhard Hess et al., *Report on the Application of Regulation Brussels I in the Member States*, at 49 (Sept. 2007) [hereinafter *Heidelberg Report*]; *Commission 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*, COM (2009) 175 final (Apr. 21, 2009) [hereinafter *Commission Green Paper*].

<sup>33</sup> See *Brussels Recast*, *supra* note 7. Although the Recast Regulation deals with a number of issues besides arbitration, this Article will focus on its treatment of arbitration.

it continues the complete exclusion of arbitration from the Recast Regulation, leaving unresolved the problems of parallel proceedings and inconsistent judgments.

Part II of this Article deals with the background leading to the Brussels Recast, including problems and cases that preceded the ECJ's decision in *West Tankers 2009*, the content and scope of the decision, the controversy provoked by the decision, and the EU Commission Proposal in 2010 to try to resolve the controversy. Part III considers issues the Recast Regulation may have resolved by means of the extensive explanatory provisions contained in Recital 12 (Recital or Recital 12), as well as issues that remain unresolved. Part IV focuses on problems that remain and possible solutions going forward, both practical and aspirational. The need for solutions is manifest because the current state of the law regarding parallel proceedings in Europe appears to create as many issues as it resolves.

## II. BACKGROUND LEADING TO THE RECAST BRUSSELS REGULATION

The path leading to the Brussels Recast's treatment of arbitration was at best rocky. The main question regarding the potential arbitration/litigation interface was whether arbitration should be included in the Recast at all. Should the camel's nose be allowed under the tent? The ECJ took the controversial step of saying yes in *West Tankers 2009* when it held that an anti-suit injunction in support of arbitration was not permitted because it was incompatible with Brussels I. In response to many different strong opinions by various groups regarding the ECJ's decision, the EU Commission undertook a compromise in its 2010 Proposal. Ultimately, however, the Commission Proposal was rejected and the final Brussels Recast came up with something else entirely, which will be discussed in Part III.

### A. Brussels I and the Italian Torpedo

Brussels I provides that once a Member State court is seised of a litigated matter, no other Member State court may go forward with the same matter until the first court has determined whether it has jurisdiction.<sup>34</sup>

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<sup>34</sup> The court first seised is the first court to receive the claim. The EU rules on jurisdiction give priority to the court first seised. See Brussels I, *supra* note 1. Article 27 (1 & 2) provides:

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

The result can be what Europeans call a “torpedo action,” which means that a party with deliberate intent to delay may race to file the first suit in a jurisdiction whose court system is notoriously slow.<sup>35</sup> Because in some cases the court first seised could take 10 years or more to reach a decision, it effectively “torpedoes” any chance for a reasonable or timely resolution of the dispute. The torpedo action is sometimes referred to as the “Italian torpedo” because the Italian courts are known to be painfully slow and inefficient.<sup>36</sup> The court seised second cannot enjoin a party in its court to discontinue the action in the inefficient first seised court because under Brussels I it must respect the integrity of the other court to correctly decide the jurisdictional question.<sup>37</sup>

The ECJ held in *Turner v. Grovit* that even when one party is acting in bad faith by bringing a case in another jurisdiction in order to frustrate existing proceedings, a court cannot issue an anti-suit injunction to stop the bad faith party from maintaining the litigation in another court.<sup>38</sup> According to the ECJ, an anti-suit injunction would limit the power of a court to freely assess its own jurisdiction and thereby undermine the mutual trust that the Member States accord one another’s legal systems and judicial institutions.<sup>39</sup> Thus, a court in one Member State cannot limit another Member State court’s power to determine the dispute by enjoining the parties from litigating before that court. Therefore, the ECJ established in *Turner* that with respect to litigated matters, the Brussels I Regulation does not permit anti-suit injunctions within the European Union.<sup>40</sup>

But what about anti-suit injunctions to protect arbitration rather than litigation? One might think that the express exclusion of arbitration found in Article 1(2)(d) of the Brussels I Regulation would mean that the Regulation provided no authority to bar an injunction whose purpose was to protect arbitration. However, in *West Tankers 2009*, the ECJ found that an anti-suit injunction in support of arbitration was not compatible with the

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court first seised shall decline jurisdiction in favour of that court.

*Id.*

<sup>35</sup> See Nielsen, *supra* note 7, at 594.

<sup>36</sup> See *id.* In discussing Case C-116/02, *Erich Gasser GmbH v. Misat Srl*, 2003 E.C.R. I-14693, Professor Nielsen states, “Due to the inefficiency of the Italian court system, it would probably take years for the Italian court to reach a decision on its jurisdiction.” *Id.*

<sup>37</sup> See Brussels I, *supra* note 1. This provision of Brussels I (Article 29) made the torpedo action possible. To deal with this problem, revisions in the Recast Regulation provide that in certain circumstances if the parties have an exclusive choice-of-court agreement, courts of Member States other than the Member State chosen by the parties must stay any proceedings until the court seised on the basis of the parties’ agreement declares that it does not have jurisdiction. See Brussels Recast, *supra* note 7, art. 31 (2)–(4). This should serve as a disincentive to potential torpedo actions in litigated matters where parties have made an exclusive choice-of-court agreement.

<sup>38</sup> See Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565.

<sup>39</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 28–31.

<sup>40</sup> See Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565, ¶¶ 28–31.

Regulation.<sup>41</sup> In that case, a vessel owned by West Tankers, which had been chartered by an Italian company known as Erg Petroli (Erg), collided with a jetty in Syracuse, Italy, causing damage. Erg collected some of its damages from its insurers, Allianz and Generali. Then, pursuant to an arbitration agreement between Erg and West Tankers, Erg began an arbitration in London against West Tankers for damages in excess of its insurance policy (Proceeding number 1). Erg's insurers in Italy, seeking to recover from West Tankers the amount they had paid Erg under the policy, brought a claim against West Tankers in an Italian court (Proceeding number 2). West Tankers then asked an English Court to enjoin the insurers from taking further steps in the Italian proceeding, arguing that because the insurers were subrogated to Erg's claim, they were also bound by the arbitration clause to arbitrate their claims in London (Proceeding number 3). The High Court of England granted the anti-suit injunction against the insurers, ordering them to stop the action in the Italian court, noting that an injunction to protect arbitration, as opposed to litigation, was permissible because arbitration was excluded from the Brussels I Regulation.<sup>42</sup>

On appeal, the House of Lords shared the view that the injunction should be granted but nonetheless referred to the ECJ the question of whether an anti-suit injunction to restrain a party from breaching an arbitration agreement by commencing litigation in another Member State was compatible with the Brussels I Regulation.<sup>43</sup> Meanwhile, the arbitration in London continued, the insurers were added as co-claimants, and in November 2008 the arbitral tribunal issued an award which held and declared that West Tankers was not liable to the insurers.<sup>44</sup>

In its decision in *West Tankers 2009*, the ECJ gave three reasons for holding that despite the arbitration exclusion, anti-suit injunctions were not permitted by the Regulation.<sup>45</sup> First, it said that when the subject matter of the dispute was clearly within the scope of Brussels I—such as the tort damages at issue in the instant case—then the validity of the arbitration agreement was only a preliminary issue that was within the jurisdiction of the Italian court.<sup>46</sup> Second, it held that the court of one Member State did

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<sup>41</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 28–30, 32, 34.

<sup>42</sup> *West Tankers, Inc. v. SpA*, [2005] EWHC (Comm) 454, [2005] 2 All E.R. (Comm) 240 (Eng.).

<sup>43</sup> *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà SpA*, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391 ¶¶ 14–15. The actual question that the House of Lords referred to the ECJ was the following: “Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?” *Id.* ¶ 23.

<sup>44</sup> See *West Tankers Inc. v. Allianz SpA*, [2011] EWHC (Comm) 829, [6] (Eng.) (describing the tribunal award).

<sup>45</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663.

<sup>46</sup> See *id.* ¶ 26. In its earlier ruling in *Marc Rich*, the ECJ said that the subject matter (appointing an

not have the right to strip another Member State court of the power to rule on its own jurisdiction by ordering a party to abandon an action in that court.<sup>47</sup> Such a step would be against the mutual trust principle that was at the core of the Regulation.<sup>48</sup> Third, the consequences of the anti-suit injunction would be fundamentally unjust because the enjoined party would be “barred from access to the court . . . and would therefore be deprived of a form of judicial protection to which it is entitled.”<sup>49</sup> The court also suggested that its decision was supported by the New York Convention,<sup>50</sup> which provides that a court seised of an action in a case where parties have made an arbitration agreement, “will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”<sup>51</sup> The New York Convention, however, does not deal with issues of timing or priority. The lack of clarity in some aspects of *West Tankers 2009* and the blurring of the interface between arbitration and litigation were to become highly debated topics in Europe.

#### B. Reaction to *West Tankers*

There was a large and generally negative reaction to *West Tankers 2009* from the arbitration community, particularly the English arbitration community. Increasingly, arbitration generates substantial income for arbitral institutions as well as for businesses in arbitration-friendly regimes. The ever-growing stakes encourage competition among various institutions and venues to be more attractive to parties who want to arbitrate.<sup>52</sup> The English feared that parties would no longer favor London as an arbitration seat if English courts could not enjoin parallel proceedings.<sup>53</sup> In fact, it did

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arbitrator) was arbitration, so the arbitration exclusion applied. Case C-190-89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-03855. In *Van Uden*, the ECJ found that provisional measures as such do not concern arbitration, but a wider variety of rights. So, they are covered under the Convention. Case C-391/95, *Van Uden v. Deco-Line*, 1998 E.C.R. I-07091. Here, the ECJ is saying that the subject matter of the dispute is not arbitration but tort damages, so arbitration is merely a preliminary issue and is therefore covered by the Regulation. *Id.*

<sup>47</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶ 28.

<sup>48</sup> See *id.* ¶ 30.

<sup>49</sup> *Id.* ¶ 31.

<sup>50</sup> See *id.* ¶ 33.

<sup>51</sup> New York Convention, *supra* note 4, art. II, ¶ 3.

<sup>52</sup> See Illmer, *supra* note 18, at 646 & n.1 (“Arbitration has become an industry sector generating considerable turnover at the preferred arbitration seats around the world,” citing a study that estimated “the total value of the fees generated by the main European arbitrations centers not including ad hoc arbitrations at around EUR 4 billion per year.”).

<sup>53</sup> See *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA*, [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391 ¶ 21 (“If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration

not take long for some commentators to opine that if parties were concerned about the risk of vexatious parallel proceedings, they should select a jurisdiction such as the United States as the seat of their arbitration.<sup>54</sup>

At the time of the *West Tankers 2009* decision in February 2009, however, proposals were already circulating about amending Brussels I with respect to a number of areas.<sup>55</sup> The Regulation itself required the European Commission to present a report on the application of the Regulation and possible proposals for adjustments or adaptations within five years after its effective date in 2001.<sup>56</sup> Somewhat late, the Commission presented a report<sup>57</sup> and a green paper in 2009,<sup>58</sup> which took into consideration a number of previously commissioned studies and reports, including a 2007 study known as the Heidelberg Report.<sup>59</sup> The Heidelberg Report advocated as one proposal the abolition of the arbitration exclusion and as another the inclusion of some specific rules in the Regulation to deal with problems of jurisdiction and recognition of judgments related to arbitration.<sup>60</sup> This study influenced the Commission, which put forward in its Report and Green Paper a number of proposals for discussion.<sup>61</sup> There were a great many comments from different groups and individuals in response to the Green Paper, many of which addressed the question of the interface of arbitration with Brussels I.<sup>62</sup>

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agreement, there is no shortage of other states which will.”). The House of Lords expressed its concern about potential elimination of anti-suit injunctions as a concern for loss of arbitrations in Europe generally, but it was primarily referring to London. *See id.* Most Member States are civil law countries whose courts would not grant anti-suit injunctions in any event. *See Radicati di Brozolo, supra* note 18, at 430.

<sup>54</sup> *See, e.g., Rainier, supra* note 14, at 436 (“Indeed, after the ECJ’s decision in *West Tankers*, the United States could potentially become more attractive as a seat of arbitration of parties to transnational agreements interested in ensuring that they do not end up litigating their disputes in multiple jurisdictions.”).

<sup>55</sup> *See Nielsen, supra* note 7, at 586 (describing surveys the EU Commission conducted in the Member States between 2004 and 2009 about the application of Brussels I).

<sup>56</sup> *See Brussels I, supra* note 1, art. 73.

<sup>57</sup> *See Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM (2009) 174 final (Apr. 21, 2009) [hereinafter *Report on No 44/2001*].

<sup>58</sup> *See Commission Green Paper, supra* note 32.

<sup>59</sup> *See Heidelberg Report, supra* note 32.

<sup>60</sup> *See id.* § 131 (“[T]he interfaces between the Judgment Regulation [(JR) that is, the Brussels I Regulation] and arbitration should be addressed in a more sophisticated way than by the all embracing exclusion of arbitration in Article 1(2)(d) JR. In the current discussion, two possible avenues should be advocated. The first is to delete Article 1 (2)(d) JR . . . . The second . . . is to address the interfaces between arbitration and the Judgment Regulation in a positive, comprehensive way . . . .”).

<sup>61</sup> *See Report on No 44/2001, supra* note 57; *Commission Green Paper, supra* note 32.

<sup>62</sup> *See Illmer, supra* note 18, at 657 & n.42 (referring to a list of over 100 contributors at [ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm)).

Many in the arbitration community were quite alarmed by the Green Paper proposals. The concerns were that the extensive regulation of arbitration that was proposed would greatly limit the autonomy of Member States with respect to arbitration and would jeopardize the body of arbitration law of some of the States.<sup>63</sup> Moreover, it was believed that the proposed amendments would impinge upon courts' obligations under the New York Convention and repudiate the doctrine of competence-competence.<sup>64</sup>

As a general matter, many in the arbitration community wanted to keep the arbitration exclusion in the Brussels I Regulation.<sup>65</sup> This was the very strong proposal of an International Bar Association Working Group.<sup>66</sup> In addition, the European Parliament passed a resolution opposing deletion of the arbitration exclusion.<sup>67</sup>

Given the robust debate about the interface of arbitration and Brussels I, the European Commission decided in June 2010 to appoint an international Group of Experts—practitioners and academics—to provide a recommendation.<sup>68</sup> The recommendation and proposal of the Group of Experts, submitted in October 2010, was adopted by the Commission and put forth as the Commission Proposal in December 2010.<sup>69</sup>

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<sup>63</sup> See Radicati di Brozolo, *supra* note 18, at 433–34.

<sup>64</sup> See *id.* at 433. Competence-competence is the doctrine that holds that arbitrators have the authority to decide their own jurisdiction. See *infra* note 79.

<sup>65</sup> See Kessedjian, *The Proposed Arbitration Provisions in the Recast of Regulation 44/2001*, *supra* note 18, at 205 (“[T]hose who are arbitration specialists are mostly opposed to changing the arbitration exception unless it is to reinforce it.”).

<sup>66</sup> In its report, the Working Group of the International Bar Association Arbitration Committee concluded as follows: “[T]here seems to be no compelling reason for deleting the arbitration exclusion; such a deletion would actually adversely affect the effectiveness of arbitration agreements and the circulation of arbitral awards. **Error! Hyperlink reference not valid.**” *Submission from the Working Grp. of the Int’l Bar Ass’n Arbitration Comm. to the Eur. Comm’n* (June 15, 2009), [http://ec.europa.eu/justice/news/consulting\\_public/0002/contributions/civil\\_society\\_ngo\\_academics\\_others/international\\_bar\\_association\\_arbitration\\_committee\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/international_bar_association_arbitration_committee_en.pdf).

<sup>67</sup> The Parliamentary Resolution dealt with many different aspects of the implementation of Brussels I, but with respect to arbitration it provided that it “[s]trongly opposes the (even partial) abolition of the exclusion of arbitration from the scope.” Resolution on Implementation and Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, PARL. EUR. DOC. (COM 0304) 9 (2010).

<sup>68</sup> See Illmer, *supra* note 18, at 657.

<sup>69</sup> See *id.*

### C. The Commission Proposal of 2010<sup>70</sup>

The Commission Proposal offered a compromise. The arbitration exclusion in the Brussels I Regulation would remain but with a limited exception. Article 29(4) of the proposed Recast Regulation provided as follows:

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.<sup>71</sup>

Thus, the preferred court for jurisdictional purposes would be the court of the Member State at the seat of arbitration or the arbitral tribunal once either one was seised of proceedings. This would be true even if an action had been commenced earlier in another Member State court.<sup>72</sup> Once arbitration or a court action was commenced in the seat, any other Member State court whose jurisdiction was challenged based on the arbitration agreement would have to stay proceedings.<sup>73</sup> Moreover, once the existence,

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<sup>70</sup> *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition Enforcement of Judgments in Civil and Commercial Matters (Recast)*, COM (2010) 748 final (Dec. 14, 2010) [hereinafter *Commission Proposal*].

<sup>71</sup> *Id.* The carve-out from the proposed regulation contained in this last sentence pertains to insurance (Section 3), consumers (Section 4) and employment (Section 5).

<sup>72</sup> See Illmer, *supra* note 18, at 661 (“[I]t 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 court or alternatively the arbitral tribunal.”).

<sup>73</sup> See *Commission Proposal*, *supra* note 70, art. 29(4).



validity, or effect of the arbitration agreement was established in the seat, the foreign court would have to decline jurisdiction. This kind of rule is known as a *lis pendens* rule.<sup>74</sup>

The Commission Proposal was seen as a positive development by many because it basically retained the arbitration exclusion, except for the *lis pendens* rule. By deferring to the parties' choice of the seat as the jurisdiction that would decide whether the arbitration agreement was valid, it offered a reasonable solution to the torpedo problem. There would now be a substantial disincentive for a party to file suit in another country because the non-seat court would have to stay the action and potentially decline jurisdiction. The *lis pendens* rule would likely discourage parties from filing parallel proceedings simply to delay and harass or to torpedo the other party because the non-seat litigation would simply not go forward.

In addition to Article 29(4), the Proposal provided in Article 33(3) a rule specifying when an arbitral tribunal would be deemed seised for purposes of the *lis pendens* rule: "an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or court for the tribunal's constitution."<sup>75</sup> This was a less appropriate change because it was not consistent with some of the international rules, such as Article 21 of the UNCITRAL Model Law on International Commercial Arbitration, which provides as follows: "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."<sup>76</sup>

The Commission Proposal generally found support, however, because the *lis pendens* rule along with the definition of "seised" were the only provisions pertaining to arbitration that would be part of the Recast Brussels Regulation if the Proposal were adopted. National law would govern any other arbitration matters. Moreover, the Proposal seemed to offer a very reasonable solution even it was not a perfect one. It largely kept arbitration out of the Regulation and yet resolved the problem of the torpedo action. In his thorough and insightful article on the Proposal, Professor Luca Radicati di Brozolo concluded, "The Proposal is overall a satisfactory compromise to the quandary of the interface between arbitration and the European jurisdictional space."<sup>77</sup>

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<sup>74</sup> *Lis Pendens Definition*, FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/lis+pendens> (last visited Oct. 12, 2014). "*Lis pendens*" is Latin for "suit pending." *Id.*

<sup>75</sup> See *Commission Proposal*, *supra* note 70, art. 33(3).

<sup>76</sup> U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 21, U.N. Sales No. E.95.V.18 (1985) [hereinafter UNCITRAL MODEL LAW 1985], available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf).

<sup>77</sup> Radicati di Brozolo, *supra* note 18, at 460.

The Proposal seemed generally acceptable to many in the arbitration community. For example, the Arbitration Committee of the International Bar Association (IBA) found the Proposal substantially in line with the IBA's recommendations that had been submitted earlier in response to the Green Paper.<sup>78</sup> It noted that the Proposal made clear that arbitration was generally excluded from the Regulation and that Article 29(4) would not prevent a court from declining jurisdiction when there was prima facie an arbitration agreement and when a country admitted the negative effect of competence-competence.<sup>79</sup> The IBA Arbitration Committee concluded that if adopted, the Proposal "would be a major development in favour of arbitration."<sup>80</sup>

There were others, however, including some in the arbitration community, who did not want the camel to put his nose under the tent. They feared that any reference to arbitration in the Recast Regulation, other than the arbitration exclusion, might permit a court to rule on some further issues that it found to be arbitration related just as the ECJ had done in *West Tankers*.<sup>81</sup> In particular, the Legislative Action Committee (LAC) of the European Parliament maintained its very strong opposition to including any mention of arbitration issues in Brussels I.<sup>82</sup> In its Draft Report in June 2011, LAC maintained that there should be an absolute exclusion of arbitration from the Recast Regulation on the grounds that arbitration is "satisfactorily dealt with" by the New York Convention and the 1961

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<sup>78</sup> See *Changes to Brussels Regulation – Dec 2010 Update*, INT'L BAR ASS'N, [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx) [hereinafter *Changes to Brussels Regulation*] (last visited Sept. 20, 2014).

<sup>79</sup> See *id.* Competence-competence is a widely followed doctrine in international arbitration that holds that an arbitral tribunal is competent to determine its own competence. That is, it has the power to determine whether it has jurisdiction. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1019 (2014). The negative effect of competence-competence is that in certain countries, such as France, courts cannot in most instances make the decision about arbitrator competence, but must defer to the arbitral tribunal, which will determine in the first instance whether it has jurisdiction. *Id.* The French Code of Civil Procedure, Article 1448 provides that "when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction except if an arbitral tribunal has not yet been seised of the dispute and if the arbitration agreement is manifestly void or manifestly inapplicable." *Id.* at 1111 n.356. The meaning of manifestly void or manifestly inapplicable has been narrowly interpreted by the French courts. SANDRA SYNKOVÁ, COURTS' INQUIRY INTO ARBITRAL JURISDICTION AT THE PRE-AWARD STAGE: A COMPARATIVE ANALYSIS OF THE ENGLISH, GERMAN AND SWISS LEGAL ORDER 89–90 (2013). Gary Born notes *supra* that case law on the subject has been codified by Article 1455 of the revised French Code. BORN, *supra* note 79, at 1113. Article 1455 provides, "If an arbitration agreement is manifestly void or manifestly not applicable, the judge acting in support of the arbitration shall declare that no appointment [of an arbitrator] need be made." *Id.* at 1112 n.360.

<sup>80</sup> See *Changes to Brussels Regulation*, *supra* note 78.

<sup>81</sup> See Radicati di Brozolo, *supra* note 18, at 457–58.

<sup>82</sup> See *Draft Report*, *supra* note 31.

Geneva Convention on International Commercial Arbitration.<sup>83</sup> In the same month, the Council of Justice and Home Affairs (the Council) also approved a deletion of Article 29(4) and provided a more extensive amendment to the explanatory recital, which became Recital 12 in the Recast Regulation.<sup>84</sup> Thus, neither the proposed Article 33(3) nor the proposed *lis pendens* rule in Article 29(4) was ultimately included in the Recast Brussels Regulation.<sup>85</sup>

After extensive negotiations among EU institutions, governments, and various stakeholders, the Recast Brussels Regulation was approved in December 2012.<sup>86</sup> The end result was far different from the original proposals by the European Commission in its Green Paper and from the carefully constructed compromise in the Commission Proposal of December 2010, which was rejected by the Parliament and the Council.

### III. BRUSSELS I RECAST

In the text of the Recast Regulation, the arbitration exclusion remains the same as in Brussels I. The only changes are (1) the extensive Recital 12, which attempts to explain how the arbitration exclusion should be understood in relation to the Brussels I Regulation, and (2) a new Article 73(2), which specifically provides that the Brussels I Regulation shall not affect the application of the 1958 New York Convention. The four paragraphs of Recital 12, which will be discussed below, make clear that parallel proceedings in arbitration and litigation will continue, that a court's decision on the validity of an arbitration agreement cannot come within the Recast Regulation even if it is a preliminary question, that the New York Convention has primacy over the Recast with respect to questions of enforcement, and that no ancillary proceedings relating to arbitration are within the Recast's scope.<sup>87</sup> The exclusion of arbitration from the Recast

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<sup>83</sup> *Id.* at 48. The Committee simply deleted Article 29(4) and somewhat expanded the explanation in Recital 11 (which was redrafted by the Council to become Recital 12 in the Recast Regulation). *Id.* The Report was incorrect, however, as to all Members of the European Union being parties to the Geneva Convention. A number are not. For example, the United Kingdom, Sweden, Portugal, and the Netherlands, among other countries, are not parties to the Geneva Convention. See *Chapter XXII Commercial Arbitration: European Convention on International Commercial Arbitration*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXII-2&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXII-2&chapter=22&lang=en) (last updated Oct. 12, 2014) (providing a list of the thirty-one adherents).

<sup>84</sup> See Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) - First Reading - General Approach, 10609/12 JUSTCIV209 CODEC 1495 ADD 1 (showing the deletion of Article 29(4) of the Commission's Proposal, and in footnote 1 to Article 84, the Recital that was to become Recital 12 in the Recast Regulation).

<sup>85</sup> See Brussels Recast, *supra* note 7.

<sup>86</sup> See *id.*

<sup>87</sup> Although a recital is not an operative provision of the legislation, in European law if an operative

Regulation's regime remains intact, but there is much to be learned from the explanatory Recital.

#### A. Recital 12, Paragraph 1: Permitting Parallel Proceedings

Even though arbitration is excluded from the scope of the Recast, the drafters of Recital 12 wanted to help courts and parties understand how this exclusion would actually work. The first paragraph of Recital 12 clarifies that a court's decision regarding an arbitration agreement will not be governed by the jurisdictional rules under the Recast Regulation. The paragraph provides that when any court is seised of a matter regarding which the parties have entered into an arbitration agreement, nothing in the Recast Regulation will prevent that court from the following: (1) referring the parties to arbitration, (2) staying or dismissing the proceedings, or (3) examining whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with national law.<sup>88</sup>

Thus, when a court is first seised by a matter where an arbitration agreement has been alleged, this does not require a second court to await its decision on jurisdiction. Proceedings in the two courts can go forward simultaneously. Therefore, parallel proceedings cannot prevent one court from acting because the other court was first seised.

Of course, in *West Tankers 2009* the arbitration tribunal was always free to continue its proceedings because arbitration is excluded from the Brussels I Regulation. But even though the ECJ in *West Tankers* focused on whether an anti-suit injunction to protect arbitration was permissible, its decision appeared to be more far-reaching. It indicated that once the Italian court decided the validity of the arbitration agreement then, because the jurisdictional question was a preliminary issue related to the substance of the dispute, both came within the scope of the Regulation.<sup>89</sup> The logical consequence appeared to be that the English court would be bound by the Italian court's decision on the validity of the arbitration agreement. That is how the Court of Appeal in London interpreted *West Tankers 2009* in a subsequent case, *National Navigation Co. v. Endesa Generacion SA (Endesa)*. Relying on its understanding of *West Tankers 2009*, the Court of Appeal in London held that a Spanish court's finding that an arbitration agreement was invalid would bind the English court under the Regulation.<sup>90</sup>

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provision is ambiguous, it is interpreted in light of the recital. See, e.g., Tadas Klimas & Jurate Vaiciukaite, *The Law of Recitals in European Community Legislation*, 15 ILSA J. INT'L & COMP. L. 61, 73 (2008).

<sup>88</sup> Brussels Recast, *supra* note 7, Recital 12, ¶ 1.

<sup>89</sup> Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 22, 26, 27.

<sup>90</sup> *Navigation Co. v. Endesa Generacion SA*, [2009] EWCA (Civ) 1397 (Eng.). However, not all

B. Recital 12, Paragraph 2: Reversing *Endesa*

Whether or not *Endesa* was correctly decided by the English court, paragraph 2 of Recital 12 makes clear that under the Recast such an interpretation would be incorrect. In *Endesa*, there was a dispute over late delivery for goods that were not delivered to the proper contractual point of discharge as required by the bill of lading.<sup>91</sup> *Endesa*, a Spanish energy company, initiated an action for damages in a Spanish court. National Navigation Co., an Egyptian shipping company, initiated in the English court a court action claiming a declaration of nonliability; however, in the Spanish court, National Navigation sought a declaration that an arbitration clause had been incorporated into the bill of lading.<sup>92</sup> It subsequently commenced an arbitration proceeding in London. The Spanish court found under Spanish law that the bill of lading did not incorporate the arbitration clause.<sup>93</sup> Thus, the question arose before the English Court of Appeal whether the Spanish court's ruling that there was no valid arbitration clause was a judgment within the scope of the Brussels I Regulation (which must be recognized by the English court).<sup>94</sup>

The English court held that although the proceedings in the Spanish court concerned arbitration, the Spanish judgment was a Regulation judgment and was binding on the English court.<sup>95</sup> This effectively terminated the arbitration. Even if the Spanish judgment was arguably not directly binding on the arbitral tribunal in London,<sup>96</sup> any arbitral award

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commentators agree that the English Court of Appeal correctly interpreted *West Tankers* on this point. See, e.g., Vesna Lazić, *The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado about Nothing' Can End Up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels-style*, 29 J. of INT'L ARB. 20, 24 (2012) (asserting that the English court reached "an obviously incorrect conclusion" because "a decision on the validity of an arbitration itself falls outside the scope of the Regulation"(internal citations omitted)).

<sup>91</sup> Navigation Co. v. Endesa Generacion SA, [2009] EWCA (Civ) 1397, ¶ 1 (Eng.).

<sup>92</sup> *Id.* ¶¶ 1–2.

<sup>93</sup> *Id.* ¶ 8(xiii).

<sup>94</sup> *Id.* ¶ 5.

<sup>95</sup> See *id.* ¶¶ 59, 69, 119, 123.

<sup>96</sup> Some courts consider that a foreign judgment would bind an arbitral tribunal. For example, in the *Endesa* decision, Lord Justice Moore-Bick stated in *dicta* as follows:

It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound by the Regulations themselves to recognize judgments of the courts of Member States of the EU, but it does not follow that foreign judgments, whether of the courts of Member States or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law . . . . It follows, therefore, that arbitrators applying English law are bound to give effect to that rule. There is nothing new in this; it has long been recognized that a judgment of a foreign court can give rise to estoppel by res judicata . . . – and the principle is routinely applied in arbitration proceedings.

against the Spanish defendant would no doubt be vacated by an English court because the Spanish decision holding there was no right to arbitrate had been held to be binding. Certainly, any attempt by a claimant to enforce in Spain an award granted in these circumstances would be futile.

The *Endesa* holding, however, appears to be reversed by the language in Recital 12, which provides as follows:

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.<sup>97</sup>

Thus, the Recast Regulation makes clear that a court's decision on the validity of an arbitration agreement is not subject to the Recast Regulation's recognition and enforcement rules even when it is an incidental question related to the substance of a dispute within the scope of the Recast. This means that in a situation like *Endesa* the English court would not be bound by the Spanish court's decision and could make its own independent decision as to whether there was a valid arbitration agreement. This results in autonomy for national courts with respect to determining the validity of arbitration agreements but also in a higher risk of inconsistent decisions. The resulting inconsistent decision will, of course, raise the question of what law governs the enforcement of those decisions. What is the relation between rules of enforcement under the Recast and under the New York Convention?

### C. Recital 12, Paragraph 3: Giving Primacy to the New York Convention

Paragraph 3 of Recital 12 tries to help answer this enforcement question. Assuming that inconsistent decisions will result when, for example, an arbitral tribunal in one jurisdiction issues an arbitration award finding the respondent liable while a court in another jurisdiction issues a judgment finding no liability, what happens next? The Recast Regulation provides that once a court has determined that the arbitration agreement is not valid, it can render a judgment on the substance of the dispute (i.e., the merits) that should be recognized and enforced in accordance with the

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*Id.* ¶ 118.

<sup>97</sup> Brussels Recast, *supra* note 7, Recital 12, ¶ 2.

Regulation.<sup>98</sup> However, assuming an inconsistent arbitration award dealing with the same matter has also been issued in another jurisdiction, that award may be enforceable under the New York Convention. While Article 73(2) of the Recast Regulation provides that the Regulation “shall not affect the application of the 1958 New York Convention,” it does not specifically give the New York Convention primacy over the Recast.<sup>99</sup> However, Recital 12 clearly states that the New York Convention takes precedence over the Recast.<sup>100</sup>

Nonetheless, for a court looking for reasons not to enforce, there is a possible though not very persuasive argument that although Recital 12 says that the New York Convention takes precedence over the Recast Regulation, the statement has no operative effect because it is not contained in the operative provisions.<sup>101</sup> Scholars assert, however, that a clear recital in European legislation controls an ambiguous operative provision, such that the operative provision will be interpreted in light of the recital.<sup>102</sup> Thus, because Article 73(2) of the Recast Regulation is not clear on its face about whether the New York Convention or the Regulation has priority, the provision should be interpreted in light of Recital 12, which gives the New York Convention precedence.

However, if the claimant tries to enforce its award at the enforcing court, where the assets of the respondent can be found, that court is likely to be in the home country of the respondent and is also likely to be the same court where the respondent brought suit. Thus, that same court would have already found that there was no arbitration agreement and that the defendant or respondent had no liability. As a result, there may be some question whether such a court would go against its own decision and enforce the inconsistent arbitral award under the New York Convention. The court might try to find reasons not to enforce, such as public policy. However, the public policy basis for non-enforcement of an arbitration

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<sup>98</sup> *Id.* ¶ 3 (“[W]here 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.”).

<sup>99</sup> See *id.* art. 73(2). Not all Member State courts believe the Convention has primacy over the Convention. See, e.g., *infra* text accompanying notes 151–55 (describing the Supreme Court of Lithuania’s position that the Brussels I Regulation should take precedence over the New York Convention).

<sup>100</sup> *Id.* Recital 12, ¶ 3 (“[The obligation to enforce a judgment] should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . which takes pre-cedence over this Regulation”).

<sup>101</sup> Cf. Klimas & Vaiciukaite, *supra* note 87, at 92 (concluding that “[w]here the recital is clear, it will control an ambiguous operative provision”).

<sup>102</sup> *Id.* at 92.

award under the New York Convention has been interpreted narrowly.<sup>103</sup>

Although one can only speculate about likely results when courts are faced with conflicting decisions, it is evident that when the European Union rejected the European Commission proposal for giving jurisdictional preference to the seat of arbitration, it created a range of potential factors and outcomes that can serve to complicate arbitration proceedings and enforcement. Nonetheless, the Recast Regulation is helpful in identifying what is not within its scope as will be discussed below with respect to ancillary proceedings.

#### D. Recital 12, Paragraph 4: No Ancillary Proceedings Within the Scope of the Brussels Recast

##### 1. *The Content of Ancillary Proceedings*

In addition to various points discussed above based on paragraphs 1 through 3 of Recital 12, in paragraph 4 the Recital makes clear that ancillary proceedings—that is, court proceedings connected with arbitration—are not subject to the Recast Regulation’s regime.

The Regulation should not apply to any actions or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal; the powers of arbitrators; the conduct of an arbitration procedure or any other aspects of such a procedure; or to any action or judgment concerning the annulment, review, appeal, recognition, or enforcement of an arbitral award.<sup>104</sup>

Thus, some of the typical interactions of a court with an arbitration proceeding, such as establishing a tribunal<sup>105</sup> or reviewing a tribunal’s claim of jurisdiction,<sup>106</sup> are not subject to the Recast Regulation. Moreover, when

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<sup>103</sup> See, e.g., *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat’l Oil Co. (Rakoil)*, [1987] 2 Lloyd’s Rep. 246, 257 (C.A.) (Eng.) (stating that in order to set aside an award on public policy grounds a party must prove “some element of illegality or that the enforcement of the award would be clearly injurious to the public good . . .”); see also *Thales Air Defence v. Euromissile et al.*, Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 18, 2004, REV. ARB., 2005, 751 (Fr.) (stating that a violation of public policy must be “flagrant, effective and concrete” in order to be sanctioned). *But cf. infra* text accompanying notes 142–43 (discussing how Lithuania’s Court of Appeal refused to enforce an award that amounted to an anti-suit injunction).

<sup>104</sup> Brussels Recast, *supra* note 7, Recital 12, ¶ 4.

<sup>105</sup> See Case C-190-89, *Marc Rich & Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-03855.

<sup>106</sup> See UNCITRAL MODEL LAW 1985, *supra* note 76, art. 16(3) (providing that an arbitral tribunal’s decision that it has jurisdiction may be reviewed by a court within thirty days). The Model Law has been adopted in over sixty-five countries, as well as in a number of territories, provinces, and states in the United States. See *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) [hereinafter *Status UNCITRAL Model Law*] (last visited Oct. 12, 2014).



a court vacates an arbitral award or when it recognizes and enforces an award, no other Member State is required by the Recast to recognize and enforce that court's judgment. Nonetheless, because all Member States are subject to the New York Convention, this should lead toward some convergence of recognition and enforcement standards.<sup>107</sup> It is less likely, however, that there will be convergence of acceptance of anti-suit injunctions as ancillary proceedings.

## 2. *Anti-suit Injunctions as Ancillary Proceedings*

The broad language above stating that “[t]he Regulation should not apply to any actions or ancillary proceedings” may give some hope to those who would like to see the anti-suit injunction reinstated to protect arbitration. After all, the ECJ's main logical argument against anti-suit injunctions in the *West Tankers 2009* decision is somewhat undercut by Recital 12. The ECJ anchored its decision in *West Tankers 2009* on the theory that since the subject matter of the dispute fell within the scope of the Regulation, a preliminary issue such as the validity of the arbitration agreement was also within the Regulation's scope.<sup>108</sup> Thus, according to the court, the use of an anti-suit injunction to resolve a jurisdictional dispute would strip the foreign court of the power the Regulation gave it under

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<sup>107</sup> In any event, international practice is not consistent on enforcement of awards. The courts of some jurisdictions will in certain circumstances enforce an award that has been set aside (i.e., vacated) in another jurisdiction. In addition, internationally, an award may be enforced in one jurisdiction and refused enforcement in another. See, e.g., *Société Hilmarton Ltd. v. Société OTV*, Cour de cassation [Cass.] [supreme court for judicial matters], Mar. 23, 1994, YB Comm. Arb. 1995, XX, 663 (Fr.); *La Direction Générale de L'Aviation Civile de l'Émirat de Dubaï v. Société International Bechtel Co.*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Sept. 29, 2005 (Fr.); see also *Corporación Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex-Exploración Y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225, at \*17 (S.D.N.Y. Aug. 27, 2013) (confirming an award under the Panama Convention nullified in Mexico because the nullification violated the United States' basic notions of justice); Mike McClure, *Enforcement of Arbitral Awards That Have Been Set Aside at the Seat: The Consistently Inconsistent Approach Across Europe*, KLUWER ARB. BLOG (June 26, 2012), <http://kluwerarbitrationblog.com/blog/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe/> (stating that Paris and the Netherlands have recognized such awards while England and Germany tend to take the view that once an award is annulled at the seat, the court cannot recognize or enforce it). In addition, internationally, an award may be enforced in one jurisdiction and refused enforcement in another. See *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pak.*, [2010] UKSC 46, [2011] Bus. L.R. 158 (stating that an award made in France was refused enforcement in the United Kingdom but subsequently enforced in France); see also George A. Bermann, *The U.K. Supreme Court Speaks to International Arbitration: Learning from the Dallah Case*, 22 AM. REV. INT'L ARB. 1, 4 (2011); Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road*, 4 J. INT'L DISP. RESOL. 587 (2013).

<sup>108</sup> Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶ 26.

Article 5(3)<sup>109</sup> of the Regulation to rule on its own jurisdiction.<sup>110</sup>

However, Brussels Recast makes clear that any ruling on jurisdiction arising out of a challenge based on the existence of an arbitration agreement “regardless of whether the court decided on this as a principal issue or as an incidental question”<sup>111</sup> is not subject to rules laid down in the Recast.<sup>112</sup> Thus, if the ruling on jurisdiction is not within the scope of the Recast Regulation, it is arguable that an anti-suit injunction pertaining to the ruling on jurisdiction is also not subject to the Recast. Such a step would appear to be an “ancillary proceeding” related to an arbitration procedure, to which the Recast Regulation should not apply.<sup>113</sup>

Nonetheless, because most civil law courts and practitioners object to the use of anti-suit injunctions,<sup>114</sup> if the issue goes back to the ECJ the possibility that anti-suit injunctions would be reinstated as a mechanism to protect arbitration is probably small. The Advocate General, Kokott, whose opinion was largely followed by the ECJ in *West Tankers 2009*, noted the following:

[A] unilateral anti-suit injunction is not, however, a suitable measure to rectify [jurisdiction in two courts]. In particular, if other member states were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.<sup>115</sup>

Similarly, Professor Radicati di Brozolo stated, “[G]iven that the same game can be played by different players, the liberty to resort to anti-suit injunctions is a recipe for chaos . . . .”<sup>116</sup>

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<sup>109</sup> Article 5(3) of the Brussels I Regulation provides as follows: “A person domiciled in a Member State may, in another Member State, be sued . . . in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.” Brussels I, *supra* note 1, art. 5(3).

<sup>110</sup> See Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663, ¶¶ 27–28.

<sup>111</sup> Brussels Recast, *supra* note 7, Recital 12, ¶ 2.

<sup>112</sup> *Id.*

<sup>113</sup> See *id.*

<sup>114</sup> See, e.g., Radicati di Brozolo, *supra* note 18, at 430 (“[S]ince anti-suit injunctions are used almost only by courts in the United Kingdom and Ireland, allowing them would be tantamount to condoning what is viewed elsewhere as an imperialistic and condescending policy . . . .”). Professor Radicati di Brozolo acknowledged, however, that “the courts in the United Kingdom are cautious about granting anti-suit injunctions or interdicts and seek to be respectful of comity.” *Id.* at 430 n.30.

<sup>115</sup> Case C-185/07, Opinion of Advocate General Kokott in *Allianz SpA and Others v. West Tankers Inc.* ¶ 72, CURIA (Sept. 4, 2008), [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&docid=66648&cid=286938](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&docid=66648&cid=286938).

<sup>116</sup> Radicati di Brozolo, *supra* note 18, at 432.

3. *Issuance of Anti-suit Injunctions by Arbitrators*

However, even if anti-suit injunctions by courts are found to be impermissible, it may be that arbitrators can issue a form of anti-suit injunction. Under the Recast Regulation, inconsistent judgments will occur with no ready remedy given the lack of the kind of *lis pendens* rule that the Commission Proposal had provided and without the possibility of a court-issued anti-suit injunction. In light of this, arbitral tribunals may fashion their own remedies. Even if the Brussels Recast were interpreted to prevent courts from issuing anti-suit injunctions, it does not appear that arbitral tribunals are covered by this prohibition. Some arbitral laws and rules as well as arbitral practice support the power of arbitrators “to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award.”<sup>117</sup> Article 26 of the UNCITRAL Arbitration Rules, for example, provides that a tribunal may grant an order to prevent harm to the arbitral process:

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example, and without limitation, to . . .

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself . . . .<sup>118</sup>

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<sup>117</sup> Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 235, 236–37 (Albert Jan van den Berg, ed., 2006). Mr. Gaillard, a lawyer trained in the civil law tradition, points out that arbitrators’ jurisdiction to issue anti-suit injunctions is confirmed by international arbitration practice, citing numerous cases in commercial arbitration, investment arbitration, and the Iran Claims Tribunal where tribunals have issued anti-suit injunctions. *Id.* at 244–59. He also notes that “[a]rbitral case law shows that arbitral tribunals have repeatedly recognized their power to award damages for the breach by a party of its undertaking to arbitrate its dispute . . . .” *Id.* at 238.

<sup>118</sup> U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL ARBITRATION RULES [hereinafter UNCITRAL ARBITRATION RULES], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>. Moreover, the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 contains identical language in Article 17(2). See U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION [hereinafter UNCITRAL MODEL LAW 2006], available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). Additionally, under the ICC Rules of Arbitration

Thus, under the UNCITRAL arbitration rules a tribunal could conclude that a party who was starting litigation in another jurisdiction in violation of an arbitration agreement was causing harm or prejudice to the arbitral process and order the party to withdraw from that litigation. Such an order could have the same effect as an anti-suit injunction.

The Iran–United States Claims Tribunal, which adopted the UNCITRAL Rules of Arbitration with some adjustments, used this provision to good effect.<sup>119</sup> One tribunal, which had ordered Iran to request a stay in Iranian court litigation because of the arbitration before the tribunal, noted, “This Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal’s jurisdiction and authority are made fully effective.”<sup>120</sup> There were in fact a number of cases in which a tribunal ordered a party to stay duplicative proceedings in an Iranian court.<sup>121</sup>

It could be argued that a tribunal-issued order would not be as effective as an anti-suit injunction because the tribunal does not have the coercive powers available to a court, which can impose penalties such as contempt of court or fines.<sup>122</sup> However, there may be lessons to be learned from a 2012 iteration of *West Tankers* (*West Tankers 2012*) where the English High Court held that an arbitral tribunal should have awarded damages to West Tankers.<sup>123</sup> West Tankers had asked the arbitral tribunal to award it damages against the respondent-insurers for their breach of the arbitration agreement, as well as an indemnity to cover any potential liability that might be found by the Italian court.<sup>124</sup> The arbitral tribunal, in a 2-1 decision, had reluctantly asserted it could not do so based on its belief that such an award was prohibited by the ECJ’s interpretation of Brussels I in *West Tankers 2009*.<sup>125</sup> According to the arbitrators, the ECJ had concluded in *West Tankers 2009* that a party had a fundamental right to

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28(1), the arbitral tribunal may order “any interim or conservatory measure it deems appropriate.” This provides the tribunal with “the broadest possible power, including the power to order anti-suit injunctions.” Christian Aschauer, *Use of the ICC Emergency Arbitrator to Protect the Arbitral Proceedings*, 23 ICC INT’L CT. OF ARB. BULL. 5, 7 (2012).

<sup>119</sup> See DAVID D. CARON & LEE M. CAPLAN, *THE UNCITRAL ARBITRATION RULES* 518 n.24 (2d ed. 2013).

<sup>120</sup> Laurent Lévy, *Anti-suit Injunctions Issued by Arbitrators*, in *ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION* 115, 119 (Emmanuel Gaillard ed., 2005) (citing from the Feb 4, 1983 Interim Award in Case No. 338, E-Systems, Inc. v. Iran, 2 Iran-U.S. Cl. Trib. Rep. 51, 57 (1983)).

<sup>121</sup> See *id.*

<sup>122</sup> Court-imposed penalties for failing to comply with an anti-suit injunction can be significant. See, e.g., *Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Info. Techs., Inc.*, 369 F.3d 645, 649 (2d Cir. 2004) (ordering a noncomplying party to pay U.S. \$1000 per day for the first three months and \$5000 per day subsequently until it complied).

<sup>123</sup> *West Tankers Inc v. Allianz SpA & Anor*, [2012] EWHC (Comm) 854.

<sup>124</sup> See *id.* ¶ 25.

<sup>125</sup> See *id.* ¶¶ 23–25 (discussion by the High Court).

bring proceedings under Article 5(3) of the Regulation, and to deny that right would be to undermine the principle of effective judicial protection.<sup>126</sup> Therefore, the tribunal found it did not have the right to impose damages on a party that was simply seeking to assert its fundamental right.<sup>127</sup>

The English High Court disagreed.<sup>128</sup> Mr. Justice Flaux noted specifically that the Advocate General (AG), with whom the ECJ had not disagreed in *West Tankers 2009*, acknowledged that because arbitration was outside the scope of Brussels I, courts and tribunals would be able to issue inconsistent decisions.<sup>129</sup> Because the AG had expressly recognized that a tribunal could issue a different decision from that of a court, Mr. Justice Flaux found there was no basis to conclude that the tribunal's jurisdiction was circumscribed by the Regulation as to the kinds of decisions it could make.<sup>130</sup> An award granting damages for breach of an arbitration clause, as well as an indemnity, was simply a logical extension of the tribunal's basic award.<sup>131</sup>

Thus, Mr. Justice Flaux concluded that the arbitrators could grant the remedy sought by *West Tankers*. He stated:

[G]iven that [the A.G.] recognises that one effect of her Opinion would be that an arbitral tribunal could reach a different decision from that of the court “first seised,” both as to the scope and effectiveness of the agreement to arbitrate and as to the overall merits, it seems to me impossible for the Respondents to contend that her “philosophy” was that the arbitral tribunal would be circumscribed in the jurisdiction it could exercise by the provisions of the Regulation.<sup>132</sup>

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<sup>126</sup> The principle of effective judicial protection is a general principle of EC law stemming from the constitutional traditions common to the Member States. *See* Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 5 E.C.R. 1651, ¶¶ 18–19 (1986). Member States must establish a system of legal remedies to ensure that individual rights under EC law can be enforced. *See* Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-06677, ¶ 41.

<sup>127</sup> *See West Tankers Inc v. Allianz SpA & Anor*, [2012] EWHC (Comm) 854, ¶ 25 (citing ¶¶74–78 of the tribunal's award).

<sup>128</sup> *See id.* ¶ 25 (citing ¶ 78 of tribunal's award). *West Tankers* had appealed to the court on a point of law under the English Arbitration Law, section 69. *See id.* ¶ 1.

<sup>129</sup> *See id.* ¶ 54.

<sup>130</sup> *See id.* ¶¶ 54, 72.

<sup>131</sup> *See id.*; *see also id.* ¶ 55 (“[T]here is no qualitative difference between a decision by an arbitral tribunal on the merits, which is inconsistent with the approach that the Italian court might adopt in due course as to the merits, and a decision by the arbitral tribunal to grant a declaration that the Respondents [the insurers] should indemnify the Appellant [*West Tankers*] in respect of any liability the Italian court, having considered the merits, might in due course conclude the Appellant was under.”).

<sup>132</sup> *Id.* ¶ 54.

Moreover, Mr. Justice Flaux’s view was that the principles elucidated by the ECJ—the fundamental right of effective judicial protection and mutual trust which apply to the legal systems of the Member States—do not apply to private arbitral tribunals.<sup>133</sup> He noted that the principle of effective judicial protection is not freestanding, but can only be invoked to protect a specific right, such as that provided under Article 5(3) of the Regulation.<sup>134</sup> However, that right “is only engaged before courts of the member states, not before arbitral tribunals. If the tribunal does not have to give effect to the right under Article 5(3), then there is no reason why the tribunal does not have jurisdiction to grant equitable damages or an indemnity.”<sup>135</sup>

Importantly for Mr. Justice Flaux, the ECJ decision was concerned with an anti-suit injunction granted by a national court, not by an arbitral tribunal.

The . . . conclusion [of the ECJ] makes the point . . . that the grant by the English court of the anti-suit injunction is contrary to the mutual trust which member states accord to one another’s legal systems. The Respondents [insurers] can point to no wider principle of European law which requires a private arbitral tribunal in one member state to repose mutual trust in any system of law other than that of the national court which supervises and protects the arbitral process in the jurisdiction where the arbitration takes place.<sup>136</sup>

Thus, the High Court’s *West Tankers 2012* decision gives support not only to an award of damages by an arbitral tribunal for breach of an arbitration agreement, but its reasoning also gives analogous support for a tribunal’s right to issue a form of anti-suit injunction when permitted by the laws or rules under which the tribunal operates.

The High Court’s decision came down in April 2012 before the Brussels Recast was adopted. However, nothing in the Recast Regulation would appear to undermine this decision. Rather, the specifically described exclusions of arbitration set forth in Recital 12 would seem to support the reasoning that an arbitral tribunal’s jurisdiction is not circumscribed by the Recast and that private tribunals are not subject to the principles imposed on Member State legal systems—such as effective judicial protection and mutual trust. Nonetheless, an anti-suit injunction may well be seen as an interim measure, which may or may not be enforceable by national courts

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<sup>133</sup> See *id.* ¶¶ 59, 62.

<sup>134</sup> See *id.* ¶ 63. Article 5(3) provides the right to sue for tort damages in the jurisdiction where the tort occurred. Brussels I, *supra* note 1, art. 5(3).

<sup>135</sup> *West Tankers Inc v. Allianz SpA & Anor*, [2012] EWHC (Comm) 854, ¶ 64.

<sup>136</sup> *Id.* ¶ 59.

and may not constitute an award that is enforceable under the New York Convention.<sup>137</sup>

#### 4. Enforcement of an Arbitral Anti-suit Injunction

A case recently referred to the ECJ,<sup>138</sup> and not yet decided, should shed light on whether an award issued by an arbitral tribunal that amounted to an anti-suit injunction is subject to enforcement in a Member State court under the New York Convention.<sup>139</sup> In December 2013, the Lithuanian Supreme Court referred to the ECJ three questions concerning whether a Member State Court can refuse to enforce an arbitral award that amounted to an anti-suit injunction.<sup>140</sup> The dispute grew out of a Shareholders' Agreement concerning the ownership and operation of Lietuvos Dujos, Lithuania's main gas provider.<sup>141</sup> Shares were held by OAO Gazprom, the Russian energy giant; Ruhrgas Energie Beteiligungs AG, a German energy company; and the State Property Fund, acting on behalf of the Republic of Lithuania.<sup>142</sup> An arbitration clause in the Shareholders Agreement provided for arbitration in Stockholm under the Rules of the Stockholm Chamber of Commerce (SCC) of "any disputes or disagreements related to this agreement or its breach, validity, entry into force or termination."<sup>143</sup> When a dispute arose, however, the Republic of Lithuania, by its Ministry of Energy, filed a claim against Lietuvos Dujos, its directors, and board (the

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<sup>137</sup> See, e.g., Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AMER. REV. INT'L ARB. 317, 331–33 (2009); see also James M. Gaitis, *The Federal Arbitration Act: Risks & Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic & International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 67–68 (2005); Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief. How Final is Provisional?*, 18 J. OF INT'L ARB. 511, 520–28 (2001). Interim measures are enforceable in countries that have adopted the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration. See UNCITRAL MODEL LAW 2006, *supra* note 118, art. 17 H ("An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued . . ."). However, only a few Model Law states have adopted the 2006 amendments. See *Status UNCITRAL Model Law*, *supra* note 106.

<sup>138</sup> See Request for a Preliminary Ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) Lodged on 14 October 2013 — Gazprom OAO, Other Party to the Proceedings: Republic of Lithuania (Case C-536/13), 2013 O.J. (C 377) 7.

<sup>139</sup> See Case Summaries, *Lithuania No. 2, OAO Gazprom v. The Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, Court of Appeal of Lithuania, 17 December 2012 and Supreme Court of Lithuania, Civil Case No. 3K-7-326/2013, 10 October 2013*, YB Comm. Arb. 2013, XXXVII, 417–23 (Lith.).

<sup>140</sup> *Id.* ¶¶ 81, 89.

<sup>141</sup> *Id.* ¶ 4.

<sup>142</sup> *Id.* ¶ 5.

<sup>143</sup> *Id.* ¶ 4.

defendants) in its national court in Vilnius, Lithuania.<sup>144</sup> The Republic of Lithuania asked for an investigation to be conducted and, if activities of the defendants were found to be improper, for managers to be removed and other steps to be taken.<sup>145</sup> A few months later, Gazprom began an SCC arbitration claiming that the court action was in violation of the arbitration agreement.<sup>146</sup>

The SCC tribunal issued an award that found that the Republic of Lithuania had partially breached the arbitration clause in the Shareholders Agreement and that it should withdraw certain requests from the court proceeding and limit other requests, essentially requiring the Republic of Lithuania to remove from the litigation the claims that could be arbitrated.<sup>147</sup> Gazprom then sought recognition and enforcement of the award in the Court of Appeal for Lithuania.<sup>148</sup>

In December 2012, the Lithuanian Court of Appeal refused to recognize the arbitration award issued by the SCC arbitral tribunal, in part because the award contained an anti-suit injunction.<sup>149</sup> The Court of Appeal stated that if it enforced the award, the tribunal's requirements that Lithuania withdraw or limit its claims in court

would become mandatory in the territory of the Republic of Lithuania and would directly influence the legal capacity of legal entities participating in the proceedings and limit the jurisdiction of national courts. This would not only breach several constitutional principles related to the right of an individual to the hearing of his case in an objective, impartial and fair court . . . but also affect the sovereignty of the state . . . which would undoubtedly be contrary to the public policy of the Republic of Lithuania as well as to international public policy.<sup>150</sup>

Thus, according to the Court of Appeal, the award was not enforceable under Article V(2)(b) of the New York Convention, which permits a court to refuse to recognize and enforce an award that is against the public policy of the country.

In its review of the Court of Appeal decision, the Lithuanian Supreme Court set forth the parties' positions on the appeal, giving far more space and focus to Lithuania's position. Lithuania asserted that the arbitral award

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<sup>144</sup> *Id.* ¶ 3.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* ¶ 4.

<sup>147</sup> *Id.* ¶ 6.

<sup>148</sup> *Id.* ¶ 7.

<sup>149</sup> *Id.* ¶¶ 27–31.

<sup>150</sup> *Id.* ¶ 30.



established a restraint from settling the dispute before a court, the ECJ does not permit this to happen in litigation and should not permit it to happen in arbitration, and “a contrary ruling would establish the supremacy of arbitration over courts; this would disturb the balance of justice between these two dispute settlement mechanisms.”<sup>151</sup>

The Supreme Court then elaborated the reasons it was referring legal questions to the ECJ for a ruling. It was particularly seeking from the international court a pronouncement on the proper relationship between the Brussels I Regulation and the New York Convention.<sup>152</sup> The court noted that because of the supremacy of EU law “national courts must ensure the full effectiveness of EU Regulations, and they must refuse to apply all provisions of national law that are in conflict with this objective (in principle, including the rules in international treaties binding the Member State).”<sup>153</sup> It therefore stated that a determination by the ECJ of the relationship between the New York Convention and EU law was necessary

in order to properly decide this case and ensure that the Supreme Court of Lithuania, in its interpretation and application of the law, will not violate its duty as a national court to ensure the full effectiveness of EU law, thus upholding the principle of the supremacy of EU law.<sup>154</sup>

Because the New York Convention has been adopted by individual Member States, but not by the European Union, whereas the Regulation is EU law, the court is arguing that the Brussels I Regulation should take precedence over the New York Convention. However, assuming the ECJ decides this case after January 1, 2015 when the Recast becomes effective, it should be clear that the reverse is true; the New York Convention takes precedence over the Regulation.<sup>155</sup>

The Supreme Court also urged that an arbitral anti-suit injunction should be subject to the Brussels I Regulation and prohibited by it.<sup>156</sup> It noted that according to established jurisprudence, a court-issued anti-suit injunction was in violation of the Brussels I Regulation. According to the Supreme Court, under a proper interpretation of the jurisprudence of the ECJ, arbitral injunctions should be prohibited by the same Regulation because

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<sup>151</sup> *Id.* ¶ 47.

<sup>152</sup> *Id.* ¶¶ 62–69.

<sup>153</sup> *Id.* ¶ 63.

<sup>154</sup> *Id.* ¶ 69.

<sup>155</sup> See discussion *supra* Part III.C.

<sup>156</sup> Case Summaries, *supra* note 139, ¶ 80.

[a] contrary interpretation would mean that dispute settlement in arbitration would gain an advantage over dispute settlement in national courts, because antisuit injunctions issued by courts may not be recognized according to the rules of the Brussels I Regulation and antisuit injunctions issued by arbitral tribunals could limit the right of national courts to rule on their own jurisdiction to examine a concrete case.<sup>157</sup>

Having made clear its position that the Brussels I Regulation should govern arbitral anti-suit injunctions and prohibit them, the Lithuanian Supreme Court then asked the ECJ to decide whether a Member State court can refuse to recognize an arbitral award that amounts to an anti-suit injunction which either orders a party (1) not to bring a case or (2) not to bring certain claims in a case and (3) to decide whether refusal is proper when the award restricts the right of a court to rule on its own jurisdiction.<sup>158</sup>

The Lithuanian Supreme Court did not refer at any point to the Recast Regulation generally or to its Recital 12. This is understandable because the Recast does not apply until January 2015.<sup>159</sup> However, it is likely that the ECJ will take Recital 12 into consideration when it decides this case, given that by the time the decision is rendered the Recast will most likely be in effect and thus influence the ECJ's decision. For example, the Recital's clear statement that the New York Convention takes precedence over the Brussels I Regulation<sup>160</sup> would appear to undermine the Lithuanian

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* ¶¶ 81, 89. The full text of the three specific questions submitted to the ECJ is as follows:

1. Whether, if an arbitral tribunal issues an antisuit injunction by which it restricts a party from bringing a case with certain claims before a court of a Member State, which, under the rules of jurisdiction in the Brussels I Regulation, has jurisdiction to rule on the merits of the civil case, the court of a Member State has the right to refuse to recognize such arbitral award, because the award restricts the court's right to determine itself whether it has jurisdiction in the case under the rules of jurisdiction in the Brussels I Regulation;
2. In case the answer to the first question is in the affirmative, whether the same is true in the case where the antisuit injunction issued by the arbitral tribunal orders a party to the proceedings to restrict its claims in a case that is being examined in another Member State, and the court of that Member State has jurisdiction to examine that case under the rules of jurisdiction in the Brussels I Regulation . . .
3. Whether a national court seeking to ensure the supremacy of EU law and the full effectiveness of the Brussels I Regulation may refuse to recognize an award by an arbitral tribunal, if such award by the arbitral tribunal restricts the right of the national court to rule on its jurisdiction and competence in a case that falls under the jurisdiction of the Brussels I Regulation.

*Id.*

<sup>159</sup> See Brussels Recast, *supra* note 7.

<sup>160</sup> See *id.* art. 73(2); *id.* Recital 12, ¶ 3. As this Article was being finalized for publication,

Supreme Court's position concerning the supremacy of EU law and the duty of a state court to ensure the full effectiveness of the Brussels I Regulation, to the detriment of the New York Convention.

Moreover, the strong language in Recital 12 makes clear that arbitration is excluded from the Recast Regulation, ancillary proceedings involving arbitration are not governed by the Recast, parallel proceedings can go forward in two venues, and the ruling of one court on the validity of an arbitration agreement will not bind another court because preliminary questions about arbitration are not subject to recognition and enforcement under the Recast Regulation. All of these provisions undercut the Lithuanian Supreme Court's arguments that an arbitral anti-suit injunction should be governed by the Brussels Regime.

Nonetheless, the ECJ may still find an argument for declaring the arbitral anti-suit injunction improper. The reasoning could be based on the similar effect that anti-suit injunctions have, whether issued by a court or an arbitral tribunal. Court-issued anti-suit injunctions are prohibited because they interfere with the power of another court to determine its own jurisdiction, and arbitrator-issued injunctions have the same adverse impact on the court. Arguably, the injunction issued by an arbitrator is effectively a litigation maneuver to the extent that it affects a court's power to rule on its own jurisdiction in a litigated matter. In addition, even though labeled an "award," an arbitral anti-suit injunction is arguably not the kind of award envisioned by the New York Convention.

Another approach that the ECJ could take would be to adopt the Lithuanian courts' view that an arbitral award that embodies an anti-suit injunction restrains the court's jurisdiction and thereby violates the public policy of Lithuania. It would therefore not be enforceable under the New York Convention Article V(2)(b).<sup>161</sup> Whatever the ECJ may decide, its

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Advocate General Wathelet delivered his opinion in "Gazprom" OAO. See Case C-536/13, Opinion of Advocate General Wathelet in "Gazprom" OAO, CURIA (December 4, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160309&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6477>. The Advocate General's opinion may or may not be followed by the ECJ. However, it describes Recital 12 of the Recast as changing the landscape after *West Tankers 2009*, finding that under the Recast the anti-suit injunction in that case would not be prohibited. *Id.* ¶¶ 132–34. Advocate General Wathelet thus found that a prohibition of an anti-suit injunction granted by a court to protect arbitration cannot be justified under the Recast. Moreover, the Advocate General stated that even if the ECJ decided not to consider the Recast (which only becomes effective in January 2015), or even if it disagreed with his interpretation, there was no reasonable way to apply the result in *West Tankers 2009* to prohibit anti-suit injunctions issued by an arbitral tribunal. *Id.* ¶ 153. Although the Advocate General stated that the Supreme Court of Lithuania may have grounds under its own law to deny enforcement of the arbitration award, he concluded that the Brussels I Regulation does not require it "to refuse to recognize and enforce an anti-suit injunction issued by an arbitral tribunal." *Id.* ¶¶ 143, 189. He further concluded that an award that contains an anti-suit injunction cannot for that reason be refused enforcement under the New York Convention. *Id.* ¶ 189.

<sup>161</sup> The ECJ might look for analogous reasoning in its prior case, *Eco Swiss China Time Ltd. v.*

opinion in this case will likely provide important guidance for courts and tribunals dealing with parallel proceedings in disputes that involve arbitration.

In sum, the problems of parallel proceedings and the risk of inconsistent judgments, which were a major concern of the EU Commission and which prompted its 2010 Proposal for the Recast, remain problems after the Recast. Yet the Recast has provided certain clarifications that will contribute to providing some certainty as to aspects of the interface between arbitration and cross-border litigation. First, a court first seised is empowered to determine arbitrability for itself and (1) to make orders either referring the parties to arbitration while staying or dismissing the litigation, or (2) to decide that the arbitration is unenforceable and resolve the dispute on the merits. If the court reaches the merits, its decision is subject to enforcement under the Recast Regulation. Second, even if the first seised court decides the arbitration agreement is invalid, the second seised court is free to reach a different conclusion. Thus, a ruling on validity of the arbitration agreement does not bind another court even if validity is determined as an incidental question related to subject matter that is within the Recast Regulation. This means a “torpedo action” cannot stop a court that is second seised from ruling on the validity of the arbitration agreement. Third, the New York Convention takes precedence over the Recast Regulation with respect to the enforcement of inconsistent awards. Fourth, ancillary procedures, such as appointment of arbitrators and decisions on vacatur or enforcement, are outside the scope of the Recast. Nonetheless, the devil is in the details, and, as will be discussed below, many difficulties can arise that will not admit of any easy or obvious solution.

#### IV. ARBITRATION’S FUTURE IN EUROPE AFTER THE RECAST

Despite some welcome clarifications, the Recast does not solve the thorny issue of how courts and tribunals will deal with the enforcement of inconsistent judgments. Possible solutions might include the reinstatement of the use of anti-suit injunctions by courts to stop a party that has agreed to

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*Benetton Int’l NV*, in which it held that a Member State must grant an application for annulment if an award is contrary to EU competition law even if the competition law claim had not been raised before the arbitral tribunal. Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, 1999 E.C.R. I-3079. The violation of EU law would render the award against the national public policy of the Member State. *Id.* The argument in *Gazprom* might be that EU law provides that anti-suit injunctions interfere with court jurisdiction, so that such interference is equally violative whether it comes from a court or a tribunal. However, the analogy would not be on all fours with *ECO Swiss* because in *Gazprom* there is no EU law prohibiting anti-suit injunctions by arbitral tribunals, since arbitration is excluded from the Brussels Recast.

arbitrate from going forward with litigation. However, using anti-suit injunctions to protect arbitration does not seem likely given the resistance to this mechanism by the ECJ and by many policy makers in the civil law system where the anti-suit injunction is effectively not in use. Nonetheless, it may be that arbitrators, rather than courts, will undertake some form of anti-suit injunction in order to protect the arbitral process. In any event, there may be other methods going forward, outside of actions by courts and legislatures, which can nudge the European Union toward more harmony and uniformity in the interface between arbitration and litigation.

#### A. Problems Going Forward

Given the priority accorded to the New York Convention, it may not be difficult for a court to decide whether to enforce an arbitral award or an inconsistent court judgment when both come before it at the same time. However, the timing will not always be so well coordinated. A court may be asked to enforce a judgment when an arbitration award that is likely to be inconsistent has not yet been handed down. Could the claimant, even though no award has yet been issued, seek a partial final award from the tribunal that the arbitration agreement is valid and then try to use that partial final award as a way of blocking an inconsistent judgment in a foreign court?

Another 2012 *West Tankers* decision (*West Tankers 2012 Court of Appeal*), although not directly analogous, lends some credence to the above scenario.<sup>162</sup> In 2008, *West Tankers* had received an arbitral award in its favor, declaring that it had no liability to the insurers.<sup>163</sup> *West Tankers* then sought and received leave to enforce the declaration of nonliability as a judgment, and a judgment was entered against the insurers pursuant to section 66(2) of the English Arbitration Act of 1996 (*West Tankers 2011*).<sup>164</sup> The insurers then moved to set aside this order,<sup>165</sup> arguing primarily that a declaration of negative liability could not be enforced because it was simply a declaration of the parties' rights with no executory aspect that required enforcement.<sup>166</sup> However, both the English High Court (Commercial Court)<sup>167</sup> and the Court of Appeal<sup>168</sup> upheld the order.<sup>169</sup> Both

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<sup>162</sup> See *West Tankers Inc. v. Allianz SPA & Anor*, [2012] EWCA (Civ) 27 (Eng.).

<sup>163</sup> See *West Tankers Inc. v. Allianz SpA & Generali Assicurazione Generali*, [2011] EWHC (Comm) 829, ¶ 6 (Eng.) (referencing the award by Mr. Justice Field in the lower court decision).

<sup>164</sup> See *id.* ¶¶ 1, 7.

<sup>165</sup> See *id.* ¶ 1.

<sup>166</sup> See *id.* ¶ 15.

<sup>167</sup> See *id.* ¶ 32.

<sup>168</sup> See *West Tankers Inc. v. Allianz SPA & Anor*, [2012] EWCA (Civ) 27, ¶¶ 39–41 (Eng.).

<sup>169</sup> Although the court did not think that an award consisting of a declaration of rights, particularly a

courts were persuaded by West Tankers' argument that its award should be enforceable as a judgment under the English Arbitration Act as "an additional weapon in the Italian proceedings and/or a shield against enforcement if those proceedings were to result in a judgment . . . that the owners [West Tankers] were to blame for the collision."<sup>170</sup>

West Tankers feared the insurers might obtain a favorable judgment in Italy and then seek to have that judgment enforced in England pursuant to the Brussels I Regulation. The Regulation provides that "[a] judgment given in a Member State shall be recognized in the other Member States without any special procedure being required."<sup>171</sup> However, it also provides that a judgment shall not be recognized "if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought."<sup>172</sup> In the Court of Appeal, Lord Justice Toulson appeared to believe that recognizing and enforcing the arbitral award as a judgment under English law would protect West Tankers under the Brussels I Regulation from the consequences of a potential enforcement in England of an inconsistent judgment from the Italian court.<sup>173</sup>

Nonetheless, even though under section 66 of the English Arbitration Act of 1996 an award may be "enforced in the same manner as a judgment or order of the court to the same effect,"<sup>174</sup> it is not clear that such a judgment is entitled to be enforced as a Regulation judgment. In the *West Tankers 2011* case before the Commercial Court, the attorney for the insurers cited the case of *Solo Kleinmotoren GmbH v. Emilio Boch*<sup>175</sup> for the proposition that an arbitration award enforced as a judgment was not a Regulation judgment.

[T]o be a "judgment" for purposes of the [Brussels] Convention,<sup>176</sup> the decision must emanate from a judicial body of

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declaration of negative rights (i.e., no liability) was always enforceable as a judgment, it found the facts of this case supported enforcement. It cited with favor the lower court opinion of Mr. Justice Field who had stated that

[w]here . . . as here, the victorious party's objective in obtaining an order under s66 (1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award. *Id.* ¶ 14.

<sup>170</sup> *Id.* ¶ 12.

<sup>171</sup> Brussels I, *supra* note 1, art. 33 ¶ 1; Brussels Recast, *supra* note 7, art. 36 ¶ 1.

<sup>172</sup> Brussels I, *supra* note 1, art. 34 ¶ 3; Brussels Recast, *supra* note 7, art. 45 ¶ 1(c).

<sup>173</sup> After acknowledging West Tankers' concerns, Lord Justice Toulson cited the Brussels I Regulation's prohibition on recognizing an inconsistent foreign judgment. *See West Tankers Inc. v. Allianz SPA & Anor*, [2012] EWCA (Civ) 27, ¶ 13 (Eng.).

<sup>174</sup> Arbitration Act, 1996, c. 23, § 66 (Eng.), available at <http://www.jus.uio.no/lm/england.arbitration.act.1996/doc.html#1>.

<sup>175</sup> Case C-414/92, *Solo Kleinmotoren GmbH v. Emilio Boch*, 1994 E.C.R. I-2237.

<sup>176</sup> The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and

a Contracting State deciding on its own authority on the issues between the parties; accordingly, a settlement recorded in an order of a court was not a judgment of the purposes of the Convention.<sup>177</sup>

In other words, to qualify as a Brussels Convention (or Brussels I Regulation) judgment, the judgment would have to be one that a court had made in deciding the issues between the parties, not simply a recording of what the parties (or tribunal) had done.<sup>178</sup> Moreover, the Recast Regulation's complete exclusion of arbitration also casts doubt on whether an arbitration award that is enforced as a judgment in a national court can be treated as a judgment under the Recast. Certainly, according to Recital 12, paragraph 2, a decision by one court on the validity of an arbitration agreement does not bind a court of another Member State.<sup>179</sup> In addition, paragraph 4 of Recital 12 states that "[t]his Regulation should not apply. . . to any action or judgment concerning . . . recognition or enforcement of an arbitral award." Thus, the enforcement of an arbitral award as a judgment would appear not to provide protection against an inconsistent foreign judgment under the Recast Regulation.

Assuming an arbitration award cannot be transformed into a Recast Regulation judgment by a national court, how much protection will it receive via the New York Convention? As noted by Lord Justice Toulson, West Tankers wanted its declaratory award to be enforced as a judgment to serve both as a shield in England, against a potential inconsistent Italian judgment, and as a sword in the Italian proceedings.<sup>180</sup> Although the Recast provides that the New York Convention will take precedence over the Recast Regulation, if the insurers came to enforce an Italian judgment in England against an existing arbitral award, the New York Convention

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Commercial Matters 1968 was the predecessor of the Brussels I Regulation, which superseded the Convention. See *Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I")*, EUROPA, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm) (last visited Sept. 21, 2014).

<sup>177</sup> See *West Tankers Inc v. Allianz SpA & Generali Assicurazione Generali*, [2011] EWHC (Comm) 829, ¶ 18 (Eng.).

<sup>178</sup> In *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, Maxi Scherer argues that a judgment on an arbitration award is different from a court judgment because of its ancillary nature. That is, the award judgment relates to a prior adjudication. Scherer, *supra* note 107, at 627–28. She notes that "[a]ccordingly, only the initial award and not the ancillary award judgment should, in principle, be open to recognition or enforcement . . ." *Id.* at 628.

<sup>179</sup> 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. Brussels Recast, *supra* note 7, Recital 12, ¶ 2.

<sup>180</sup> See *West Tankers Inc. v. Allianz SPA & Anor*, [2012] EWCA (Civ) 27, ¶ 12 (Eng.).

would not apply. The Convention applies “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . .”<sup>181</sup> In the *West Tankers* arbitration, the award was made in England and the action to enforce it as a judgment was also in England, so its enforcement there could only be under English law, not under the Convention. Thus, if the award and an inconsistent judgment had come before the English court at the same time, it could not be enforced under the New York Convention because enforcement of the award was sought in the same state where the award was made.

Moreover, it is likely that in many cases, as is true in *West Tankers*, the court of the state where the award was made will be called upon to protect an award made in its jurisdiction against an inconsistent foreign judgment. Thus, it appears that the applicable law governing enforcement of the arbitral award would be national law and not the New York Convention or the Recast Regulation, since arbitration is excluded from the Regulation. Therefore, the New York Convention could not serve as a shield in England to protect an arbitral award made in England.<sup>182</sup>

The question then is whether an English court can protect such an award under its national law and whether it can refuse to enforce a foreign Member State judgment on the basis of its inconsistency with an arbitration award, given that the Brussels Recast provides that such a judgment “shall be recognized . . . without any special procedure being required.”<sup>183</sup>

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<sup>181</sup> New York Convention, *supra* note 4, art. I(1). The English Arbitration Act of 1996, section 100, defines a New York Convention award as “an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.” Arbitration Act, 1996, c. 23, § 100 (Eng.). The situation is different in the United States, however, based on its implementation of the second sentence of Article I(1) of the New York Convention, which provides that the Convention “shall also apply to arbitral awards not considered as domestic awards in the State where there recognition and enforcement are sought.” New York Convention, *supra* note 4, art. I(1). In the United States, implementing legislation in the Federal Arbitration Act (FAA) defines a non-domestic award as one that “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.” 9 U.S.C. § 202 (2014); see *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983).

<sup>182</sup> Unlike in the United States, in most Contracting States to the New York Convention, the use of the second criterion—applying the New York Convention to awards not considered as domestic awards in the State where recognition is sought—“has remained a dead letter.” ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 22 (1981). According to Gary Born, “the overwhelming tendency of national legislatures is to adopt a strictly territorial approach to arbitral awards, treating any awards made on national territory as domestic (subject to local annulment actions), and any awards made outside national territory as foreign/non-domestic (not subject to local annulment actions, and instead protected by the Convention’s recognition requirements.)” BORN, *supra* note 79, at 2380–81.

<sup>183</sup> Brussels Recast, *supra* note 7, art. 36, ¶ 1; Nielsen, *supra* note 7, at 591. One way for a Member State court to give more protection to an arbitration award seated in its territory that also needed to be



However, the New York Convention may be able to function as a sword against an inconsistent judgment if it can be applied to obtain enforcement of an award in a state other than the state where the award was made. Whether the Italian court would recognize and enforce a negative declaratory award under the Convention is not clear. Nor is it clear whether a partial final award declaring that an arbitration agreement was valid would be recognized and enforced under the New York Convention in a foreign court and thereby prevent that court from finding the same agreement to be invalid.

In *West Tankers 2012*, the English court's recognition of the declaratory award as a judgment came after there was a final award. Although a partial final award would occur earlier in the arbitral proceedings, there is no obvious reason why it should not be recognized and enforced as an award in a foreign court under the New York Convention.

However, the timing is important. As discussed above, a court that has already declared an arbitration agreement invalid may be unlikely to enforce an inconsistent award from another jurisdiction that would undermine its own decision despite the priority of the New York Convention. It would likely use a ground under the Convention such as public policy to resist a decision in another Member State that was counter to its own decision.<sup>184</sup> If the court had not yet decided the question, however, the New York Convention should require enforcement of the partial final award on the arbitration agreement's validity.

Finally, there is also the unresolved question of whether the complete exclusion of "ancillary procedures" from the scope of the Recast Regulation means that anti-suit injunctions are included within those procedures and

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enforced in its territory would be to revive the notion of enforcement of a nondomestic award under the New York Convention. Such an award, as in the United States, could be based on some international connection or relationship, such as one or more of the parties being from a different country or the subject matter of the dispute being international business or property. See Harry Ormsby, *The Recast Brussels Regulation and "Domestic" Arbitrations*, KLUWER ARB. BLOG (Dec. 9, 2014), <http://kluwarbitrationblog.com/blog/2014/12/09/the-recast-brussels-regulation-and-domestic-arbitrations/> (stating that paragraph 3 of Recital 12 of the Recast, which provides that the New York Convention has priority over the Recast, would be more useful in resolving conflicts between enforcement of inconsistent awards and judgments if "domestic awards which are sufficiently international in nature are able to be categorised as non-domestic awards for the purpose of the Convention").

<sup>184</sup> See New York Convention, *supra* note 4, art. V(2) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that . . . The recognition or enforcement of the award would be contrary to the public policy of that country."). Depending on the reason for a court's finding of invalidity of the arbitration agreement, the ground for refusal might also be Article V(2)(a), which provides for non-recognition and non-enforcement if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country." New York Convention, *supra* note 4, art. V(2)(a).

therefore cannot be prohibited under the Recast. These and many other questions will arise once the Recast Regulation becomes applicable to the Member States in 2015.

## B. Possible Solutions

### 1. *What the Recast Accomplishes*

By making clear that a decision of invalidity by a court first seised does not stop either a second seised court or a tribunal in the second court's jurisdiction from going forward, the Recast can serve to deter some parties who are simply filing a suit in order to harass or delay. In addition, assuming the ECJ does not overturn decisions such as that of the English High Court holding in *West Tankers 2012* that tribunals can award both damages for breach of an arbitration clause and an indemnity, these potential remedies might dissuade parties from initiating vexatious parallel proceedings.

There is also the possibility of using anti-suit injunctions to stop parallel proceedings. It is probably unlikely that court-issued anti-suit injunctions will be reinstated after the Brussels Recast (even though they might arguably be considered "ancillary proceedings" outside the scope of the Recast). Nonetheless, arbitral tribunals may well issue orders for the purpose of preventing "prejudice to the arbitral process itself" under rules such as the UNCITRAL Arbitration Rules or under the UNCITRAL Model Law<sup>185</sup> unless the ECJ rules otherwise.

The value of an arbitral order that would function like an anti-suit injunction should be considered in light of the harm that can be caused by a parallel proceeding that is initiated in bad faith for the purpose of delay and harassment. The purpose of UNCITRAL Rule 26(2)(b) is to provide a tribunal with a way of controlling against conduct that would undermine the arbitral process. International arbitrators, who are generally chosen because they are believed to be fair-minded, independent, and impartial, should be entitled to be trusted not to use such measures often or indiscriminately. Because the New York Convention does not prevent parallel proceedings, this vulnerability to abuse could and should be shored up by a mechanism such as an anti-suit injunction. Even lawyers trained in the civil law tradition find that there are times when an anti-suit injunction should be issued by an arbitral tribunal to protect the integrity and effectiveness of the arbitral process.<sup>186</sup> An anti-suit injunction can accomplish this, particularly

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<sup>185</sup> See UNCITRAL ARBITRATION RULES, *supra* note 118, art. 26 (2)(b); see UNCITRAL MODEL LAW 2006, *supra* note 118, art. 17(2)(b).

<sup>186</sup> See, e.g., Gaillard, *supra* note 117, at 264 ("[A]ntisuit injunctions may . . . have an edifying effect, that of reminding the parties of their voluntary acceptance of international arbitration for the

if backed by the possibility that the tribunal could ultimately award damages if the litigating party did not withdraw its suit.

The counter argument is that sometimes the initiation of a parallel proceeding is not commenced simply as a tactic to delay but rather because the party has a legitimate claim that it never was a party to the alleged arbitration agreement. Thus, such a party would maintain that it should not be barred from pursuing its claim in court by the potential imposition of a damages claim by the tribunal if it goes forward. However, in considering the two different motivations—delay versus legitimate claim—the goals of efficiency and speed would certainly push toward the legitimate claim being presented in the arbitration proceeding. In many instances, if the tribunal rejects a challenge to its jurisdiction, that claim will be reviewed by a court.<sup>187</sup> Moreover, the tribunal itself may well decide that there is no valid arbitration agreement. On balance, an order by the tribunal to a party to cease litigation in another jurisdiction would seem more likely to deter harassing litigation than to undermine a legitimate claim.

Although the Recast has provided a number of helpful clarifications, more steps can still be taken to deal with the remaining problems. The next section will consider some possible ways of developing a more uniform and predictable interface between arbitration and litigation.

## 2. *What Remains to be Done*

The forces at work in the last few years on whether and to what extent the Brussels I Regulation should impact international arbitration appear to have grown out of the inherent tensions between national law, regional (EU) law, and international law. In the struggle over whether arbitration should come within the scope of the Brussels I Regulation, those favoring a national law approach and those favoring an international law approach ultimately found common ground. That common ground was to continue to exclude arbitration from the Brussels I Regulation.<sup>188</sup> The Member States preferred the autonomy to apply their own national law rather than some attempted harmonization by the European Union. One might think that

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resolution of their dispute, and protecting the integrity of the arbitral process.”); Lévy, *supra* note 120, at 123 (“[A]rbitrators should not refrain from issuing anti-suit injunctions where such measures appear necessary to protect the arbitral proceedings.”).

<sup>187</sup> See, e.g., UNCITRAL MODEL LAW 1985, *supra* note 76, art. 16(3) (“If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal . . .”).

<sup>188</sup> The reason that arbitration was excluded from the original Brussels Convention in 1968 was because it was believed that the New York Convention and the 1961 European Convention on International Commercial Arbitration already sufficiently regulated international commercial arbitration. See Radicati di Brozolo, *supra* note 18, at 425.

those favoring an international approach would not support the Member States' application of their own law to international arbitration.<sup>189</sup> However, what seemed to be the concern of many internationalists was that more regional control of arbitration of any kind through regulation would limit the flexible rules in some Member States. That flexibility has permitted competition between legal systems in different Member States and provided broad freedom and autonomy in matters of arbitration.<sup>190</sup> There is, however, a certain inevitability that there will and there should be a further harmonization of laws affecting arbitration. Commentators have pointed out that already Member State laws on arbitration are affected by EU law.<sup>191</sup> Public policy decisions by arbitrators in individual Member States are impacted by EU policy.<sup>192</sup> Moreover, in the EU there are existing legal provisions outside of the Recast Brussels Regulation that relate to arbitration.<sup>193</sup> Professor Massimo Benedettelli has listed these areas where there is room for further harmonization of arbitration law: subject matter arbitrability, permitting arbitrators to seek preliminary rulings from the ECJ as to the proper interpretation of EU Treaties and EU legislation, "creat[ing] a new ground of exclusive jurisdiction . . . under the . . . competence of the State of the seat of the arbitration,"<sup>194</sup> and "recognition and enforcement of judgments and awards."<sup>195</sup>

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<sup>189</sup> Of course, the international arbitration community is not monolithic, and many favored the EU Commission 2010 Proposal. *See supra* text accompanying notes 71–77.

<sup>190</sup> *See* Radicati di Brozolo, *supra* note 18, at 424–25.

<sup>191</sup> *See, e.g.*, Allen B. Green & Josh Weiss, *Public Policy and International Arbitration in The European Union*, 22 AM. REV. INT'L ARB. 661, 666–68 (2011) (discussing Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-03055, in which the ECJ held that a Member State must grant an application for annulment if an award was contrary to EU competition law even if the competition law claim had not been raised before the arbitral tribunal).

<sup>192</sup> *See, e.g.*, Maud Piers, *How EU Law Affects Arbitration and The Treatment of Consumer Disputes: The Belgian Example*, 59-JAN DISP. RESOL. J., 76, 79 (2005) ("Belgian case law and jurisprudence generally accept that arbitrators have a duty to raise public policy issues on their own initiative. This is consistent with the arbitrator's duty to the parties to issue an enforceable award. An arbitral award that violates a directly applicable public policy could be set aside or not enforced. Were it otherwise, parties could choose arbitration to evade EC-public policy-based rules.")

<sup>193</sup> *See, e.g.*, Benedettelli, *supra* note 18, at 585, 592 ("Starting with a decision in 1992 in the case of *Elf Aquitaine-Thyssen/Minol*, the EU Commission has required the settlement by arbitration of private disputes arising in connection with alleged breaches of those behavioral or structural measures which the Commission may impose when granting conditional merger clearances under Articles, 6, paragraph 1, *lit.* (b) and 8, paragraph 2, *lit.* (b), Reg. (EC) no. 139/2004." (citations omitted)).

<sup>194</sup> Benedettelli, *supra* note 18, at 615. The United States has developed to some extent a doctrine of preference for the jurisdiction of the seat of arbitration, using the concepts of "primary jurisdiction" for the court of the seat and "secondary jurisdiction" for other courts. *See, e.g.*, *Karaha Bodas Co. v. Perusahan Pertamina Minyak*, 364 F.3d 274, 287 (5th Cir. 2004).

<sup>195</sup> Benedettelli, *supra* note 18, at 616; *see also* Benedettelli, *supra* note 18, at 613–19. In the European Union, one possible avenue of harmonization might be for the European Union itself to adopt the UNCITRAL Model Law and require Member States to adopt it or conform their laws to it. A number of Member States have already adopted a version of this law, which is a very highly regarded

In the meantime, however, the problem not resolved by the Recast—that arbitration and litigation of the same issues can proceed simultaneously with the high risk of inconsistent awards (i.e., the issues of parallel proceedings)—is a global problem, not merely a European regional problem.<sup>196</sup> Lack of a global solution or even a reasonably harmonized approach to the problem undermines predictability and therefore confidence in the arbitration process. Even the process in Europe will not be uniform because courts in EU countries where the mechanism is available can continue to issue anti-suit injunctions against a party who has brought a lawsuit in a non-Member State in breach of an arbitration agreement. Non-EU countries, such as the United States and Singapore, will also in certain circumstances issue anti-suit injunctions. Having a global consensus on how best to avoid parallel proceedings in violation of an arbitration agreement would help support the fundamental objective of the New York Convention to enforce arbitration agreements.

One approach toward harmonization could be to give more deference to the court of the seat. This would have been one result of the Commission Proposal discussed earlier.<sup>197</sup> The idea has already been developed in the United States and elsewhere to some extent by means of the concept of “primary” and “secondary” jurisdiction.<sup>198</sup> The concept derives from a reading of the New York Convention that gives preferential status to the court of the seat with respect to procedural matters (Article V(1)(d)) and to the setting aside of awards (Article V(1)(e)).<sup>199</sup> “Primary” jurisdiction is said to belong to the court with the jurisdiction to annul or set aside an award while “secondary” jurisdiction is that of other courts.<sup>200</sup> Encouraging

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*lex arbitri*; it has been adopted in sixty-seven countries. See *Status UNCITRAL Model Law*, *supra* note 106. However, there would likely be strong resistance from countries like England and France who are quite predisposed to their own laws.

<sup>196</sup> See, e.g., Grace Gunah Kim, Note, *After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*, 12 CARDOZO J. CONFLICT RESOL. 573, 603 (2011); Andrew Pullen, *The Future of International Arbitration in Europe: West Tankers and the EU Green Paper*, 12 INT'L ARB. L. REV. 56, 61 (2009).

<sup>197</sup> See *supra* text accompanying notes 68–71.

<sup>198</sup> See *Karaha Bodas Co.*, 364 F.3d at 297–310.

<sup>199</sup> See W. Michael Reisman & Heide Iravani, Symposium, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 12–17 (2010) (“[T]he Convention establishes two tiers of review competence, making a sharp distinction between so-called ‘primary’ or ‘venue’ jurisdictions and ‘secondary’ or ‘enforcement’ jurisdictions.”). This view of primary and secondary jurisdiction with respect to vacatur and enforcement of awards has been criticized by commentators who believe the annulment of an award at the seat is not necessarily preclusive of the possibility of enforcement in other countries. See, e.g., Luca G. Radicati di Brozolo, *The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao Lignite*, 25 AM. REV. INT'L ARB. 47 (2014); Marc J. Goldstein, *Annulled Awards in the U.S. Courts: How Primary is “Primary Jurisdiction?”*, 25 AMER. REV. INT'L ARB. 19 (2014).

<sup>200</sup> See Reisman & Iravani, *supra* note 199, at 12; see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997); CHRISTOPHER DUGAN ET AL., INVESTOR-STATE

an international perspective that broadens the concept to include the court at the seat of arbitration as having primary jurisdiction under Article II of the Convention on the question of the validity of the arbitration agreement could contribute to a more harmonized approach to parallel proceedings occurring between a court and a tribunal.

In considering any potential areas of harmonization, however, a cautionary note is in order: based on the resistance shown to EU regulation of arbitration in the run-up to the Recast Regulation, further attempts at harmonization of arbitration laws and rules in the European Union should not stray far from existing international standards and practice and should maintain to the greatest extent possible the autonomy of private parties. There should be significant flexibility in fixing the balance among EU Rules, national rules, and rules chosen by the parties.

There are, however, a number of ways that arbitration practice could be nudged toward uniformity of practice rather than harmonization of laws. Soft law instruments such as the IBA Rules on Taking of Evidence have already created a widely acceptable approach for taking evidence in arbitration hearings that is a hybrid of common law and civil law.<sup>201</sup> The IBA Guidelines on Party Representation in International Arbitration (adopted May 25, 2013), although somewhat controversial and not yet widely in use, reflect international concerns over different ethical standards applicable to arbitration counsel from different jurisdictions.<sup>202</sup> Other soft law instruments could be created that would encourage but not require their

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ARBITRATION 682 (2011) (“The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award. Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country. The Convention mandates very different regimes for the review of arbitral awards (1) in the countries in which, or under the law of which, the award was made, and (2) in other countries where recognition and enforcement are sought. Under the Convention, the country in which, or under the arbitration law of which, an award was made is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.”).

<sup>201</sup> See Timo Ylikantola, *Document Discovery in Current International Arbitration Practice: Are There Differences Between Common Law and Civil Law Traditions?*, 16 VINDOBONA J. INT’L COM. L. & BUS. 123, 131 (2012) (“One of the main purposes of the IBA Rules of Evidence is to provide an efficient, economical and fair process, especially to parties who are from different legal cultures. Therefore, the IBA Rules of Evidence reflect procedures in use in many different legal systems and they are designed to be used in connection with or to supplement institutional, ad hoc or other rules or procedures governing international arbitrations.”).

<sup>202</sup> At the IBA’s 17th Annual International Arbitration Day in February 2014, delegates noted that arbitrators come from different legal cultures and that “there is a current compelling need for the development of a code of ethics in international arbitration and for the adaptation of tribunals and institutions to the adoption of such a code.” Sam Chadderton, *Arbitration: What Does the Future Hold?*, 68 IBA GLOBAL INSIGHT 49, 50–51 (2014).

adoption by the parties.<sup>203</sup> Such instruments could be created by private groups and organizations, such as UNCITRAL, UNIDROIT, or the IBA. Another potentially influential private group is the European Law Institute (ELI), created in 2011 and modeled in part after the American Law Institute in the United States.<sup>204</sup> According to a European Commission Press Release in 2011, the ELI will “identify possible solutions to help improve the application of EU law, and develop suggestions for reforms of EU legislation in all areas.”<sup>205</sup> Thus, the ELI could provide a framework for examining the application of arbitration laws and play an important role in developing solutions and suggesting reforms.

One possible model for achieving flexibility while encouraging more harmonization is the proposed Regulation on a Common European Sales Law (CESL).<sup>206</sup> Proposed in 2011,<sup>207</sup> the CESL remains controversial, but there are elements in its structure that might be profitably used in an arbitration context. If adopted, the CESL would provide a harmonized contract law regime within the national law of a Member State.<sup>208</sup> It would apply only when the parties opted to use it. If the parties chose it, however, the national contract law would not apply, unless some aspect of contract law was not covered by the CESL.<sup>209</sup> In addition, the CESL could be chosen when one of the parties was from a third country, if the other party was from a Member State.<sup>210</sup>

If a similar concept to CESL were developed for arbitration law, it would permit parties a choice between two laws: either the Member State’s law at the seat or the regional arbitration regime. Having an optional arbitration regime would permit a Member State to keep its original arbitration law, but the State might be inspired to modify that law if it found that most parties were choosing the alternate arbitration regime. Moreover, the option of a regional arbitration regime might ultimately lead to a

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<sup>203</sup> See generally INTERNATIONAL INVESTMENT LAW AND SOFT LAW (Andrea K. Bjorklund and August Reinisch eds., 2012) (containing interesting perspectives on the role of soft law instruments in international investment law).

<sup>204</sup> Press Release, European Comm’n, European Commission Welcomes Foundation of the European Law Institute (June 1, 2011), available at [http://europa.eu/rapid/press-release\\_IP-11-666\\_en.htm](http://europa.eu/rapid/press-release_IP-11-666_en.htm).

<sup>205</sup> *Id.*

<sup>206</sup> *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011) [hereinafter CESL].

<sup>207</sup> *Id.*

<sup>208</sup> See *id.* at 6. Despite opposition from Germany and the United Kingdom, the CESL appears on path to adoption. See *European Parliament votes for Common European Sales Law*, OUT-LAW.COM (Feb. 27 2014), <http://www.out-law.com/articles/2014/february/european-parliament-votes-for-common-european-sales-law/>. Parliament voted in favor of the law on February 26, 2014. *Id.* The next step would be adoption by the European Council of Ministers, which would cause it to become law. *Id.*

<sup>209</sup> See CESL, *supra* note 206, at 6.

<sup>210</sup> See *id.* at 7.

broader international consensus on parallel proceedings between arbitration and litigation.

## V. CONCLUSION

In the Explanatory Memorandum to its 2010 Proposal on Brussels I, the EU Commission explained its concern about the interface between arbitration and litigation.

[B]y 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.<sup>211</sup>

The Commission Proposal of a *lis pendens* rule within the Recast Brussels Regulation that would have given a jurisdictional preference to the court or the tribunal of the seat seemed to be a reasonable solution to the problem of parallel proceedings. However, it would have ended the exclusion of arbitration from the Recast Brussels Regulation and might have potentially led to other court decisions like *West Tankers 2009* that could blur the lines between the Regulation's application to litigation and to arbitration. The rejection of the Commission Proposal by the Parliament and the Council leaves the parallel proceedings issue unresolved, although some clarification was achieved. The statement that precedence is to be given to the New York Convention over the Recast Regulation was a helpful step although it is not altogether clear how this will work in practice. Other provisions from Recital 12 also bring needed clarity. A second seised court can reach a different conclusion about an arbitration agreement's validity, and the ruling of the first court will not be binding on the second court. However, decisions about enforcement when there is a judgment that is inconsistent with an arbitral award will not be easy to implement in a fair and reasonable way.

More work needs to be done to create a predictable and transparent interface between arbitration and cross-border litigation, which should be the focus of private international law organizations and groups. If the camel's nose is not going to be permitted under the tent, then nonetheless a way must be found for the tent dweller and the camel to work together for their mutual benefit.

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<sup>211</sup> *Commission Proposal*, *supra* note 70, Explanatory Memorandum, § 1.2.