

The arbitration exception in the Brussels Jurisdiction Regulation in the light of the judgment of the European Court of Justice in *Allianz SpA et al. v. West Tankers, Inc.*

Abstract

Dit artikel analyseert de reikwijdte en inhoud van de arbitrage-exceptie onder de EEX-Verordening naar aanleiding van de uitspraak van het Hof van Justitie in de *West Tankers*-zaak. Het Hof van Justitie oordeelt dat de 'anti-suit injunctions' onverenigbaar zijn met de EEX-Verordening, zelfs wanneer zulke maatregelen de werking van een arbitragebeding effectueren. Dit is in lijn met eerdere rechtspraak op dit punt. Toch is de uitspraak in de *West Tankers*-zaak in de literatuur heftig bekritiseerd. Dit artikel onderzoekt of deze kritiek gerechtvaardigd is en of de EEX-Verordening herzien zou moeten worden. Daarbij gaat dit artikel met name in op de vraag of het gewenst is om de arbitrage-exceptie uit de EEX-Verordening te schrappen, zoals voorgesteld in het Heidelberg Report en het in april 2009 gepubliceerde Groenboek betreffende de herziening van de EEX-Verordening.

1. Introduction

The meaning and reach of the arbitration exception under the Brussels Regulation, and previously under the Brussels Convention, has generally been subject to a vivid discussion among arbitration and private international law specialists. The debate on this issue particularly intensified following the recent judgment of the European Court of Justice (hereinafter: ECJ or Court) in *Allianz SpA et al. v. West Tankers, Inc.*¹ In its ruling, the Court confirmed that anti-suit injunctions are incompatible with the EU legislation even when issued in support of arbitration agreements. This holding comes as no surprise not only to civil law lawyers. It is in line with earlier decisions of the Court, such as *Gasser*² and *Turner*.³ In both judgments, the Court held that such injunctions were not compatible with the system established by Regulation (EC) No 44/2001,⁴ even if issued by the court which is competent according to the jurisdictional rules of the Regulation.⁵ Yet, the decision of the ECJ delivered in *West Tankers* has been widely criticised,⁶ especially by lawyers from common law jurisdictions and arbitration law specialists. This contribution analyses the reasoning of the ECJ and examines to what extent the criticism of this judgment so far expressed in arbitration theory and practice is justifiable. Further, the need to amend the Brussels I Regulation is considered and comments on the proposals suggested in that

respect are given. Thereby a proposal to remove the arbitration exception from the scope of the application of the Brussels I Regulation is considered in particular.

2. Summary of the facts and of the reasoning of the Court in the *West Tankers* judgment

The vessel 'Front Comor' collided with a jetty owned by Erg Petroli SpA in Syracuse (Italy). The vessel was owned by West Tankers Inc. and was chartered to Erg Petroli SpA. The charter party provided for the applicability of English substantive law. It contained an arbitration clause according to which all disputes arising under the charter party would be resolved by arbitration in London. The compensation for the damage resulting from the collision was paid by Erg Petroli's insurers Allianz SpA (formally called Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali (hereinafter: Allianz et al.). In order to recover damages for its uninsured losses, Erg Petroli initiated arbitration proceedings in London against West Tankers. For their part Allianz et al. filed a claim against West Tankers with the court in Syracuse to recover the amounts paid for the damage caused to Erg Petroli under the insurance policy. Whether West Tankers could have been exempted from liability for navigation errors according to the clause in the charter party or the Hague Rules⁷ was the subject-matter in both proceedings.

West Tankers applied to the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court). It sought a declaration that Allianz et al. were bound by the arbitration agreement in the charter party between West Tankers and Erg Petroli SpA. Additionally, it applied for an injunction restraining Allianz et al. from participating in any proceedings in relation to the dispute except in arbitration,

- 1 *Allianz SpA/Generali Assicurazioni Generali SpA v. West Tankers, Inc.* 10 February 2009, Case C-185/07, NIPR 2009, 128 (also available at <curia.europa.eu>, visited on 25 February 2009) (hereinafter: *West Tankers*).
- 2 *Erich Gasser GmbH v. MISAT Srl*, Case C-116/02, 9 December 2003, [2003] ECR I-14693, NIPR 2004, 36, where the ECJ held that the court of a Member State that has jurisdiction under Art. 23 could not issue an anti-suit injunction restraining the party from pursuing proceedings before the court of another Member State which was first seised of the dispute.
- 3 *Turner v. Grovit*, Case C-159/02, 27 April 2004, [2004] ECR I-3589, NIPR 2004, 146, where the ECJ held that the court of a Member State could not issue an anti-suit injunction to restrain a party from pursuing proceedings in another Member State on the ground that these proceedings were initiated in bad faith.
- 4 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 2001, L 12/1) (hereinafter: Brussels I Regulation or Regulation).
- 5 Cf., H. Seriki, 'Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin?', 23 *Journal of International Arbitration* 2006, pp. 25 et seq., expressing doubts whether the English courts can still grant anti-suit injunctions to support arbitration agreements after the decision in *Gasser* and *Grovit*.
- 6 See 'West Tankers: Online Symposium', e.g., 'Dickinson on West Tankers: Another One Bites the Dust', 'Harris on West Tankers', 'Kessedjian on West Tankers', A. Briggs, at <conflictoflaws.net/2009/west-tankers-online-symposium> (hereinafter: 'West Tankers: Online Symposium').
- 7 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924), amended by the Protocol to Amend the International Convention of the Unification of Certain Rules of Law relating to Bills of Lading (Visby Rules) (Brussels, 23 February 1968) and the Protocol amending the Convention, as amended by the Protocol of 23 February 1968 (Brussels, 21 December 1979) (*UNTS* Vol. 1412, p. 127, No 23643).

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particularly in the proceedings before the Italian court in Syracuse. The High Court granted both applications, taking the view that the ECJ's decision in *Turner* did not preclude anti-suit injunctions in support of arbitration agreements.⁸ Allianz et al. appealed against this decision, arguing that such anti-suit injunctions were contrary to the Brussels I Regulation. In deciding on the appeal, the House of Lords expressed the view that an anti-suit injunction in the present case could not infringe the Regulation, because all arbitration matters were excluded from its scope of application by Article 1(2)(d). It decided to stay its proceedings and referred the following question to the ECJ for a preliminary ruling:

'Is it consistent with Regulation (EC) No 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?'

The ECJ held that the claim for damages brought against West Tankers in the proceedings before the Italian court was within the scope of application of the Brussels I Regulation. Consequently, an anti-suit injunction restraining a party from pursuing these proceedings is not compatible with the Regulation. More importantly, the ECJ also held that 'a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within [Regulation's] scope of application'.⁹ Thus, in the view of the Court 'the objection of lack of jurisdiction raised by West Tankers ... on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation'.¹⁰ In particular this part of the reasoning of the ECJ has been subject to criticism.¹¹ In the view of some commentators, the Court failed to address in a satisfactory manner the extent and the scope of the arbitration exception under the Regulation. Is the judgment of the ECJ in *West Tankers* really only a political decision as a number of critics suggest? Or does the Court still provide sound legal grounds for its decision? It seems appropriate to start the discussion of these issues by an attempt to define the scope of the arbitration exception under the Regulation, in the context of the circumstances and the facts of the present case.

3. Claim for damages against West Tankers is within the scope of application of the Regulation

The Court held that the substantive subject-matter of the dispute was decisive when determining whether a dispute fell within the scope of the Regulation.¹² Thereby, it merely confirmed the position taken in earlier decisions, in particular in *Rich*¹³ and *Van Uden*.¹⁴ Already in *Rich* it is stated that '[i]n order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute'.¹⁵

The ECJ in *West Tankers* properly distinguished between the proceedings before the English courts leading to the issuing of an anti-suit injunction from the proceedings in Italy in which the claim for damages was brought. It rightly considered the former to be outside the scope of the Regulation.¹⁶ Already from the Explanatory Report written on the Convention on the Association of Denmark, Ireland and the United Kingdom¹⁷ it follows that the arbitration exception includes not only the arbitral procedure as such, but also 'court proceedings which are ancillary to arbitration'.¹⁸ According to the Report, the 'exception' extends to judgments determining whether an arbitration agreement is valid or not. With respect to the claims for damages, the Court held that it

did fall within the scope of the Regulation.¹⁹ In other words, the question is whether the Italian court in Syracuse has jurisdiction under Article 5(3). Besides, the Court held that deciding on the validity of an arbitration agreement upon an objection to jurisdiction concerning the subject-matter which falls within the Regulation is not covered by the exception of Article 1(2)(d). Thereby, it referred to the Report on the accession of the Hellenic Republic to the Brussels Convention.²⁰

It should be emphasised that in the present case the injunction was clearly intended to restrain Allianz et al. from pursuing the *action for damages* by means other than in arbitration proceedings. The Court rightly held that the claim for damages did fall within the scope of the Regulation. Consequently, any injunction intending to restrain a decision on this issue is obviously incompatible with the Regulation.²¹ The fact that arbitration may have been agreed upon with respect to these claims does not place this subject-matter outside the scope of the Regulation. Nor does the fact that a decision on the validity of an arbitration agreement may be taken in the context of such proceedings entail such an effect. In her Opinion, the Advocate General rightly stated that 'the principle of mutual trust can also be infringed by a decision of a court of a Member State which does not fall within the scope of the regulation obstructing the court of another Member State from exercising its competence under the regulation'.²²

It is true that as soon as the existence of the arbitration agreement is invoked, it triggers the application of the 1958 New York Convention.²³ However, the fact that another international instrument may be applicable to this particular question does not imply that the decision on the jurisdiction on the merits of the dispute – the claim for damages – is thereby

8 In granting the anti-suit injunction, the High Court relied on *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Co. Ltd.* [2005] 1 Lloyd's Rep. 67.

9 *West Tankers*, par. 26.

10 *Id.*, par. 27.

11 See, e.g., the comment by Layton on 'West Tankers: Online Symposium', par. 4 (*supra* n. 6) stating that the decision of the ECJ under par. 27 'is particularly regrettable'.

12 *West Tankers*, par. 22.

13 Case C-190/89 *Rich* [1991] ECR I-3855, NIPR 1993, 150, par. 24 (excerpt in 17 *Yearbook Comm. Arb.* 1992, pp. 233 et seq.).

14 Case C-391 *Van Uden* [1998] ECR I-7091, NIPR 1999, 77, paras. 33 and 34.

15 *Rich*, par. 24 (*supra* n. 13).

16 *West Tankers*, par. 23.

17 P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979, C 59/71) (hereinafter: Schlosser Report).

18 Schlosser Report, par. 64, providing examples such as the appointment of arbitrators, determining the place of arbitration and an extension of time-limits for making the award.

19 *West Tankers*, par. 26.

20 Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1986, C 298/1), written by D.I. Evrigenis and K.D. Kerameus (hereinafter: Kerameus Report).

21 See also Advocate General Kokott's Opinion in *West Tankers*, par. 33 (available at <curia.europa.eu>, visited on 16 February 2009).

22 *Id.*, par. 34.

23 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, UNTS Vol. 330, p. 38, No 4738 (1959) (hereinafter: 1958 New York Convention).

removed from the scope of the Regulation. And again, the anti-suit injunction is exactly *directed* towards restraining the pursuing of proceedings on the merits of the dispute which are within the scope of the Regulation. The claim for damages clearly does fall within the substantive scope of the Regulation's application, as well as any judgment subsequently rendered in such a claim.

In contrast, a decision on the validity of an arbitration agreement itself falls outside the *enforcement* regime of the Regulation.²⁴ Indeed, the decision on the validity of the arbitration agreement rendered by the court seised will bind the courts in the same state if they subsequently decide to set aside or to enforce an arbitral award. The decision on the validity of the arbitration agreement itself cannot be recognised in another EU Member State under the Brussels Regulation. Besides, it does not bind an arbitral tribunal either, so that arbitrators may take a different view on the validity of the arbitration agreement. In other words, it will not prevent the courts in other Member States from rendering a different decision on the validity of the arbitration agreement until a judgment on the merits has been rendered by the court seised and has been recognised in another EU Member State. Only a decision on the merits will be enforceable in another Member State under the Regulation and it will consequently prevent the courts in the latter from ruling on the same claim between the same parties, including rendering any possible decision on the validity of an arbitration agreement.

If the anti-suit injunction is requested after the court seised has ruled on the validity of the arbitration agreement, the request for an injunction is clearly *only* aimed at restraining a party from pursuing a claim on the merits of the dispute. Such a claim relating to the merits of the dispute obviously falls within the field of application of the Regulation. As already clearly indicated in previous decisions by the ECJ, any order restraining a party from pursuing such a claim which comes within the Regulation's scope is undoubtedly incompatible with the Regulation.

As rightly emphasised by the ECJ in *West Tankers*, the Regulation does not authorise a review of decisions on the jurisdiction of one Member State by the court of another Member State 'apart from a few limited exceptions'.²⁵ Thereby it referred to the earlier case law of the Court stating the position that in no circumstances is a court of one Member State in a better position to decide whether the court of another Member State has jurisdiction.²⁶ In other words, there can be no discussion on the arbitration exception under the Regulation, aside from the fact that the decision on the validity of the arbitration agreement itself cannot be enforced under the Regulation. This is obviously the reason why the Court refers, in paragraph 26, to the Kerameus Report, which states as follows:

'However, the verification, as an incidental question, of the *validity of an arbitration agreement* which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as *falling within its scope* [emphasis added].'²⁷

Neither the Court nor the Report provides any extensive analysis on this issue, but it is probably the rationale of this decision.

An anti-suit injunction restrains a party from pursuing a claim on the *merits* of the dispute. In other words, the party is restrained from requesting this Court to decide whether it has jurisdiction under Article 5(3) of the Regulation and to exercise this jurisdiction.²⁸ As to the decision on the validity of the

arbitration agreement, it operates so as to restrain the party from relying on a decision which is *incorrect* in the view of the court issuing the injunction. No such controlling mechanism on the decisions rendered in the context of Article II is provided under the 1958 New York Convention. In particular, the Member States to the Convention are free to ignore any in their view *incorrect* decisions rendered on the validity of an arbitration agreement by the court of another Member State. However, the Convention does not provide for any controlling mechanism or supervisory function on the correctness of such decisions by the courts of other Member States. If the injunction is issued before the court seised of a matter has ruled on the validity of an arbitration agreement, it automatically implies restraining the party from raising or further pursuing the plea of the invalidity of an arbitration agreement. In other words, the party is restrained from raising this objection because, in the view of the court issuing the injunction, the court seised is not a proper jurisdiction to decide on this matter. Instead, the arbitral tribunal and the courts at the seat of arbitration are competent to decide on this matter according to the view of the issuing court.²⁹

It is therefore interesting to find out whether the court seised of the matter does or does not have jurisdiction to decide on the validity of the arbitration agreement. An answer to this question is to be sought in the 1958 New York Convention.³⁰ Advocate General Kokott in her opinion in *West Tankers* did address the relevant provision of the Convention,³¹ but the judgment makes only a passing reference to it.³² Considering that the objection to jurisdiction by invoking an arbitration agreement triggers the application of the Convention, it is appropriate to address the provision of Article II in more detail. In addition, the ways in which the courts in various jurisdictions have interpreted and applied this provision will be presented in the followings paragraph. A more detailed discussion on this issue seems appropriate, especially considering that some commentators have questioned the compatibility of the ECJ judgment in *West Tankers* with the principle of competence-competence.³³ Thereafter, it will be examined

24 See, e.g., OLG Stuttgart 22 December 1986, *Recht der Internationalen Wirtschaft* 1988, p. 480.

25 *West Tankers*, par. 29. Cf., J.-P. Beraudo, 'The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgments', 18 *Journal of International Arbitration* 2001, pp. 13 et seq., at p. 26, stating, *inter alia*, that '[t]he European Union would be in dire straits if a judge were permitted to criticize the reasons underlying a judgment by his colleagues in other countries'. See also, 'Pfeiffer on *West Tankers*', under 5, 'West Tankers: Online Symposium' (*supra* n. 6).

26 *West Tankers*, par. 29, referring to Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, NIPR 1993, 149, par. 23 and *Gasser*, par. 48 (*supra* n. 2).

27 Kerameus Report, par. 35 (*supra* n. 20).

28 See also the Opinion of the Advocate General in *West Tankers*, par. 37, stating as follows: 'It is more important whether the Regulation applies to the action against which the anti-suit injunction is directed – thus, in this case, the action pending in Syracuse. Should that not be the case, the effectiveness of the Regulation could not be impaired by the anti-suit injunction.'

29 See the Judgment of the House of Lords of 21 February 2007 in *West Tankers Inc. (Respondents) v. RAS Riunione Adriatica di Sicurtà SpA and others* (Appellants), Session 2006-07 [2007] UKHL 4, paras. 19 and 20.

30 Alternatively, the relevant provisions of the national law of the court seised of the matter are to be considered, should the Convention be inapplicable.

31 Opinion of Advocate General Kokott in *West Tankers*.

32 *West Tankers*, par. 33.

33 See, e.g., K. Noussia on 'West Tankers: Online Symposium' (*supra* n. 6).

whether anti-suit injunctions contravene the 1958 New York Convention.

4. Article II of the 1958 New York Convention

That the court seised of a matter is empowered to decide on the validity of an arbitration agreement on the basis of Article II of the 1958 New York Convention is almost indisputable in arbitration theory and practice. The provision of Article II(3) of the Convention clearly states that '[t]he court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an [arbitration] agreement ... shall ... refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed [emphasis added]'.³⁴ Similar provisions can be found in national arbitration statutes.³⁵ They may be relevant if an arbitration agreement falls outside the scope of application of the Convention³⁶ or if their application is invoked on the basis of the more favourable right provision of Article VII(1) of the Convention. These provisions, as well as a readiness on the part of national courts to provide their support, appear essential in enforcing the parties' right to arbitrate. However, in providing their judicial assistance, the courts do exercise a certain degree of control over arbitration agreements.

4.1 Extent of court control under Article II of the New York Convention

Thus, the Convention obviously provides in Article II(3) that the court seised of the matter is competent to decide on the validity of an arbitration agreement. However, the Convention is silent on the extent of this control, as well as on the meaning and reach of the wording 'null and void, inoperative or incapable of being performed'. These questions are left to be determined by the national laws of the Member States. It is to be noted that they have not been unanimously interpreted in legal literature and arbitration practice. In the literature different views have been expressed and the courts have taken various approaches when applying Article II(3) of the 1958 New York Convention. Generally, the question of when the courts are to fully examine the existence and validity of an arbitration agreement has remained a controversial issue in arbitration theory and practice. In some legal systems, such as France, the courts have taken the view that *prima facie* evidence of an arbitration agreement is sufficient to refer the parties to arbitration.³⁷ It seems that the Swiss Supreme Court has followed a similar approach.³⁸ These jurisdictions accept the negative effect of the competence-competence principle, according to which the court should refrain from examining the jurisdiction of the arbitral tribunal before the arbitrators have been able to rule on this issue first.³⁹ However, *prima facie* evidence does not suffice in the majority of jurisdictions when their courts rule on the referral to arbitration. Instead, a greater degree of control, even a complete control of the validity of an arbitration agreement in the context of Article II of the 1958 New York Convention, has been maintained in many legal systems.⁴⁰ The Convention does not regulate the principle of competence-competence, but the national laws do. Whilst the positive effect of the competence-competence principle has been widely recognised, the negative effect of this principle has so far only been fully accepted in a rather limited number of jurisdictions.

It is to be noted, however, that a full examination of the validity of an arbitration agreement in the context of Article II(3) should not be considered as a decisive factor in determining the 'arbitration friendliness' of a particular jurisdiction. In

other words, it does not necessarily entail that it is a less friendly arbitration framework than the one where a full examination is exercised in the setting aside or the enforcement proceedings. It simply means that different states have taken different views as to *when* a full examination of the validity of an arbitration agreement is to be exercised. Thus, such examination has merely been exercised at different moments, i.e., different stages in the proceedings.

Which approach is more appropriate – control at an early stage of the proceedings or control after an arbitral award has been rendered? There is no straightforward answer to this question, as every approach has its obvious advantages and disadvantages.

As a matter of principle, it may be more preferable that the courts exercise only minimal control over an arbitration agreement in the context of Article II(3) of the Convention. In particular, it is clearly preferable that some aspects of the validity of an arbitration agreement are subject to court control at a later stage. An examination of the subject-matter arbi-

34 However, in her comment on *West Tankers*, K. Kessedjian seems to suggest that 'the New York Convention is silent' on the question 'which court has the power to decide whether the arbitration agreement is 'null and void, inoperative or incapable of being performed' ('Kessedjian on *West Tankers*', available at <conflictoflaws.net/2009/kessedjian-on-west-tankers/> visited on 16 March 2009). Similarly, it is argued that the arbitration agreement implies the obligation for a party not to invoke the jurisdiction of the court in the subject-matter falling within this agreement.

35 E.g., provisions on 'stay of proceedings and referral to arbitration' in: Arts. 1022 and 1074(1) of the Dutch Code of Civil Procedure (Book IV); Section 9 of the 1996 English Arbitration Act; Art. 1458 of the French Code of Civil Procedure; Art. 1032 of the German Code of Civil Procedure (Book X); Section 3 of the United States Federal Arbitration Act.

36 The Convention's field of application is only determined with respect to arbitral awards in Art. I. It is suggested that this provision should be applied analogously to determine which arbitration agreements fall under the Convention for the purposes of the application of Art. II(3). A.J. van den Berg, 'New York Convention of 1958 – Consolidated Commentary', 21 *Yearbook Comm. Arb.* 1996, p. 433.

37 The negative effect of competence-competence was apparently already recognised in French law in *CA Paris 9 March 1972, Lefrère v. SA Les Pétroles Pursan*, *Revue trimestrielle de droit commercial et de droit économique* 1972, p. 344.

38 See, e.g., Swiss Federal Tribunal 19 April 1994, *Les Emirats Arabes Unis v. Westland Helicopters Ltd.*, *ASA Bulletin* 1994, pp. 404 et seq. It is suggested that the enactment of the 1996 Arbitration Act in England implies 'a significant step towards the full acceptance of the negative effect of the competence-competence rule'. E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International 1999, p. 410.

39 For more particulars on this issue, see E. Gaillard, B. Yas and C. May, 'Negative Effect of Competence-Competence: The Rule of Priority in favour of the Arbitrators', in: E. Gaillard and D. di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Award: The New York Convention in Practice*, London: Cameron May 2008, pp. 257-273.

40 For example, the negative effect of the competence-competence principle has never been accepted in Germany. For more particulars see: K.P. Berger, 'Germany Adopts the UNCITRAL Model Law', 1 *International Arbitration Law Review* 1998, p. 121 at p. 122 and P. Schlosser, 'La nouvelle législation allemande sur l'arbitrage', *Revue de l'arbitrage* 1988, p. 291 at p. 297. Similarly, the courts in the United States in principle carry out a full examination on the validity of an arbitration agreement when deciding whether or not to refrain from exercising their jurisdiction and to refer the parties to arbitration.

trability is an obvious example.⁴¹ Besides, such an approach fully incorporates the negative effect of the competence-competence principle.

However, it is questionable whether it is always appropriate to follow the same approach with respect to other aspects of the validity of an arbitration agreement. Is it a proper approach when it is doubtful whether all the parties involved are parties to an arbitration agreement, even though there is *prima facie* evidence of its existence? In such cases, an early decision by the court in a particular jurisdiction may be preferred. This is especially so if a subsequently rendered arbitral award may only be subject to enforcement in that particular jurisdiction. Reasons of the cost efficiency and enforceability of a subsequently rendered award may favour such an early decision by the courts in that respect.

Some authors have argued that these drawbacks of a limited review at this stage can be easily overcome when the arbitrators are prepared to make a separate award on jurisdiction. Such an award could then be challenged immediately after the preliminary award has been made.⁴² It should be emphasised, however, that not all statutes provide for a possibility to challenge an interim or preliminary award on jurisdiction immediately after such an award has been rendered.⁴³ An example can be found in Dutch statutory arbitration law: an interim award on jurisdiction may only be challenged in connection with the challenge to a final or partial final award.⁴⁴ In addition, arbitration statutes of the majority of legal systems within the EU do not provide for the possibility of obtaining a declaratory judgment on the validity of the arbitration agreement when the seat of arbitration is in that country, as will be addressed in a greater detail later.⁴⁵ Accordingly, the examination of the validity of an arbitration agreement in the context of Article II of the Convention may in some circumstances be the only possibility of obtaining an early judgment on this issue. Obviously such a possibility may prove useful from the point of view of time and cost efficiency.

In conclusion, what is more important for the 'arbitration friendliness' of the judiciary towards arbitration is a full acceptance of the view that the effect of an arbitration agreement should generally be upheld whenever possible, save in such circumstances when a lack of consent to arbitrate is evident. Thereby, it is not necessarily decisive when full control of the validity of an arbitration agreement is exercised, before or after the arbitral proceedings have been completed. Namely, some courts may apply a *prima facie* evidence approach in the 'referral to arbitration stage' and subsequently still deny the effect of arbitration agreements in setting aside or enforcement proceedings. Conversely, a full assessment of the validity of an arbitration agreement at an early stage does not automatically mean that a particular jurisdiction is 'arbitration unfriendly'. For example, German and US courts carry out an extensive control at this stage, but neither of these jurisdictions can generally be considered as 'arbitration unfriendly'. For some, this approach may have a negative connotation of undermining the full acceptance of the negative effect of the principle of competence-competence. Yet what is decisive is the readiness of the courts to uphold the validity of agreements to arbitrate whenever possible, irrespective of when the control on validity has been exercised. Besides, in contrast to the positive effect of competence-competence, the negative effect of the principle is still accepted in a relatively limited number of jurisdictions.

4.2 Compatibility of anti-suit injunctions with the 1958 New York Convention

The analysis of the provision of Article II of the New York Convention in the previous paragraphs clearly illustrates that the court seized does have jurisdiction to decide on the validity of an arbitration agreement (par. 3), including any objection of the non-arbitrability of the subject-matter (par. 1). In reliance on its previous decision,⁴⁶ the English Court of Appeal in *West Tankers* held that anti-suit injunctions did not contravene the 1958 New York Convention.⁴⁷ This is surprising, considering that such an injunction deprives the court seized of the authority which it has on the basis of an international instrument. It is true that the anti-suit injunctions are directed towards a party and not towards a foreign court.⁴⁸ However, it evidently influences this court in exercising its competence to decide on its own jurisdiction. It is true that the primary purpose of the provision in Article II is to support the right of a party to arbitrate by invoking the arbitration agreement. However, the wording 'unless it finds that the said agreement is ... null and void, inoperable or incapable of being performed' expresses the right of the other party to raise the invalidity of such an agreement and the competence of the court to decide on this objection. Anti-suit injunctions operate so as to intend that a party is deprived of a right and a foreign court of the authority they have on the basis of the 1958 New York Convention.

As already mentioned, the courts of different Member States have taken different views on the extent of this examination of the validity of an arbitration agreement. Issuing such restraining orders appears as an expectation of the issuing court that the approaches of 'restrictive examination' taken by its own courts in interpreting the Convention should receive

41 Namely, it is evidently more appropriate that the objection of non-arbitrability is dealt with by the courts after an award has been rendered. This is particularly so bearing in mind that the so-called 'objective arbitrability' usually involves public policy considerations. Generally, there is the tendency that the public policy exception should be narrowly construed in international arbitration. In other words, it will usually be more appropriate to decide on this issue after the arbitrators have rendered their decision than to make any declarations on non-arbitrability in advance just because the issue at stake may touch upon public policy. See, e.g., the legal reasoning in the landmark decision of the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614 (1985).

42 Fouchard / Gaillard / Goldman, p. 410 (*supra* n. 38).

43 An example of such a possibility is Art. 16(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration.

44 Art. 1064 par. 4 of the Dutch Code of Civil Procedure.

45 See *infra* section 5.2. *Contra* B. Steinbrück, stating that 'Article II(3) ... does not "support" the ECJ's finding', on 'West Tankers: Online Symposium' (*supra* n. 6).

46 *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Co. Ltd.* [2005] 1 Lloyd's Rep. 67.

47 As indicated in the House of Lords judgment in *West Tankers*, par. 5 (*supra* n. 29).

48 Cf., A. Dickinson, 'Resurgence of the Anti-Suit Injunction: The Brussels I Regulation as a Source of Civil Obligations', 57 *International and Comparative Law Quarterly* 2008, p. 465 at p. 472, referring to the ECJ judgments in *Gasser* and *Grovit*, the author states that 'the theoretical basis which underpins them, the mutual trust between Member States, makes sense only in the context of a regime in which the relevant obligations (to accept or to decline jurisdiction) are imposed to the Member States themselves, and not the individual litigants'.

a universal application. And this is certainly not in line with the text and the spirit of the Convention.⁴⁹

The purposes that are meant to be served by issuing anti-suit injunctions in support of arbitration are clearly positive. Facilitating the effectiveness of arbitration agreements and preventing contradictory decisions can be mentioned as examples. Yet they operate so as to circumvent the freedom of the Member States in defining the extent of the examination of the validity of the arbitration agreement. Consequently, the court is prevented from exercising its jurisdiction under Article II(3) of the Convention according to the principles of its own legal system. As the comparative view *supra* shows, the full examination of the validity of the arbitration agreement is the approach followed in many jurisdictions with an arbitration-‘friendly’ legal framework. Besides, it is not obvious why the courts at the place of arbitration would be a more appropriate forum to decide on the validity of an arbitration agreement than the court seised of the matter. This is particularly so if a subsequently rendered award will be enforceable in the country of the court seised and not in the country of the seat of arbitration.

As already mentioned, the decision of the court seised would have binding effect only within that particular legal system. By no means would the arbitrators be under any obligation to follow this decision. Instead they are competent to decide on their own jurisdiction. A risk of consequently having contradictory decisions on the validity of the arbitration agreement and possibly also on the merits of the dispute is indeed a major shortcoming. Yet, as soon as an arbitral award is rendered it can be enforceable in all Member States of the EU, as well as in other states which are parties to the 1958 New York Convention. Consequently, the enforcement of any subsequently rendered judgment will have to be refused in all EU Member States on the basis of Article 34(4) of the Brussels Regulation. Conversely, any judgment recognised under the Regulation will prevent the subsequent enforcement of an arbitral award under Article V(2)(b) of the New York Convention.

When deciding on the issues related to arbitration, the national courts are inclined, perhaps more than in any other field of law, to look beyond their national borders and to consider the practice in other jurisdictions. This is probably the reason why arbitration agreements are denied effect by the judiciary generally only in rather exceptional circumstances. Consequently, the problem of conflicting decisions arises rather seldom, as is also mentioned in the Report on the Application of Regulation Brussels I in the Member States of September 2007 (Heidelberg Report).⁵⁰

5. Should the Brussels I Regulation be amended so as to include arbitration within its scope of application?

The main reason why arbitration was excluded from the scope of the Brussels Convention when it was negotiated in 1960 was that the recognition of arbitration agreements and arbitral awards had been sufficiently dealt with in the 1958 New York Convention.⁵¹ In her Opinion, the Advocate General suggested that the only way in which to cope with the problem of contradictory decisions would be to amend the Regulation so as to include arbitration within the Regulation.⁵² Similarly, the Heidelberg Report recommends deleting the arbitration exception, even though it states that most of the national reports submitted in the present Study disapproved of such a course of action. As stated in the Report, the majority of the Member States ‘adopted a critical attitude towards possible extension’ of the Brussels I

Regulation to arbitration and mediation.⁵³ The same is true for most of the interviewed stakeholders.⁵⁴ In the literature, it is not a widely accepted idea either, although it has been suggested by some authors.⁵⁵ Yet the Commission of the European Communities prepared in April 2009 the Green Paper⁵⁶ and the Report⁵⁷ on the application of the Brussels Regulation. The purpose is ‘to launch a broad consultation among interested parties on possible ways to improve the operation of the Regulation with respect to the points raised in the Report’⁵⁸ which include the issue on the interface between the Regulation and arbitration.

The fact that the 1958 New York Convention has been considered one of the most successful international instruments in commercial law is the major reason against including arbitration within the Regulation’s scope of application. However, the Heidelberg Report takes the view that the practical problems relating to the exclusion of arbitration justify deleting the arbitration exception from the Regulation.⁵⁹ It is outside the scope of this paper to discuss all the changes relating to the arbitration exception considered and suggested in the Heidelberg Report. The Report addresses arbitration and mediation in paragraphs 106-139, including various proposals found in the literature and national reports. It is assumed that the most appropriate approaches in the view of the authors of the Report are summarised in paragraphs 131-136. These suggestions will be briefly addressed.

The authors take the view that it would not be appropriate to introduce ‘far-reaching amendments’ to the Regulation, considering that a majority of the Member States were clearly opposed to introducing any changes whatsoever to the current state of affairs.⁶⁰ Thus, it is suggested, first, to delete the

49 Cf., ‘Layton on West Tankers’ at ‘West Tankers: Online Symposium’ (*supra* n. 6): in criticising the ECJ judgment, the author is of the view that anti-suit injunctions may contravene the New York Convention, but not the Brussels I Regulation.

50 See also B. Hess, Th. Pfeiffer and P. Schlosser, Report on the Application of Regulation Brussels I in the Member States, September 2007, Ruprecht-Karls-Universität Heidelberg, Study JSL/C4/2005/03 at p. 56 (available at <ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>) (hereinafter: Heidelberg Report).

51 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 27 September 1968, written by P. Jenard, OJ 1979, C 59/1, p. 13.

52 Opinion of the Advocate General, par. 73.

53 Heidelberg Report, p. 51 (*supra* n. 50), stating further in fn. 154 that only the reports from Cyprus, Estonia, Lithuania, Slovenia and Spain expressed the view that the extension of the Regulation to arbitration would be helpful.

54 Id.

55 H. van Houtte, ‘Why Not Include Arbitration in the Brussels Jurisdiction Regulation’, 21 *Arbitration International* 2005, pp. 509 et seq. See also the literature referred to in the Heidelberg Report, fn. 152 (*supra* n. 50).

56 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, 21 April 2009 COM(2009) 175 final (hereinafter: Green Paper).

57 Report from the Commission to the 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, 21 April 2009, COM(2009) 174 final.

58 Green Paper, p. 2 (*supra* n. 56).

59 Heidelberg Report, p. 54 (*supra* n. 50).

60 Id., p. 64.

exception under Article 1(2)(d) and to retain the prevalence of the 1958 New York Convention in Article 71. Secondly, two new provisions in Articles 22(6) and 27A are recommended. The provision of Article 22(6) is suggested to read as follows:

‘The following courts shall have exclusive jurisdiction, regardless of domicile, ...

(6) in ancillary proceedings concerned with the support of arbitration the courts of the member States in which the arbitration takes place.’

It is not entirely clear what purpose is intended to be achieved by introducing this provision. In other words, jurisdiction to provide for the assistance to arbitrations taking place in their territories already follows from the relevant provisions of national arbitration statutes. Considering that the Heidelberg Report suggests that Article 31 of the Regulation would apply also to arbitration,⁶¹ it seems that this provision introduces insignificant alterations to the present state of affairs. Thus, the courts of the Member States would simply continue to apply their own national arbitration law in providing support to arbitration. It includes the attitude of those jurisdictions providing for the possibility of court assistance in taking evidence in support of arbitral proceedings taking place abroad.⁶²

Additionally, the Heidelberg Report suggests that a new Article 27A should be introduced, providing for a mandatory stay of the court proceedings in a Member State with respect to the validity of an arbitration agreement if a court of a Member State at the place of arbitration is requested to render a declaratory decision in this respect.⁶³ The issue of the place of arbitration is recommended to be dealt with in a new recital which reads as follows:

‘The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.’

The acceptance of the proposed amendment may give rise to a number of problems. The major objections to the proposed amendments can be summarised as follows:

- (1) The scope of application is insufficiently defined in the text of the Regulation, but is instead dealt with in a recital.
- (2) It is not obvious why a court at the place of arbitration is a more appropriate jurisdiction to decide on the validity of the arbitration agreement, especially considering that a majority of the Member States do not provide for such a possibility in their arbitration statutes.⁶⁴ Consequently, amendments to the arbitration statutes in the vast majority of the Member States would most likely be required.
- (3) The acceptance of the proposed changes would seriously undermine the relevance of the 1958 New York Convention among the EU Member States and influence the application of its provisions.

5.1 (Further) Diversity in defining the scope of application of the Brussels Regulation

In their answer⁶⁵ to the criticism expressed in the position paper of the French Working Group of the ICC,⁶⁶ the authors of the Heidelberg Report consider that their suggested amendments address sufficiently clearly the position of non-European parties to arbitration. Referring to paragraph 136 of their Report, the Regulation will in their view apply in all

cases when the place of arbitration is in a Member State, even if none of the parties to the agreement are European parties.⁶⁷ First of all, it does not seem appropriate to deal with such an important issue such as the applicability of the Regulation in a recital. Instead, it is desirable that the scope of application is carefully defined with respect to arbitration in the text itself. It is not clear why the scope of application regarding arbitration is not defined within the context of Article 4(1). Besides, if the suggested amendment was accepted, it would result in applying different criteria in defining the Regulation’s scope of application with respect to forum selection clauses and arbitration agreements. This is not to suggest that the same approach that is taken in Article 23 of the Brussels Regulation should necessarily be followed with respect to arbitration clauses. If so, the Regulation would apply if one of the parties to the arbitration agreement were domiciled in a Member State and the agreement provided that the seat of arbitration would be in a Member State. Even though it would be interesting to examine what are the reasons justifying a different approach,⁶⁸ the authors do not address this issue. One would assume that a full analogy with Article 23 would not be appropriate, considering that the place (or seat) of arbitration is not always determined in arbitration clauses. The authors suggest that the recital should provide that the place of arbitration is either determined by the parties or by the tribunal. It is not the method as such that is surprising here, as this is provided in many arbitration statutes and rules on arbitration.⁶⁹ However, it is questionable whether the same method,

61 Id., p. 364.

62 For example, the 1996 English Act in Section 2(3) does provide for the possibility of court assistance in taking evidence in support of arbitral proceedings taking place abroad, unless the court finds it inappropriate to exercise such a power in a particular case. See also M. Hunter/T. Landau, *The English Arbitration Act 1996 – Text and Notes*, The Hague: Kluwer Law International 1998, p. 40, fn. 72.

63 The proposed text of Art. 27A reads as follows: ‘A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as the place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that agreement.’

64 *Contra* Hess on *West Tankers*, ‘West Tankers: Online Symposium’ (*supra* n. 6), favouring giving priority to the courts at the seat of arbitration.

65 B. Hess, Th. Pfeiffer and P. Schlosser, ‘Brussels I Regulation and Arbitration, The Findings and Proposals of the Heidelberg Report – A Reply to the ICC French Working Group’, p. 4 (available at <ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>).

66 Observation on the Report on the Application of Regulation Brussels I in the Member States of the EU, unofficial version dated 22 May 2008, referred to in *id.*, p. 1, fn. 1.

67 The authors are obviously of the opinion that defining the scope of application in this manner would not be contrary to the case law of the ECJ, in particular Case C-412/98 Group *Josi Reinsurance Company SA v. Universal General Insurance Company* [2000] ECR I-5925, NIPR 2000, 200 and Case C-182/02 *Owusu v. Jackson* [2005] ECR I-1383, NIPR 2005, 152.

68 Generally, on the different ‘treatment’ of jurisdiction and arbitration agreements in comparative law, see S. Brekoulakis, ‘The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?’, 24 *Journal of International Arbitration* 2007, pp. 341 et seq.

69 However, such a provision may contradict the arbitration rules of some institutions (see, e.g., Art. 14(1) the 1998 ICC Rules according to which the place of arbitration shall be determined by the ICC Court unless agreed upon by the parties). Accordingly, if such a provision is to be included in the Regulation, it should provide for a reference to the arbitration rules in this respect.

in particular the latter, is appropriate to determine the Regulation's scope of application.

In any case, it would be very important to carefully define the scope of application of the Regulation, should the arbitration exception be removed.

5.2 Appropriateness of the exclusive jurisdiction of the seat of arbitration

It is questionable whether the courts of the place of arbitration are the most appropriate jurisdiction to rule on the validity of an arbitration agreement, and render a judgment which would be binding in all EU Member States. It would inevitably have an influence on the applicability of the 1958 New York Convention, as will be explained later.⁷⁰ Besides, if the arbitration exception was to be swept away and a provision on the jurisdiction of the courts at the seat of arbitration as suggested in the Heidelberg Report were to be included, adjustments to the national laws of many EU Member States would most likely be needed. This is because the majority of arbitration statutes in the countries within the EU do not provide for the possibility of obtaining a declaratory judgment on the validity of an arbitration agreement. Generally, such provisions are rather exceptionally incorporated in arbitration statutory law. Examples can be found in English⁷¹ and German law.⁷²

In contrast, such a provision is not incorporated in the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).⁷³ Thus, no possibility of obtaining a declaratory judgment on the validity of an arbitration agreement exists in the Member States of the EU which have shaped their arbitration law on the Model Law unless Article 8 is altered so as to provide for such an action. Consequently, the arbitration statutes of many Member States would have to be amended so as to accommodate the suggested amendments.

Most likely it would not be sufficient to rely solely on the relevant provision in the Brussels Regulation itself without amending arbitration statutes accordingly. In other words, if the amendment of the Regulation was not followed by corresponding adjustments to the arbitration statutes of the EU Member States, it could seriously affect 'arbitration friendliness' in some jurisdictions. First of all, it would result in a different statutory regulation, one for situations when the Brussels I Regulation applies and another for cases falling outside of its scope of application. Such a diversity of sources of arbitration law, as well as difficulties that are likely to arise in connection with defining their scope of application, is an obvious drawback. Namely, it is likely that the 'arbitration friendliness' of a particular legislative framework and consequently the attractiveness of that state as an arbitration seat will thereby be affected. The existence of a 'dual regime' is likely to cause uncertainty as to which actions related to arbitration are permitted in certain circumstances.

Finally, the suggested provision in Article 27A obviously deviates from the *lis pendens* rule of Article 27. In particular, the latter provides an obligation for any court other than the court first seised to stay its proceedings. However, it seems that the court at the seat of arbitration does not have to be seised *first* according to Article 27A. If this is indeed suggested, that may delay the decision on the validity of the arbitration agreement. This may especially be the case if the place of arbitration is not determined in the arbitration agreement, so that the arbitral tribunal must first be constituted in order to determine the place of arbitration.⁷⁴

5.3 Proposed amendments and the 1958 New York Convention

In contrast to the view expressed by some commentators,⁷⁵ the regulation to be amended as suggested in the Heidelberg Report would run counter to the provision of Article II(3) of the New York Convention. As already illustrated, this provision clearly states that the court 'seised of the matter' on the merit of the dispute may decide on the validity of the agreement when deciding whether or not to refer a dispute to arbitration. Accordingly, this provision would have no relevance in the EU Member States should the Brussels I Regulation be amended so as to provide for the jurisdiction of the court at the seat of arbitration. Besides, that would result in a 'dual regime', one applicable when the Regulation applies (the seat of arbitration is in a Member State) and another when the 1958 New York Convention applies (the seat is outside a Member State). As explained before, sometimes it may be known only after an arbitral tribunal has been constituted so that the place of arbitration may be determined if the parties had failed to do so.

The recognition of decisions delivered by the court in an EU Member State at the seat of arbitration would fall under the scope of the Brussels Regulation if the amendments proposed by the Heidelberg Report were accepted. However, the enforcement and recognition of arbitral awards would fall within the scope of the New York Convention. In applying the Convention in the enforcement of awards rendered in EU Member States, the courts in EU jurisdictions would not be competent to examine the validity of arbitration agreements, as provided in Article V(1)(a). They would be bound by any decision taken on this issue by the court of the EU Member State of the seat of arbitration.

In contrast, when deciding on the enforcement of arbitral awards rendered in other jurisdictions, the courts in the EU Member States would be allowed to determine the validity of the arbitration agreement. Thus, the provision of Article V(1)(a) of the New York Convention would lose its relevance in EU Member States. It is at least questionable whether it is desirable that amendments to the Brussels Regulation affect the Convention so substantially, resulting in such a divergent application of its provisions.

⁷⁰ See *infra* section 5.3.

⁷¹ 1996 English Arbitration Act, Sections 32 and 72(1). These two provisions relate to applications to rule on validity if a party has participated in the proceedings (Section 32) or not (Section 72 par. 1). For more particulars, see F. Bachand, 'Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction', 22 *Arbitration International* 2006, p. 463 at pp. 467-468.

⁷² 1998 German Arbitration Act, Art. 1032 par. 3. A comparable provision can be found in the United States Federal Arbitration Act, Section 4.

⁷³ The same is true for the Swiss Private International Law Act, Chapter 12.

⁷⁴ In the meantime, the court first seised may already even have decided on the validity of the arbitration agreement. Besides, the fact that the authority of the arbitral tribunal to determine the seat of arbitration is determined by the Regulation may contradict some Rules on arbitration which provide that a particular body of that institution would make such a determination. See, e.g., Art. 14(1) of the 1998 ICC Rules of Arbitration.

⁷⁵ See, e.g., H. Muir Watt in her comment supporting the view expressed by K. Kessedjian, 'West Tankers: Online Symposium' (*supra* n. 6).

6. Concluding remarks

The discussion on the compatibility of anti-suit injunctions with the Brussels I Regulation could start with the reasoning of the House of Lords stating that 'the contractual right to have the dispute determined by arbitration ... falls outside the Regulation and cannot be inconsistent with its provisions'.⁷⁶ However, even if it is accepted that the right to arbitrate falls outside the Regulation, the only way to give a support to this right by using an anti-suit injunction is to restrain a party from pursuing a claim which does fall within the Regulation. In other words, the only way in which to give support to something that falls outside the scope of the Regulation is to restrain the proceedings concerning the matter falling within the scope of its application. It is thereby not decisive whether the court in deciding on the validity of the arbitration agreement has applied another instrument, and not the Regulation. This is so because this decision is an incidental ruling taken within the court's decision as to whether or not to exercise its jurisdiction over the merits of the dispute. Even if the view is taken that the enforcement of arbitration agreements falls outside the Regulation and is not subject to its terms,⁷⁷ the decision on the merits of the dispute is not thereby removed from the scope of the Regulation.

One may ask whether a decision of the ECJ would be different if an injunction was directed towards precluding the party from raising the objection of the invalidity of an arbitration agreement instead of restraining the party from pursuing the claim for damages. It may be argued that such an injunction cannot be considered as being incompatible with the Regulation, because the decision on the validity of an arbitration agreement falls entirely outside the scope of the Regulation. In contrast to the question for preliminary ruling in *West Tankers*, such an injunction would not be directed towards restraining the party from pursuing a claim of damages. The answer would obviously not and should not be different. It is true that the jurisdiction of the court to decide on the validity of an arbitration agreement is based on the 1958 New York Convention and not on the Regulation. However,

such an injunction operates so as to influence the procedural position of the party in the proceedings on the merits of the dispute in a manner which is incompatible with the Regulation. And the reasoning of the ECJ, referring to the Kerameus Report, clearly indicates that it would not be different. Although the brevity of the ECJ has been criticised by many, it will probably discourage submitting yet another question on the compatibility of anti-suit injunctions issued in support of arbitration with the Brussels I Regulation.

Deleting the arbitration exception from the text of the Brussels I Regulation as suggested in the Heidelberg Report would not be an appropriate approach in dealing with the problem of potentially conflicting decisions. In particular, it would not be satisfactory if the Brussels Regulation was to provide for the recognition of judgments rendered in the proceedings related to arbitration. As already explained, the acceptance of the suggested proposal would require its relationship with the 1958 New York Convention to be carefully defined. This is particularly so with respect to Article II, the relevance of which would be undermined should Article 27A be introduced as suggested.

Generally, a new EU instrument dealing exclusively with arbitration would be more appropriate in tackling the problems which have so far arisen, than to attempt to resolve them by deleting the arbitration exception from the Brussels I Regulation.⁷⁸ It would be a better way to protect the right of a party to arbitrate and to avoid parallel proceedings than by issuing anti-suit injunctions or by introducing the amendments to the Regulation.

76 House of Lords in *West Tankers*, par. 14 (*supra* n. 29).

77 See P. Schlosser, 'Anti-suit injunctions zur Unterstützung von internationalen Schiedsverfahren', *Recht der Internationalen Wirtschaft* 2006, pp. 486-492.

78 *Contra* H. Muir Watt, 'West Tanker: Online Symposium' (*supra* n. 6).