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Andrej Savin[*]

THE ARBITRATION EXCEPTION AND PROTECTION OF ARBITRATION AGREEMENTS IN THE EU

Abstract: *Arbitral proceedings are excluded from the scope of Brussels I Regulation on the Recognition and Enforcement of Foreign Judicial Awards. This exception, a result of the fact that the 1958 New York Convention serves successfully as a primary instrument for the recognition and enforcement of arbitral awards, creates a number of difficulties both for arbitral tribunals and for regular courts.*

The first part of this article looks at the exception from Article 1 (2) (d) of the Regulation through official commentaries and court cases of the European Court of Justice. Although there is confirmation in the latter that arbitration is excluded, the inconsistencies and doubts about the article's scope continue to put parties in doubt.

The second part analyzes some difficulties which arise out of Article 1 (2) (d) and which are encountered in practice. Among these are the problem of the arbitration agreement's validity, the issues of interim measures and court assistance and the problem of recognition and enforcement of judgments made in violation of arbitration agreements.

The third part analyzes the recent initiatives for reforming the Regulation. Before all, a look is taken at the so-called Heidelberg Report which the European Commission ordered as a basis for its own Green Book on the changes and the Report that follows it. Attention is also drawn to other suggestions which look at arbitration exception.

Keywords: arbitration, Brussels I Regulation, civil jurisdiction.

1 Civil Litigation and Arbitration in the EU

Brussels I Regulation,[1] just like Brussels Convention before it,[2] excludes arbitration from its scope. This exclusion is recognized and well

* Associate Professor, Copenhagen Business School

1 Council Regulation of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, OJ L307, 24.11.2001.

2 Consolidated version in OJ C, 26.1.1998.

documented but also much debated.[3] Right from the Convention's birth, the opinion was divided on the how broadly the exception ought to be interpreted. Some of these doubts have survived to this day while new have been raised.

The consequences of the exclusion of arbitration from the Regulation's scope are mostly well known.[4] Among the more dramatic is that a party acting in bad faith seeking to slow down the arbitration proceedings or to avoid them altogether can begin proceedings in regular courts. Since such proceedings are likely to fall within the arbitration exception, there is no mechanism in the Regulation (although there may be in national law) to prevent them.[5] Further to that, judgments given in violation of arbitration agreements may be recognized in the EU. In addition, there is no uniform allocation of jurisdiction for ancillary or supportive proceedings.

More recently, voices have been raised that call for modification of this exception, most prominently in the EU commissioned „Heidelberg Report" on the application of the Regulation.[6] The paper seeks to analyze the difficulties raised by the above issues and looks at the proposals to eliminate them. The paper begins by examining the relationship between civil litigation and arbitration in European countries as set out in the Brussels Regulation and as interpreted by the Court of Justice. It continues with looking at ECJ case law to analyze the evolution of the attitude to court proceedings in support of arbitration. In particular, the controversial *West Tankers* decision is looked at as a way of resolving some of the difficulties concerning national proceedings but also as a way of demonstrating the ECJ's attitude towards judicial discretion in cases involving arbitration. Finally, various proposals for eliminating the difficulties are analyzed.

1.1 THE ARBITRATION EXCLUSION

Article 1 of the Regulation provides:

> (1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. (...)

3 See e.g. Ambrose, C, Arbitration and the Free Movement of Judgements (2003) 19 Arb. Int. 1.

4 See the Commission's list of perceived consequences in Report on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, page 9, available on http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm

5 For the demise of English strategy of employing anti-suit injunctions in such cases see section on *West Tankers* judgment below.

6 Hess, B., Pfeiffer, T. And Schlosser, P., Study JLS/C4/2005/03, *Report on the Application of Regulation Brussels I in the Member States* (Heidelberg 2007).

(2) The Regulation shall not apply to:
(...)
(d) arbitration.
(...)

The comprehensive exclusion of arbitration is well documented in official comments and reports. What emerges from these is awareness that the arbitration is possibly better handled in the already existing and hugely successful New York Convention 1958. The Brussels Convention was seen primarily as an instrument for facilitating free movement of civil and commercial judgments between Member States and if arbitration was to be deal with at European level, it would be in a dedicated instrument. Such instrument, however, was never to be.

As a reason for exclusion, the first official report, The Jenard Report of 1968,[7] emphasizes the existence of international agreements on arbitration. Above all, the report mentions the 1958 New York Convention but also expresses the hope that a future European Convention might facilitate the free movement of judgments „to an even greater extent than the New York Convention". The Report understands the Convention to exclude not only the recognition and enforcement of arbitral awards but also any other litigation relating to arbitration.

The Schlosser Report of 1978[8] differentiates between proceedings involving arbitration itself and all other disputes. The former include all disputes relating to arbitration to be started, in progress and concluded and are completely excluded from the scope of the Regulation. The latter include all disputes that the parties had agreed ought to be settled by arbitration but got settled by regular courts instead. Those include all situations where the court either ignored the arbitration clause or considered it otherwise inapplicable. The report expresses doubt over the applicability of the exclusion to these. The issue is of some importance as, if a judgment is given in violation of an arbitration agreement, the recognition can then be refused provided that the arbitration exception included such disputes. The Report does not attempt to resolve this issue. On the other hand, it emphasizes that parties have absolute freedom to submit their disputes to arbitration, even in cases where exclusive jurisdiction is established in the Convention, and again underlines the exclusion in ancillary proceedings and proceedings involving arbitral awards. The Member States remain free to invalidate arbitration agreements.

7 OJ C59, 5.3.1979, p. 1.
8 OJ C59, 5.3.1979, p. 77, especially paragraphs 61–65.

Right from the beginning, the opinion In Member States was divided on the how broadly the exception ought to be interpreted. While the English largely relied on the opinion that arbitration ought to be excluded in its entirety, the rest thought that only proceedings as part of arbitration should be so.[9]

1.2 THE EVOLUTION OF THE COURT'S ATTITUDE

The Court's approach was cautious but not without ambiguities.

The first significant case of the (then) European Court of Justice to discuss the exception was *March Rich*.[10] The case involved an arbitration agreement in England between a Swiss and an Italian party. Disputing the validity of the agreement, the Italian party sued for negative declaration in Italy. The Swiss party relied on the agreement to contest jurisdiction of the Italian court while the Italian party contested the validity of the arbitration clause in the English proceedings. The question ultimately referred to the ECJ by the English Court of Appeal was whether the English proceedings were in the scope of the exception. The court responded that

> By excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Article 1 (4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.
>
> Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

The Schlosser Report specifically lists the proceedings concerning arbitrators, the place of arbitration, enforcing or setting aside as falling outside the scope of the Regulation and the judgment simply confirms this.[11] On the other hand, the Report does not mention proceedings for the validity of arbitration agreement, proceedings where arbitration agreement serves to challenge jurisdiction, injunctions to enforce arbitration agreements, declaratory proceedings as to validity of arbitration agreement, proceedings for damages for breach of arbitration agreement and recognition and enforcement of judgments given in violation of arbitra-

9 See specific reference to this in the Schlosser Report at par. 61.

10 C-190/89 *March Rich & Co AG v. Società Italiana Impianti* [1991] ECR I–3855.

11 Par. 65.

tion agreements.[12] *Marc Rich* does not address any of these issues specifically although there is scope for interpreting it to exclude at least some.

One very important consequence of the *Marc Rich* is its effect on proceedings commonly referred to in private international law as „Italian torpedoes". A *lis pendens* rule,[13] which requires the court first seised to proceed and all others to stay proceedings in the EU context is blind to which court is *really* appropriate to hear the dispute. In other words, the rule demands the court first seised to act first, even in cases where it manifestly does not have jurisdiction as to substance of the dispute (e.g. because there is a choice-of-court agreement in favour of another court). This much has been clearly established by the ECJ in *Erich Gasser* case.[14] An „Italian torpedo" involves deliberately seising a court in a country well-known for slow proceedings in the hope that the delay and inconvenience, often measured in years, might persuade the other party back to the negotiating table. An unfortunate and much-criticized consequence of *Gasser* is that such torpedoes are available in the Brussels I Regulation space.[15] On the other hand, the fact that *Marc Rich* excludes arbitration from the scope of Regulation means that arbitration is, as eloquently put by Trevor Hartley, a „torpedo-free zone".[16] The lack of jurisdiction in arbitration proceedings simply prevents the *lis pendens* that caused *Gasser* from occurring.

A further development took place in the *Van Uden* decision.[17] The case concerned the availability of provisional measures where arbitration had been agreed. The Court ruled that proceedings parallel to arbitration may fall within the scope of the Regulation but ancillary do not. The decision seems to confirm that where arbitration is the *substance* of the dispute the exception in the Regulation will be activated but where question concerning arbitration is only *secondary* to a principal issue, the court may proceed. This may be also seen as the Court's first attempt to shrink the scope of the exception.

The *Turner* case revolved around the use of English traditional procedural instruments in a case involving oppressive litigation in another

12 See Rogerson, P., Chapter I – Scope in Magnus, U. and Mankowski, P., *Brussels I Regulation* (Sellier 2007), p. 64.

13 See Art. 27 of the Brussels I Regulation.

14 C-116/02 *Gasser v. MISRAT* [2003] ECR I–1469.

15 Fentiman, R., case note 'Erich Gasser GmbH v MISAT Srl', (2005) 42 Common Market Law Review 241.

16 See Hartley, T., *International Commercial Litigation* (OUP 2009), pp. 254–259.

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

country. The case, although not directly concerning arbitration, is of considerable importance for the understanding of the issue as it precedes and connects to another relevant case.[18] It involved a question of whether an anti-suit injunction, which is an injunction prohibiting a party from commencing or continuing foreign proceedings, can be used in a context involving another EU state. In other words, can an injunction which has its roots in English traditional, pre-Brussels procedural law, be used to prevent the party from continuing proceedings, which were clearly Brussels-based but also vexatious and oppressive, in another EU country? The Court ruled that it could not. After the *Turner* decision, the obvious parallel question immediately became: could an anti-suit injunction be used to restrain proceedings commenced in violation of the arbitration agreement? The issue was of considerable practical importance as anti-suit injunctions were seen as a valuable procedural instrument prohibiting vexatious or oppressive behaviour by parties.

1.3 THE ***WEST TANKERS*** DECISION

The *West Tankers* case answers the dilemma posed by *Turner* in the negative. The case is the last and possibly the most controversial in the series of cases outlined above.

The case involved a charterparty agreement between a British company, West Tankers, and Erg Petroli, an Italian company based in Sicily. It provided that all disputes arising from the contract were to be decided by arbitration in London. The law applicable was to be English law. After the vessel owned by West Tankers collided with Erg Petroli's jetty, the Italian company Allianz, Erg Petroli's insurers, initiated proceedings before a court in Syracuse, Italy, claiming damages for its uninsured losses against West Tankers. West Tankers initiated proceedings in England against Allianz seeking a declaration that the Italian proceedings were subject to the charterparty agreement and, therefore, to arbitration. In addition, it sought an antisuit injunction seeking to restrain Alianz from continuing with proceedings in Syracuse.

The question referred to by the House of Lords was whether, pursuant to *Turner*, the antisuit injunctions were also incompatible in cases involving arbitration. In view of the House of Lords, the arbitration exception of Article 1 (2) (d) of Regulation 44/2001 also covered English proceedings.[19] If the parties have agreed to settle disputes by arbitration

18 C-159/02 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I–3565.

19 See Opinions, [2007] UKHL 4, an appeal from [2005] EWHC 454 (Comm).

exclusively, the Lords contended, their „legal relationship is completely removed from the outset from the national courts, apart from the courts at the arbitral seat".[20]

The Advocate General's opinion considered the procedural and the practical side of the question.

In paragraph 39 and the following the AG expressly acknowledges the existence of two diverging views as to the scope of the exception in Article 1 (2) (d) and calls on Schlosser Report, further mentioning that recognition and enforcement of judgments in violation of arbitration clause may depend on the correct understanding of Article 1 (2) (d). She stresses that the Article itself does not give any indication as to which meaning is correct[21] but that preparatory works and the use of the term „arbitration" indicate that not only *arbitration* proceedings but also *related* proceedings are excluded. She then analyzes the *Marc Rich* and *Van Uden* judgments, confirming that the latter means that the scope of the Regulation must be „determined from the substantive subject-matter of the dispute".

The key to understanding the AG's reasoning and the judgement subsequently based on it is found in the opinion in paragraph 58:

> 58 [...] If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community.

The Regulation, the AG opined, is not rendered inapplicable simply because the parties have entered into an arbitration agreement but is applicable in all cases if the substantive subject-matter is covered.

In practical terms, the AG states that „the aims of purely economic nature cannot justify the infringements of Community law".[22] In other words, the competitive disadvantage „with which London would be threatened" if anti-suit injunctions could no longer protect arbitration cannot justify infringements of EU law.

The key element by which the practical argument is dismissed is phrased as follows:

> 67. Proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration

20 *West Tankers* AG opinion, par. 38.

21 Ibid, paragraph 45.

22 Ibid, paragraph 66.

> clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration.
>
> 68. [...] For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.

The Court's judgment follows the AG's opinion. There is no reasoning in it which is not already present in the AG's opinion and it is notable for the cursory manner with which some fundamental questions are dealt with. Remarkably, the Court does not enter into a proper discussion of the arbitration exception at all, quickly going over *Marc Rich* case and not mentioning *Van Uden*. The commercial and economic side of the issue, addressed but dismissed in AG's opinion, is avoided altogether.

What gives particular reasons for concern is the fact that the interests of the party who commences proceedings through Regulation, possibly in bad faith, is given greater attention than those of the party who is relying on the arbitration agreement. This is expressed in Article 31 of the judgment:

> 31. Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5 (3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

It would be probably correct to say, based on the above, that the ECJ's view is that London proceedings do fall under the arbitration exception but that the Italian do not. A more precise interpretation would be to say that preliminary issues fall within the scope of the Regulation and are exclusively to be decided by courts in which they are raised.

2 The Scope of Arbitration Exclusion Today: Potential and Real Problems

A number of issues outlined in Section 1 above remain unresolved as a result of *West Tankers*. According to the national reports submitted in consequence of the Heidelberg Report[23] there are several outstanding

23 See Heidelberg Report, footnote 6 above, pars. 117–129.

groups of issues not presently addressed in a satisfactory manner. The first involve the validity and enforcement of arbitration agreements, including declaratory judgments and antisuit injunctions. The second involve ancillary measures including appointment of arbitrators and preliminary measures. The third involve recognition and enforcement of judgments given in disregard of the arbitration agreement or in situations.

2.1 VALIDITY OF ARBITRATION CLAUSES

The problem concerning validity of arbitration agreement goes to the core of the question concerning the effectiveness of arbitration. If an arbitration clause is invalid, relying on it would mean taking the procedure away from regular courts which otherwise would have decided it. If an arbitration clause is valid, the parties ought not to be allowed to circumvent it. The appropriate mechanism for determining the validity of arbitration clause is, therefore, essential.

The New York Convention Article II.3 states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, 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.

This simply means that courts of signatory states ought to give up jurisdiction in favour of arbitration where the latter had been agreed by the parties but contains no instructions on determining the validity of the arbitration agreement.

No solution is expressly provided in the Regulation 44/2001. The Evrigenis and Kerameus Report states that:

> 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.[24]

This would mean that, in proceedings against a party in a regular court in the Regulation state, the court will have jurisdiction to determine the existence and validity of an arbitration agreement which is raised in contest to that jurisdiction. The same argument is found in paragraph 54 of the *West Tankers* opinion: „the existence and applicability of the arbi-

24 Evrigenis and Kerameus Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters (OJ 1986 C 298, p. 1), par. 35.

tration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction".

The problem, however, is deeper. Whether the question on validity is only preliminary, as seems to be suggested both in the *West Tankers* case and in earlier case law, is not a side issue but something which determines the outcome of the case. Opting for arbitration has a very simple effect of excluding regular courts, entirely and perpetually, from deciding on merits in the issue in question. This exclusion is acknowledged in the Regulation for, if it were to be otherwise, exception in Article 1 (2) (d) would never have been inserted in the Regulation. This exclusion is in no way affected by the need to refer to courts of the seat of arbitration in cases where their assistance is needed (e.g. where an arbitrator needs to be appointed).

The *West Tankers* court, in insisting that jurisdiction under Regulation cannot be taken away by invoking arbitration agreement, an opinion expressed in paragraph 31 and elsewhere in the judgment, is giving jurisdiction to verify the existence and validity of arbitration agreement to each and every court in every single one of the EU's 27 Member States. This amounts to an „Italian torpedo" solution for arbitral proceedings. Further to that, by treating the issue as preliminary and not, as it ought to be, one which actually determines the application of the Regulation, the *West Tankers* Court opened the door to immobilizing arbitral proceedings. The Court thus makes the procedural effectiveness fall a victim to abstract ideal of intra-EU solidarity.[25]

2.2 ANCILLARY PROCEEDINGS

In addition to the issue of validity there exists the issue concerning the jurisdiction for ancillary measures. These have earlier been marked to include ancillary proceedings for the appointment of arbitrators but also arbitration proceedings used to challenge jurisdiction of regular courts and situations where damages are sought for breach of arbitration agreement.

In fact, the House of Lords *West Tankers* decision clearly indicates a belief that the courts at the seat of the arbitration are best suited to support the proceedings, a notion which has never been very controversial among other EU nations either. Such support is however, at present, not covered by the Regulation, which is clear from the *Marc Rich* decision. Pursuant to that decision, any ancillary proceedings are simply outside the

25 On this problem in other areas of international civil jurisdiction see Hartley, T., The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws (2005) 54 International and Comparative Law Quarterly, 813–828.

scope of the Regulation and are, therefore, subject to traditional rules of jurisdiction. Provisional measures, under *Van Uden*, as long as they run parallel to arbitration, are not excluded and do fall under the Regulation.

There are good reasons to include ancillary proceedings in the Regulation. The *Marc Rich* decision demonstrates the difficulties that arise when awards and court decisions are incompatible. There is, in arbitration proceedings, a real danger that conflicting decisions will be given by different courts. In that sense, it is possible to address the issue by adding specific head of jurisdiction.[26]

One area where caution is probably advisable involves a situation where a future reform of Brussels Regulation gives exclusive jurisdiction to courts of the seat of arbitration for any ancillary measures. Such a move would exclude the jurisdiction of other courts which in some cases may have an interest in issuing supportive measures.

2.3 RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Recognition and enforcement of arbitral awards does not fall under the Regulation but the exception of Article 1 (2) (d) creates some very specific problems. The first of these is: what is the status of foreign declaratory judgments that relate to arbitral proceedings? The second is: will judgments rendered in breach of arbitration agreements be recognized?

The arbitration exception makes declaratory judgments on the validity of arbitration agreements possible.[27] The Schlosser Report confirms that these judgments are excluded from the scope of the arbitration exception. The consequence of this is that, if a declaratory judgment was given which proclaimed on the validity of the arbitration agreement, such judgment would not be able to benefit from the recognition process in Article 31, the matter falling outside of the Regulation's scope. In addition, the presence of a declaratory judgment deciding that there is a valid arbitration agreement would not prevent a judge in another country from proceeding on the merits in the case.[28] Therefore, a direct consequence of this is judgements which declare arbitration clauses and agreements void in one country but valid in another. When looked at together with the ECJ's reasoning in the *West Tankers* case, this exclusion would make pre-emptive attacks which have as their subject preventing agreed-upon arbitration possible.

26 For a discussion of some proposals, see below.

27 Declaratory judgments are possible in some systems, but not in others. See, e.g. English Arbitration Act 1996, Section 32 (1).

28 See Van Houtte, H., Why Not Include Arbitration in the Brussels Jurisdiction Regulation? (2004) 21 Arbitration International 509 at 514.

A potential solution for the problem might be found in including declaratory proceedings in the scope of the Regulation.[29] Such judgments would then be recognizable throughout the EU, preventing some of the problems outlined above. Nothing in that solution would conflict with the New York Convention, which would still take precedence over the Regulation by virtue of Article 71 of the latter.

The recognition of judgments in breach of arbitration agreements is currently not regulated in the Brussels I Regulation. If a court is seised of the case in violation of the arbitration agreement, a very real prospect and one that is encountered in practice, and if such a court were to render a decision, there would be nothing in the Regulation itself that would prevent such decision from being recognized and enforced in other Member States as such a judgment would fall within the scope of the Regulation.

There is nothing in the court practice of the ECJ that would suggest a solution and none of the grounds in the Regulation provide that recognition can be refused to such judgments.[30] The enforcing court cannot review the jurisdiction of the original court. Equally disappointingly, the Reports are also largely silent.

In the absence of injunctive relief rendered impossible by the *West Tankers* decision one possibility remains in obtaining damages in civil proceedings.[31]

3 Solving the Problem: the Proposals

Over the years, the problem of the interpretation and application of Article 1 (2) (d) remained, in spite of the attempts in ECJ case law to clarify the scope of the Article. This generated a number of proposals attempting to address the problem. Prompted by the Commission's drive to review the Regulation 44/2001,[32] further studies and proposal have been formulated. In this section, we will attempt to analyze the most important.

29 See paragraph 122 in the Heidelberg Report.

30 Van Houtte, H., May Court judgements that Disregard Arbitration Clauses and Awards be enforced under the Brussels and Lugano Convention (1997) 13 Arbitration International 85–92.

31 See Joseph, D., *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell 2005), p. 425.

32 Green Paper on the Review of Council Regulation (EC) No 44/2001, Brussels, 21.4.2009, final, COM(2009) 175; Report on Application of Regulation in COM(2009) 174 (see footnote 4 above).

3.1 THE HEIDELBERG REPORT[33]

Report on the application of the Regulation 44/2001, commonly known as Heidelberg Report, was based on „interviews, statistics and practical research" in national courts of 24 states. It is a comprehensive analysis of the application of the Regulation. In addition, it identifies those areas which, in the view of the authors, need to be changed in the future redrafting of the Regulation and suggests solutions.[34] One of the authors is Professor Peter Schlosser, the author of the original Schlosser Report from 1978, while the other two are Professors Hess and Pfeiffer.

The authors start from the premise that the free movement of judgments in Europe is now more efficient than movement of arbitral awards.[35] The status quo is represented by exclusion of arbitration from the scope of Brussels I and by it being subject to International instruments, of which the New York Convention 1958 is the most important. As a consequence of this situation, the Report identifies uncoordinated competition among national systems, lack of coordination with regard to the recognition of arbitral awards, parallel proceedings and diverging decisions concentring the validity of arbitration clauses and efficiency of the recognition and enforcement of judgements.[36] The drafters' aim seems to be to improve the efficiency of arbitration in the EU while maintaining the supremacy of the New York Convention 1958. Therefore, they concentrate on addressing the litigation which is parallel or supportive to arbitral proceedings.

The first part of the original Heidelberg proposal is the deletion of the exception found in Article 1 (2) (d).[37] This would not affect the New York Convention regime, which would take precedence by virtue of Article 71, allowing normal recognition of arbitral awards. The effect of this removal would be to allow recognition of judgments on validity of arbitration clauses throughout the EU.

The second part of the proposal is the introduction of a new article, Article 22 (6) into the Regulation. This article would specifically address ancillary proceedings to arbitration:

> The following courts shall have exclusive jurisdiction, regardless of domicile, (...)

33 See footnote 6 above.

34 The Report complements the Nuyts Report on residual jurisdiction in the EU: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

35 See Hess, B., The Findings and Proposals of the Heidelberg Report – A Reply to the ICC French Working Group, (2009) 6 Transnational Dispute Management, Volume 1.

36 See Report, par. 117–120.

37 See par. 131.

> (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place."

The effect of such a provision would be to give exclusive jurisdiction to courts in those Member States where the arbitration takes place. Such courts could appoint arbitrator, introduce other supportive measures but also rule on and have exclusive jurisdiction in cases concerning validity of the arbitration agreement. The change proposed, as is obvious, does not affect *Van Uden* decision, which already puts parallel proceedings under the scope of the Regulation, but overturns *Marc Rich*.

In addition to this, a new Recital would address the issue of the place of arbitration:

> „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 States 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 third part of the proposal concerns the validity of the arbitration agreement. A new Article, 27A is proposed:

> 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 a place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement.

The effect of the proposed Article 27A would be to oblige the court seised by the party which challenges the validity of the arbitration clause to stay its proceedings until the court in the state where the seat of the arbitration is located has had a chance to act. The plaintiff who seeks to challenge the arbitration agreement on grounds of validity would, therefore be forced to do so in the state where the seat of arbitration is located. The intention must also have been to avoid parallel proceedings.

The criticism of the proposal has been significant. The Report itself concedes that national contributors were mostly sceptical towards removing the arbitration exception.[38] The reaction of the academic and professional community has also been mixed, with some supportive of partial deletion of the exception and others critical of it.

38 See Report, par. 108.

The Max Planck Institute submission regarding the Green Paper on the review of the Regulation[39] focuses on the proposals to introduce Article 22 (6) and 27A. While they see the latter as generally positive and superior to alternatives they perceive the first as redundant, as the support of the court at the place where the arbitration has its seat usually exists anyway and there is, therefore, no need for its mandatory introduction. In addition to this, there are cases where there is a need for court support in states *other* than the state of the seat, even though they are somewhat rare. The second problem quoted is that relating to taking of evidence, which normally has to happen at the place where that evidence is located. Granting exclusive jurisdiction at the seat would prevent this. Finally, the new Article 22 (6) would not prevent the possibility to grant interim relief but fear is voiced over whether all courts would understand that Article 22 (6) operates in that way or would refuse to grant such relief.

The International Bar Association Arbitration Committee, in its response to the Green Paper,[40] points out the absence of significant problems in the interface between the Regulation and the arbitration exclusion. Only one case is quoted where a conflict appeared between an award annulment in one EU state and a court decision in another.[41] A problem concerning the deletion of the arbitration exception is seen in those situations where the award is recognized in a country *different* from the country of the seat only to be invalidated *at the seat*.[42] Only one case is cited where a judgment related to validity was refused recognition in a different Member State.[43]

Another important point, raised both by the International Bar Association Arbitration Committee and the UK House of Lords Report,[44] is that, in order to give the place of the seat of arbitration exclusive jurisdic-

39 Illmer, M., Steinbrück, B., Submission to the European Commission by Martin Illmer and Ben Steinbrück regarding the Green Paper COM(2009) 175 final, available at http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm retrieved on 31.3.2010.

40 Available at http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm retrieved on 31.3.2010.

41 *Société PT Putrabali Adyamulia v Société Rena Holding and Société Moguntia Est Epices* Civ. 29 june 2007, (2007) Revue de l'Arbitrage 507, note Gaillard, E. (2007) 136 Journal du Droit International 1240.

42 See *Société Cytec Industries v Scoiété SNF SAS*, Paris, 23 March 2006, (2007) Revue de l'Arbitrage 100, confirmed by Civ. 4 June 2008, noted by Mourre, A. (2008) 137 Journal du Droit International 1107.

43 *Ficantieri Cantieri Navali Italiani*, Paris Court of Appeal, 15 June 2006, noted Bolléé, S. (2007) Revue de l'Arbitrage 90.

44 Fentiman in House of Lords, 21st Report of Session 2008–09, HL Paper 148, paragraph 91.

tion, it would be necessary to introduce into the Regulation rules which help determine that place. This would, in turn, be difficult, as differences exist between Member States on this issue.

Similar criticism has come from some French commentators[45] who believe that including arbitration into the Regulation would deprive it from all its advantages. This view, however, rests on the French understanding of kompetenz-kompetenz, which is negative. That understanding takes that if a court is seised of a dispute which is submitted to an arbitration, the court shall decline jurisdiction. The court may only proceed if the arbitration agreement is manifestly null.[46] The deletion of the arbitration exception, which would in turn lead to any court having the competence to rule on the validity of arbitration agreement, would annul the protective effect of negative kompetenz-kompetenz.

The modified proposal was submitted in part as a response to some of the concerns.[47] In terms of deletion of the arbitration exception, the concerns discussed above and others have been addressed with the following redrafting of Article 1 (2):

> (d) Arbitration, save supportive measures and declaratory relief proceedings as provided for under Articles 22 (6), Article 27A and Article 31.

The rest of the original proposal remains unchanged.

3.2 THE *VAN HOUTTEN* SOLUTION

Another prominent proposal in the debate on the reform of the arbitration exception is to be found in Hans van Houtte's proposal.[48] This proposal takes as its beginning Articles II.2 of the 1958 New York Convention, which obliges courts to refer parties to arbitration when this exists, and the European Protocol, which says that „the validity of the arbitration

45 Mourre, A., Should arbitration stay excluded from the scope of application of regulation 44/2001? (2006) 24 ASA Bulletin 800. On the issue of a uniform Community regulation of arbitration see id., Faut-il un statut communautaire de l'arbitrage? (2005) 23 ASA Bulletin 408.

46 John J. Barceló III, Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective, (2003) 36 Vanderbilt Journal of Transnational Law 1115 at 1124.

47 Hess, B., Should arbitration and European procedural law be separated or coordinated? Some remarks on a recurrent debate of European lawmaking (2010) Cahiers de l'Arbitrage (forthcoming).

48 See notes 28 and 30. Also id., Towards a European Arbitration Regime? in *Towards Europeanization of Private Law – Festschrift J. Rajski* (Beck: Warsaw 2007), p. 425.

agreement is determined by the law of the contract that governs the agreement."

Van Houtte's proposal requires the deletion of the exclusion found in Article 1 (2) (d). Article 22 ought to be amended thus:

> 5. In proceedings anciallary to arbitration and proceedings to annul the awards, the court of the Member State where the seat of arbitration is established.
>
> 6. In proceedings concerned with the enforcement of judgments or awards, the courts of the Member States in which the judgment or award has been or is to be enforced.

Crucially, the proposal would include a true „arbitration exception" clause in the form of Article 23bis:

> When the parties have agreed that an arbitral tribunal with its seat in a Member State is to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, such an agreement shall be in writing or evidenced in writing. Where such an agreement is concluded between the parties, the courts of the Member State shall have no jurisdiction over their disputes unless the Arbitral Tribunal or the court of the seat of arbitration has decided that the Arbitral Tribunal has no jurisdiction.

Finally, the *lis pendens* is addressed by modifying Article 27:

> When proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States or before a court of a Member State and an Arbitral Tribunal sitting in another Member State,...

The final part of the proposal is to modify Article 34 by inserting heading 5:

> It is irreconcilable with an arbitral award rendered in another Member State, that is binding on the parties or has not been set aside or suspended by a court of that Member State involving the same cause of action and the same parties provided that the award fulfils the conditions necessary for its recognition in the Member State addressed.

The Van Houtte proposal is essentially addressing the same concerns that the Heidelberg Report is. Unlike the latter, however, the Van Houtte proposal is more detailed and possibly more constraining.

3.3 OTHER SOLUTIONS

In addition to the two mentioned very detailed proposals for redrafting the role that arbitration plays in Regulation 44/2001 and in addition

to the responses to the Commission's Green Paper[49] there have over the years been other suggestions and solution.

One obvious solution would simply be to keep the *lis pendens* rule gives a priority to the foreign court sesied in breach of the arbitration agreement such as it is developed in *West Tankers*. Sympathy is often expressed for this in the form of oft-used but still true adage „If it isn't broken, do not fix it." There is certainly some support for the view in the fact that very few cases in Member States can be identified where real conflicts of the kind identified by Heidelberg Report could be found.

The negative doctrine of kompetenz-kompetenz, used in the French courts, has some potential but does not address the issue fully. The doctrine allows the court to decline jurisdiction when an arbitral tribunal had already been seised of the matter. Further to that, if the tribunal had not been seised and there is no arbitration agreement, or if this agreement is null, the tribunal may proceed. This strategy is designed to prevent obstruction but it is not clear how it really operates in terms of addressing the desire to create obstruction.[50]

A partial solution had been attempted in the 1961 Geneva Convention,[51] Article VI (3) of which states:

> Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

Further to that, Article V (3):

> Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

Clare Ambrose suggested as a solution to keep the arbitration exception but to unify the choice of law rules applicable to arbitration. In addition, to confirm that a ruling concerning the existence of arbitration

49 See references in footnotes 38 and 39 above where other responses can also be found.

50 See Barcelo in note 45, at 1126.

51 European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963–1964).

agreement is within the exception and to explicitly allow courts to refuse a judgment given in breach of an arbitration agreement.[52]

3.4 THE COMMISSION'S RESPONSE

The Commission initiated a discussion on reform of Brussels I Regulation through a Green Paper and a Report on the Regulation's application, both published in 2009.[53] While the former gives an assessment of the Regulation's application, the latter also suggests some solutions.

The Commission's Green Paper does not question the primacy and effectiveness of the New York Regime. The Commission's aim in intervening seems not to be to create a parallel regime but to „ensure the smooth circulation of judgments in Europe and prevent parallel proceedings." While the Commission readily accepts the need for change, it clearly states that intervention, in whatever shape it may come, must be limited to that aim.

The deletion of the arbitration exception would, in Commission's view, result in court proceedings in support of arbitration coming into the scope of the Regulation. The courts of the seat of arbitration should here play a decisive role.[54] Further to that, the deletion would result in all of the Regulation applying to procedural measures, as opposed to just Article 31. The Commission believes that the deletion of the exception would enable recognition of judgments on validity throughout the EU. Possibly more importantly, the Commission suggests that refusal of recognition of judgments irreconcilable with arbitral awards might be needed.

While the suggestions presented in the Green Paper seems to follow the general direction of the Heidelberg Report, there is no reason to believe that they will bind the Council and the Commission when it comes to actual reform. The overwhelming scepticism to deletion of exception may very well change the overall direction in which the change happens.

3.5 NATIONAL REACTION

The national reaction to proposals for reform and deletion of Article 1 (2) (d) has been mixed. It is fair to say that the majority of national reporters for the Heidelberg Report also felt uneasy with deleting the exception while more generally acknowledging the need for reform. This much

52 See note 3 above.

53 See footnote 32 above. Green Paper Section 7, page 8. Report Section 3.7. Both instruments address the Regulation as a whole, not just arbitration.

54 Footnote 14 of Green paper suggest that the way for determining the place of arbitration in such cases might be to refer to parties' agreement and if such is absent to courts of the Member State which would have jurisdiction in the absence of such agreement.

has been recognized in the Report itself. In addition to that, the comments submitted to the Green Paper reveal a variety of national differences.[55] As a way of demonstrating these, two opposing views are looked at: that of the UK and that of France. Traditionally, the first is in favour of complete exclusion of arbitration, as explained in the first section above, while the latter would maintain partial.

The position of the UK government had been the concern about the implication that *West Tankers* might have for the future of arbitration in the UK. The UK government prefers its traditional position, which is to remove arbitration from the scope of the Regulation entirely. The concern, however, is that West Tankers had reduced the scope of the exception significantly. „Whenever a court characterises the subject matter of a claim brought before it as a matter within the scope of the Regulation, any issue as to the existence, scope or validity of an arbitration clause is a preliminary or incidental issue." This results in greatly reduced power of the courts of the seat of arbitration. The danger, the UK government contends, is that whichever court is first seised will have the primacy in determining the relevant issues, to the detriment of the conscientious party who relied on arbitration. This is certainly the danger which arose in *West Tankers* and in some earlier UK cases. The second contention of the UK government, that judgments rendered in violation of the arbitration agreement but going into merits would then have to be recognized through mechanisms in the Regulation seem to arise less often in practice.

The UK government, initially favourable to the Commission's proposal asking for a greater interface between arbitral and court proceedings has somewhat modified its position.[56] Its present position is to remove „the entire arbitral process from the scope of the Regulation." This was, it has to be emphasized again, the UK's original provision which would leave arbitration entirely to the regime in the New York Convention, at least in theory. The exception in the Regulation should not only be maintained but expanded. The question of the validity of the arbitration agreement should be completely excluded from the scope of the Regulation. Finally, ancillary proceedings and recognition and enforcement should also be fully excluded.

The solution that would satisfy the UK view of arbitration envisages Article 1 (2) (d) as follows:

> arbitration, and in particular an action in respect of which the parties have made an arbitration agreement within the meaning of Article II

55 See note 38.

56 See UK Response, item 36.

> of the New York Convention; an action or judgment on the validity, effect or scope of such an agreement; and ancillary proceedings in relation to such an agreement or any aspect of the arbitral process.

The French government[57] emphasized in their response the need to be as much as possible in harmony with the international conventions and primarily with the New York Convention of 1958. It seemed, therefore, ill advised to propose changes that would interfere with the operation of the Convention, or, least of all, that would change the Convention itself. This constitutes the official response of the French Government. Nevertheless, in the operative part, the French government considers the value that different interventions might have on the operation of the New York Convention and the Regulation.

The French government considers a partial removal of the arbitration exception from the Regulation possible in as much as it would place ancillary proceedings within the scope of the Regulation. Nevertheless, such removal would be undesirable, primarily in terms of possible clashes with the New York Convention. The competence for determining the validity of the arbitration agreement should, in their view, remain with the arbitration tribunal and not be extended to regular courts through recognition of validity awards. In favour of this, Article II.3 of the New York Convention is cited. It also is seems that the biggest concern of the French government is that big European centres would through too much intervention lose the flexibility that the arbitration offers.

The other continental governments stand on similar grounds.[58] They emphasize, above all, the need to preserve the structure and functioning of the New York Convention which, in the opinion of both practitioners and governments functions well. Any intervention in the Brussels I Regulation which might interfere with the Convention is, therefore, discouraged. The continental governments, in stark contrast with the UK government, emphasize that few practical problems have arisen from the Regulation's exception and are doubtful that sweeping changes are needed to correct it. When some changes are allowed or called for, they ought to be restricted. The German government, for instance suggests that Article 22 may be amended as per Heidelberg Report. This change, giving the

57 See Section 7, Réponses des Autorités françaises au Livre vert relatif à la révision du règlement (CE) n° 44/2001 du Conseil concernant la compétence judicaire, la reconnaissance et l'exécution des décisions en matière civile et commercial, on http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm retrieved 1.4.2010.

58 See, for instance contributions by Germany, Italy or Denmark.

courts in the place of arbitration extra powers, would reduce the risk of abuse and strengthen the arbitration.[59]

4 Conclusion

There are two points that ought to colour any future debate concerning the arbitration and its place in the Brussels I Regulation.

The first is that the amount of debate generated by the problem reflects its *perceived* importance. While this may not seem to justify sweeping action it signifies the growing uncertainty about the situation in the EU. Such uncertainty may result in gradual migration of arbitral proceedings to other regions.

The second is that the amount of case law reported reflects the relative *real* stability on the terrain. In simpler terms: the cases reported do not justify the apprehension felt by the writers of the Heidelberg Report.

If the interface problem between litigation and arbitration is, as put in the UK government's comments, „the result of the Regulation's intrusion into the process, in particular the superimposition of the Regulation's rules of jurisdiction, lis pendens and mutual recognition and enforcement" the solution may indeed be very simple. It may amount to bringing the arbitration to the level where it is already outside the European Union, safely in the context of the New York Convention as, perhaps, they ought to be.

On the other hand, if the problem arises from the inherent instability in the relation between courts and arbitration, as the present author believes, no amount of fine-tuning is going to remove the problem. The question then becomes simply which of many choices can we best live with?

IZUZIMANJE ARBITRAŽE I ZAŠTITA ARBITRAŽNIH SPORAZUMA U EU

Andrej Savin

REZIME

Arbitraža je izuzeta iz Briselske I uredbe o priznanju i izvršenju sudskih odluka. Ovaj izuzetak, rezultat činjenice da se u Evropskoj uniji Njujorška konvencija iz 1958. godine ocenjuje kao primaran i uspešan način priznavanja arbitražnih odluka, istovremeno stvara niz teškoća u radu ar-

59 See page 16, Frage 7, Überprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivilund Handelssachen, online, located as in note 38, retrieved 1.4.2010.

bitraža i sudova Evropske unije. Članak istražuje koje su posledice izuzetka na ugovorenu arbitražu i kako se ova može zaštititi.

Prvi deo čini pogled na izuzetak iz člana 1 (2) (d) Uredbe kroz zvanične komentare kao i kroz sudsku praksu Evropskog suda pravde. Mada je ova praksa uporno potvrđivala da je arbitraža izuzeta, nedoslednost i nepotpunost i dalje dovode stranke u sumnju. Posebna pažnja je posvećena kontroverznom slučaju West Tankers i njegovim mogućim i stvarnim posledicama.

U drugom delu se posebno analiziraju neke teškoće iz prakse koje su direktna posledica izuzetka iz člana 1 (2) (d) Uredbe. Među ovima se nalaze: problem ocene valjanosti arbitražnog ugovora, problem privremenih mera i sudskih pomoćnih radnji i problem priznanja i izvršenja sudskih odluka koje su donete uprkos postojećem ugovoru o arbitraži.

U trećem delu se analiziraju nedavne inicijative za izmenu Uredbe, pre svega tzv. Hajdelberški izveštaj koji je Evropska komisija naručila kao osnovu za sopstvenu Zelenu knjigu o izmenama Uredbe i potonji Izveštaj. Takođe se obraća pažnja na druge predloge koji se bave izuzećem arbitraže iz domena Uredbe.