

# Can International Arbitration Remain Unaffected by EU Law? – Anti-Suit Injunctions and the Scope of the Arbitration Exception

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## *Abstract*

*The European Court of Justice has recently ruled in the case C-185/07 West Tankers (Allianz) that under certain circumstances the validity of an arbitration agreement may be evaluated under the Brussels I Regulation by a court of an EU Member State. Moreover, the courts of the seat of arbitration may not issue so-called anti-suit injunctions to protect arbitration against court proceedings in breach of an arbitration agreement in another Member State. This article deals with the concept of anti-suit injunctions and the interface between international arbitration and EU law, with focus on the recent case law of the ECJ. The European Commission has proposed amendments to the arbitration exception. The impact of the reform is difficult to foresee; however, any measure which implies bringing arbitration within the scope of EU law must be assessed carefully. International arbitration is a universal means of dispute resolution and the EU should be cautious not to adopt an inappropriate solution based on regional needs.*

## *Full Article*

### **1 Introduction**

It is a truth universally acknowledged that parties to a dispute sometimes commence proceedings in foreign jurisdictions with a view to gain time.<sup>1</sup> On such instances, a foreign court may be seised in bad faith and in disregard of, for example, an agreement to arbitrate. Although the foreign court

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<sup>1</sup> The author is indebted to Jane Austen for the structure of the opening sentence.

is ultimately likely to find that it does not have jurisdiction over the dispute because of the existing arbitration agreement, reaching this conclusion may nevertheless take a long time and involve an examination of the validity of the agreement to arbitrate. “Time is money”<sup>2</sup>, and this is particularly true in transnational litigation where prolonged court proceedings often mean substantial costs, be it in the form of litigation expenses or otherwise. In order to combat this type of dilatory manoeuvres, courts in Common Law jurisdictions may issue so-called “anti-suit injunctions”, that is, orders restraining a party from commencing or continuing vexatious court proceedings in foreign jurisdictions.

European Union law does not, in principle, deal with international arbitration. In creating an “area of freedom, security and justice”<sup>3</sup>, the EU has adopted the Brussels I Regulation<sup>4</sup> (hereinafter also “the Regulation”) which deals with the recognition and enforcement of judgments in civil and commercial matters. However, the wording of the opening article of the Regulation is straightforward: “[t]he Regulation shall not apply to [...] arbitration.”<sup>5</sup> Curiously enough, this “arbitration exception” was nonetheless at the heart of a controversial judgment by the Court of Justice of the European Union<sup>6</sup> (“European Court of Justice”, hereinafter also “the ECJ” or “the Court”) in the recent *West Tankers* (also known by the name *Alilianz*) case.<sup>7</sup> In that reference for a preliminary ruling, the House of Lords

2 This adage is attributed to Benjamin Franklin (1706–1790).

3 Title V of the Treaty on the Functioning of the European Union, OJ C 115 of 9 May 2008.

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. For the sake of clarity, the paper only refers to the Brussels I Regulation although in many instances it may be appropriate to bear in mind that the Lugano Convention, the signatories of which include also the EFTA Member States (with the exception of Liechtenstein; Iceland, Norway and Switzerland being signatories), is highly similar in terms of its content. Also the relevant case law of the European Court of Justice is, to an extent, applicable thereto. However, it is not the purpose of this article to deal further with the Lugano Convention.

5 Article 1(2)(d). In a similar fashion, Article 1(2)(e) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16, provides that “[t]he following shall be excluded from the scope of this Regulation: [...] arbitration agreements [...]”.

6 At the time of the judgment, the Court of Justice of the European Communities; from 1 December 2009 onwards the Court of Justice of the European Union, as it was renamed with the entry into force of the Treaty of Lisbon.

7 Judgment of the Court (Grand Chamber) of 10 February 2009 in Case C-185/07 *West Tankers*.

asked the ECJ whether a United Kingdom court could issue an anti-suit injunction to protect *arbitral* proceedings in London against parallel *court* proceedings commenced in another EU Member State, namely Italy. In its judgment, the ECJ ruled this practice to be incompatible with the Brussels I Regulation.

The question is: why were these protective measures not compatible with EU law, considering that the Regulation does not apply to arbitration? The effect of the *West Tankers* judgment as to the scope of the Brussels I Regulation is worth considering: the judgment involves bringing arbitration-related anti-suit injunctions into the scope of application of the Regulation and therefore blurs the boundaries of the arbitration exception. So far, international arbitration as an autonomous system of dispute resolution has been left untouched by the Union legislator. Moreover, one may contemplate the practical consequences of the judgment: what happens when anti-suit injunctions are no longer available to protect arbitration in the EU? In this respect, the possible economic significance of the *West Tankers* judgment is not to be underestimated. Since the possibility to issue anti-suit injunctions is no longer available for situations falling under EU law, contracting parties may increasingly choose their seat of arbitration outside the European Union.

In the following, I will first present the common law concept of anti-suit injunction, with a focus on English law. Secondly, the relationship between arbitration and EU law and the relevant case law leading up to the *West Tankers* case will be outlined. Thirdly, I will analyse the judgment in *West Tankers* and discuss the effects that the judgment might produce. Finally, it is not without significance how the arbitration exception is to be construed in the future. I will therefore conclude by addressing the possible future developments of the relationship of arbitration and the Brussels I Regulation.

## 2 Anti-Suit Injunctions

### 2.1 Origin and Legal Basis in English Law

The anti-suit injunction is an order that a court may issue to restrain a party to proceedings from either commencing or continuing litigation in a certain forum, often in a foreign jurisdiction.<sup>8</sup> The legal basis for anti-suit injunctions in current English law<sup>9</sup> is in the Supreme Court Act 1981.<sup>10</sup> However, the origins of this equitable<sup>11</sup> jurisdiction date back centuries, the first reports of an application for such relief being from the 15<sup>th</sup> century.<sup>12</sup> Its historical roots lie in a “common injunction” which the Courts of Chancery<sup>13</sup> could issue to restrain a party from commencing or continuing a suit in the courts of common law where to do so would be contrary to conscience.<sup>14</sup> As no statutory basis to grant an injunction existed before the Supreme Court of Judicature Act 1873, at the time, injunctions were granted by the Court of Chancery under its equitable jurisdiction.

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8 According to another definition, “[a]n anti-suit injunction is an order of the court requiring the injunction defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country, or court proceedings elsewhere in England.” (Footnotes omitted.) See, Raphael 2008, p. 4.

9 The concept of an anti-suit injunction is known throughout the common law world. However, for the purposes of this paper, the discussion will focus on the concept of the anti-suit injunction in English law (which refers to the law of England and Wales; Scotland and Northern Ireland being separate, independent jurisdictions). This is done in order to provide an overview of the concept to support the discussion on the European law implications which the English concept is perceived to have with regard to the case law of the ECJ, in particular Case C-185/07 *West Tankers*, explained below. Nevertheless, reference is made to the United Kingdom whenever the state is referred to in its capacity as a Member State of the European Union.

10 Section 37(1) which reads: ‘The High Court may by order (whether interlocutory or final) grant an injunction [...] in all cases in which it appears to the Court to be just and convenient to do so.’ Earlier provisions include the Supreme Court of Judicature (Consolidation) Act 1925 Section 45(1) and Supreme Court of Judicature Act 1873 Section 25(8).

11 Generally speaking, “equity” in common law jurisdictions refers to a set of legal principles developed to supplement strict rules of law and to mitigate their severity. For a more detailed presentation on the concept of equity in English law, see McGhee 2005, pp. 1–12.

12 Such injunctions are known to have been commonly issued from the time of Henry VI (1422–1461). See, to that effect, Altaras 2009, p. 328.

13 Until the Supreme Judicature Acts in 1873 and 1875 the English legal system was divided into courts of law and equity, that is, the common law courts and the Courts of Chancery respectively. The two formed separate and partly competing jurisdictions until they were fused by the said Acts. See, Raphael 2008, p. 41.

14 Bell 2003, p. 172.

## 2.2 Anti-Suit Injunctions and Transnational Litigation

The first record of a case with a transnational dimension, that is, where a party sought an injunction to prevent litigation outside of England was the case of *Love v Baker*<sup>15</sup> from year 1665.<sup>16</sup> Since then, the form and conditions for the anti-suit injunction have evolved, but the jurisdiction remains wide and discretionary. In general, by issuance of anti-suit injunctions, English law acts to prevent the pursuit of foreign proceedings that are vexatious or oppressive.<sup>17</sup> For example, courts may issue such injunctions in order to protect the integrity of the process<sup>18</sup> or guard against the evasion of public policies of the forum.<sup>19</sup>

It is to be noted that the anti-suit injunction is a discretionary remedy which the courts may issue when it is “just and convenient to do so”<sup>20</sup>. Thus, the right to obtain an injunction is not a cause of action<sup>21</sup> and it must always be in the interests of justice to grant the injunction.<sup>22</sup> Importantly, it is an elementary condition that the issuing court should have personal jurisdiction over the addressee of the order.<sup>23</sup> This is of paramount significance, especially in transnational litigation, since a key characteristic of the order is that it is directed at the person aiming to commence or continue the

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15 *Love v Baker* [1665] 1 Ch Ca 67. See also, Raphael 2008, p. 10.

16 For the first reported case of a court granting an injunction in proceedings outside the British Isles, see *Beckford v Kemble* [1822] 1 Sim. & St. 7 (sale of plantations in Jamaica).

17 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. The case is generally cited as the leading authority for the doctrine. See, e.g. Harris 2008, p. 370; and, more generally, Bell 2003, pp. 180–190.

18 As in *Armstrong v Armstrong* [1892] P 98.

19 See, e.g. *Bank of Tokyo Ltd v Karoon* [1987] AC 45.

20 Supreme Court Act 1981 Section 37(1).

21 Altaras 2009, p. 328. However, it has also been observed that “the cause of action is for an injunction itself, and does not require the underpinning of a separate equitable right” and that “there is no doubt that an anti-suit injunction is a legitimate form of final claim which can be claimed at trial independently of the existence of any other cause of action.” See, to that effect, Raphael 2008, p. 72 as well as footnotes 42 and 43 therein.

22 Raphael 2008, p. 173.

23 According to Lord Goff in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, the person must be “amenable” to the jurisdiction.

foreign proceedings, not at the foreign court itself.<sup>24</sup> The consequences of non-compliance with an anti-suit injunction are severe: it is a contempt of court and, therefore, acting in breach of an injunction may result in serious penalties, including imprisonment or seizure of assets situated in the United Kingdom.<sup>25</sup> The party acting in breach of an anti-suit injunction also runs a risk that the judgment obtained in a foreign jurisdiction will not be recognised in the United Kingdom.

### 2.3 Anti-Suit Injunctions in Support of Arbitration

In the basic situation, an anti-suit injunction is granted to restrain the pursuit of court proceedings abroad in order to protect court proceedings in England. However, anti-suit injunctions may also be issued in support of an arbitration clause.<sup>26</sup> Traditionally English courts have readily granted an injunction where proceedings are commenced in a foreign jurisdiction in breach of an existing arbitration agreement.<sup>27</sup> Notwithstanding the fact that the ECJ ruled in the case *Turner*<sup>28</sup> that anti-suit injunctions to restrain foreign court proceedings in the European Community were incompatible with the Brussels Convention,<sup>29</sup> the English courts maintained that they could continue to issue anti-suit injunctions where this was done in support of *arbitration*.<sup>30</sup> Admittedly, although the ECJ's position was clear in that anti-suit injunctions were incompatible with EU law, it could arguably be

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24 This is expressed already in the words of the Lord Chancellor in *Love v Baker* [1665] 1 Ch Ca 67: "It was said, The Injunction did not lie for foreign jurisdictions, nor out of the King's Dominions. But to that it was answered, The Injunction was not to the Court, but to the Party." To the same effect, see e.g. Lord Hobhouse in *Turner v Grovit* [2001] UKHL 65, para 22. See also, Bell 2003, p. 173. However, the *in personam* nature of the anti-suit injunction has not infrequently been seen as mere formalism. For instance, according to the late ECJ Advocate General Ruiz-Jarabo Colomer: "it is undeniable that, as a result of a litigant being prohibited, under threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is direct interference with its unfettered jurisdictional authority." See his Opinion in Case C-159/02 *Turner*, para 34.

25 Raphael 2008, p. 1; see also, Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*, para 14.

26 For an early recorded case to this effect, see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 L.T. 846.

27 To this effect, Sheppard 2005.

28 Case C-159/02 *Turner*.

29 *Ibid.*, para 31.

30 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598. It is noteworthy that the judge granting the anti-suit injunction at first instance in *West Tankers* [2005] EWHC 454 (Comm) indicated that he was bound by this judgment.

held that it was equally obvious from the ECJ's case law on arbitration<sup>31</sup> and its exclusion of the Brussels I Regulation that the *Turner* jurisprudence did not apply to arbitration and, therefore, could not preclude the issuance of anti-suit injunctions in support of arbitration.

It was precisely this situation which was addressed by the ECJ in the *West Tankers* case in February 2009. The facts of the case were the following. In year 2000, a ship owned by West Tankers Inc. collided with a jetty in Syracuse, Italy. Insurance companies brought proceedings against West Tankers Inc. in the *Tribunale di Siracusa* (District Court of Syracuse) in Italy claiming damages; West Tankers Inc., on the other hand, sought a declaration in the High Court in London, United Kingdom, to the effect that the insurers, who were claiming by their statutory right of subrogation under Italian law, were bound by an existing arbitration clause in the charter-party<sup>32</sup>, and that consequently, the dispute should be resolved in arbitration. The anti-suit injunction in support of the arbitral proceedings was granted by the British judge at first instance.<sup>33</sup> Once the case reached the House of Lords<sup>34</sup>, the lords decided to refer a question for a preliminary ruling under Article 234 EC<sup>35</sup> to the ECJ concerning the compatibility of the anti-suit injunction, when issued in support of arbitration, with European Union law. The ECJ replied: no such injunctions were to be allowed, even if they were issued in support of an arbitration agreement.<sup>36</sup>

#### 2.4 Criticism of the Anti-Suit Injunction

In order to understand the ECJ's reaction to anti-suit injunctions in the *West Tankers* case, it is in order to provide a critical assessment of the value of

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31 See, in particular, Case C-391/95 *Van Uden*; and Case C-190/89 *Marc Rich*.

32 A charter-party (Lat. *charta partita*, a legal paper or instrument, "divided", i.e. written in duplicate so that each party retains half) is the contract by which the owner of a ship lets it to others for use in transporting a cargo. See, the 11<sup>th</sup> Edition of Encyclopaedia Britannica and <http://www.britannica.com>.

33 *West Tankers* [2005] EWHC 454 (Comm).

34 *West Tankers v RAS Riunione Adriatica di Sicurtà SpA and others* [2007] UKHL 4.

35 Now, in an amended form, Article 267 of the Treaty on the Functioning of the European Union. The following paragraph has been added to the Article by the Treaty of Lisbon: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

36 Judgment of the Court (Grand Chamber) 10 February 2009, Case C-185/07 *West Tankers*, para 34.

anti-suit injunction. In the following, the anti-suit injunction is considered from the points of view of international comity, human rights as well as its practicality. In particular, the practicality argument is contemplated with reference to the needs of the uniform system for the allocation of jurisdiction in the EU. To illustrate the point, the national procedural law of one EU Member State, namely that of Finland, will be considered.

#### *2.4.1 International Comity and Human Rights*

The anti-suit injunction has been criticised widely on several grounds. The most obvious reason is that it is seen to interfere with the notion of international comity of nations. In public international law, comity involves mutual and reciprocal respect which is to prevail in the relations between different nations and their courts and legal systems.<sup>37</sup> Inasmuch as anti-suit injunctions interfere with matters falling within the national sovereignty of other countries, namely the administration of justice, the principle of comity of nations is compromised. It may be mentioned that the idea of comity is also reflected in the Brussels I Regulation. In particular, the principle of mutual trust by virtue of which judgments given in other Member States are recognised and enforced all over the EU<sup>38</sup> may be seen as an expression to respect the administration of justice in other Member States.

Furthermore, the anti-suit injunction is seen as possibly violating fundamental human rights since it may be seen as obstructing a party's access to court, particularly in the sense of Article 6 of the European Convention of

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37 Raphael 2008, p. 7. Another description is provided by Sir John Donaldson MR in *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA), p. 186: "Judicial comity is shorthand for good neighbourliness, common courtesy, and mutual respect between those who labour in adjoining judicial vineyards."

38 See, in particular, Recitals 16 and 17 of the Preamble to the Brussels I Regulation.



Human Rights<sup>39</sup>. It has been suggested that this right to access to court may possibly come to be assessed on a transnational basis, and that therefore to impede access to a court in a different country might constitute a violation of Article 6 of the European Convention of Human Rights.<sup>40</sup> In addition, the possibility to obtain an anti-suit injunction may also be seen as inherently favouring litigants in those jurisdictions where the anti-suit injunction is available, as opposed to litigants in jurisdictions where such an order is unknown.<sup>41</sup>

#### 2.4.2 *Anti-Anti-Suit Injunctions and Attaining “Practical Justice”*

The anti-suit injunction is often applauded as a practical tool to achieve practical justice.<sup>42</sup> However, it should be noted that this practical nature is directly linked with the unilateral character of the instrument; practical justice may be achieved easily whenever the party agrees to be restrained from continuing the foreign proceedings and whenever the foreign court does not object to being thus affected. However, whenever this is not the case and the foreign court does not want to tolerate interference with its jurisdiction, the practicality is lost. A court in a common law jurisdiction may in such a situation issue a “counter-injunction” against the anti-suit injunction; these are known as *anti-anti-suit* injunctions. It goes without saying that subsequently an *anti-anti-anti-suit* injunction may, and is even

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39 Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. The European Court of Human Rights has held that a right of access to a court is inherent in Article 6 of the Convention and that the individual has a right of effective access to a court. See, for these two conditions, *Golder v United Kingdom* (1975) judgment of 21 February 1975 §§28 and 35–36; and *Airey v Ireland* (1979) judgment of 9 October 1979 §§24 and 28, respectively. These considerations are also valid in the context of EU law, since the ECJ has held that “the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.” See e.g. Case C-432/05 *Unibet*, para 37.

40 See, to this effect, Raphael 2008, pp. 28–31.

41 To this effect, see Ambrose 2003, p. 412.

42 See, e.g. Raphael 2008, p. 12.

likely, to follow.<sup>43</sup> In such a scenario, the aim of achieving practical justice is obviously defeated.

From the viewpoint of achieving practical justice, it is interesting to contemplate the hypothetical outcome of the *West Tankers* case, had the ECJ decided otherwise. Namely, if the ECJ had expressly endorsed the use of anti-suit injunctions within the scope of the Brussels I Regulation, it is not inconceivable that similar procedural tools might have been introduced also in the other Member States' laws of procedure. In the overwhelming majority of EU Member States the concept of an anti-suit injunction is unknown. However, hypothetically speaking, it is not to be excluded that this kind of development might even have come about through new interpretations of the existing procedural laws, as demonstrated by the following example.

#### 2.4.3 Hypothesis: an Anti-Anti-Suit Injunction Emanating from a "Civilist" Member State – the Case of Finland

I would like to further entertain this hypothesis of reciprocal injunctions emanating from courts of different Member States. In the case *Through Transport*<sup>44</sup>, proceedings were commenced in a Finnish court, *Kotkan käräjäoikeus* (District Court of Kotka), in breach of an agreement providing for arbitration in London. The English High Court was subsequently seised with a view to obtain an anti-suit injunction to restrain the Finnish proceedings. An interesting question which may be asked is whether the Finnish court could have responded to the anti-suit injunction?

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43 The problems associated with a potential never-ending chain of anti-suit injunctions were famously highlighted in the transatlantic *Laker Airways* litigation. See, e.g. case *British Airways Board v Laker Airways Ltd* [1984] UKHL 7. For an example of an *anti-anti-suit injunction*, see case *GE Francona Reinsurance Ltd v CMM Trust No.1400* [2004] EWHC 2003, para 10.

44 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598. It may be noted that on appeal against the decision to grant the injunction, the English Court of Appeal was faced with a situation similar to the one later to present itself in the case *West Tankers*. In fact, the Court of Appeal considered the possibility of making a reference for a preliminary ruling to the ECJ, but observed that Article 68 EC permitted only courts against whose decisions there are no judicial remedies under national law to make a reference concerning the interpretation of the Brussels I Regulation. Therefore only the House of Lords would have been competent to make such a reference, as was subsequently the case in *West Tankers*. It may be noted that Article 68 EC has since been repealed by the Treaty of Lisbon.

Similarly to most European jurisdictions with origins in the Romano-Germanic legal tradition, Finnish law does not contain a provision for granting anti-suit injunctions. However, Finnish courts may order precautionary measures in accordance with Finnish law. In particular, under the Finnish Code of Judicial Procedure “the court may [...] prohibit the deed or action of the opposing party, under threat of a fine [...]”.<sup>45</sup> The very broad wording of this provision may be seen as enabling, at least in theory, the court to order a party to restrain from acting in the court of another Member State, which is, in effect, more or less the result produced by the anti-suit injunction.<sup>46</sup>

I do not intend to suggest that, had the ECJ decided otherwise in *West Tankers*, Finnish courts would have actually commenced to issue anti-suit injunctions. Rather, the purpose of the above hypothesis is to underline that the “practical” effectiveness of the anti-suit injunction may not be a very sound justification for upholding anti-suit injunctions in the first place as regards the Brussels I Regulation. In any event, had the ECJ deemed anti-suit injunctions compatible with the Regulation, nothing would have prevented other Member States from including similar tools in their national laws. Whilst this remains a theoretical contemplation, such developments would have potentially gravely undermined the effectiveness of the anti-suit injunction and the overall efficiency of the Brussels I regime.

### 3 The European Union Law Context

#### 3.1 Arbitration and EU law

Arbitration used to enter the ambit of European Union law through Article 293 EC, whereby Member States were to negotiate the “simplification of formalities governing the reciprocal recognition and enforcement of [...]”

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45 Chapter 7 Section 3 of the Code of Judicial Procedure (4/1734). An unofficial English translation of the code by the Ministry of Justice of Finland is available at <http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

46 In an article from 2004, a Finnish scholar suggested that an agreement conferring exclusive jurisdiction on the Finnish courts might be a factor which might induce the Finnish court to grant the measure. See, to that effect, Koulu 2004, pp. 235–236. At the current state of the law, this possibility is of course precluded under the Brussels I Regulation by virtue of the more recent ECJ’s case law, particularly the cases C-116/02 *Gasser*, C-159/02 *Turner*, and C-185/07 *West Tankers*.

arbitration awards.” However, this provision has now been repealed by the Treaty of Lisbon.<sup>47</sup> In any event, arbitration has always been expressly excluded from the scope of the Brussels I Regulation. The main reason for the exclusion is the fact that the rules governing arbitration have largely been established by international conventions.<sup>48</sup>

Despite the seemingly clear wording of the arbitration exception, the question of what has actually been excluded from the Regulation’s scope is not unambiguous. While it has been acknowledged that the Contracting Parties of the Brussels Convention<sup>49</sup> “intended to exclude arbitration in its entirety”<sup>50</sup> from the scope of the Convention; it has been equally observed that “the literal meaning of the word ‘arbitration’ itself implies that [the exception] cannot extend to every dispute affected by an arbitration agreement.”<sup>51</sup> The interface between the Regulation and arbitration revolves around certain determinants, such as whether arbitration is “merely a matter incidental to an examination of the competence of the court of origin to

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47 Article 293 EC has been repealed because it had become outdated and was no longer seen as necessary to achieve the aims prescribed therein. It is true that various measures described in Article 293 EC could already be adopted, e.g. on the basis of Articles 65, 94 and 95 EC (now Articles 81, 115 and 114 TFEU, respectively). However, it may be contemplated whether the removal of the explicit competence of the Union in matters relating to arbitration could complicate possible future developments regarding arbitration and EU law. See, on the reasons for repealing Article 293 EC, *travaux préparatoires* concerning the ratification of the Lisbon Treaty by the Republic of Finland (in Finnish), HE 23/2008 vp, pp. 265–266.

48 In particular, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, UN Treaty Series, Vol. 330, p. 3 (hereinafter the “New York Convention”), to which in total 142 states, including all Member States of the EU, are parties. In addition, the European Convention on International Commercial Arbitration of 1961 done at Geneva, 21 April 1961, is worth mentioning; however, not all Member States are parties to this Convention. For more on the reasons for the exclusion of arbitration, see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968, OJ C 59, 5 March 1979, (hereinafter the Jenard Report), p. 13. It may be noted that the so-called “EC Arbitration Convention”, namely Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 23 July 1990, OJ 1990 L 225, p.10, is a convention on compulsory arbitration regarding taxing conflicts and transfer prices, and is therefore not to be confused with the conventions on international commercial arbitration.

49 1968 Brussels Convention; later Council Regulation 44/2001, the “Brussels I Regulation”.

50 Case C-190/89 *Marc Rich*, para 18.

51 Report 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, signed at Luxembourg, 9 October 1978, OJ 1979 C 59, p. 71 (hereinafter “the Schlosser report”), p. 93.

assume jurisdiction”<sup>52</sup> or a “preliminary issue which the court must resolve in order to determine the dispute”<sup>53</sup>. All in all, it is noteworthy that the existing ambiguity as to the way in which the arbitration exception is to be construed is not a totally new phenomenon.<sup>54</sup>

The European Court of Justice has been faced with arbitration in several cases which relate to arbitration in one way or another.<sup>55</sup> The situations include whether an arbitral tribunal is a “court of a Member State” which is under an obligation to make a reference for a preliminary ruling,<sup>56</sup> whether an arbitral award may be annulled by a national court based on a provision of EU law,<sup>57</sup> as well as whether the appointment of arbitrators and the grant of provisional measures which relate to a dispute to be heard before an arbitral tribunal are measures within the scope of the Brussels I Regulation.<sup>58</sup> The ECJ has also examined arbitration agreements in respect of their compatibility with consumer protection.<sup>59</sup> With regard to the weak position of the consumer and the imbalance between the consumer and the seller,<sup>60</sup> an arbitration agreement may be considered to be void on grounds of public policy related to consumer protection.<sup>61</sup>

Furthermore, it may be pointed out that the ECJ has held, in the context of the United Nations Convention on the Law of the Sea,<sup>62</sup> that EU law precludes the submission of a dispute to an arbitral tribunal set up under an international convention where this would involve the interpretation or ap-

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52 *Ibid.*

53 Case C-190/89 *Marc Rich*, para 26; Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*, para 54.

54 For a more detailed presentation on the evolution of the scope of the exception, see Briggs 2008, pp. 504–511. Particularly the judgment in the case C-391/95 *Van Uden* has blurred the clarity of the exception. See, to that effect, *ibid.* p. 510.

55 Indeed, it may be noted that the ECJ itself has jurisdiction, by virtue of Article 272 TFEU, “to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.”

56 Case 102/81 *Nordsee*.

57 Case C-126/97 *Eco Swiss*.

58 At the time of the judgments, the Brussels Convention of 1968. See, Case C-190/89 *Marc Rich* and Case C-391/95 *Van Uden*, respectively.

59 See Cases C-168/05 *Mostaza Claro* and C-40/08 *Asturcom*.

60 Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial*, para 27.

61 See, Case C-40/08 *Asturcom*, para 52.

62 United Nations Convention on the Law of the Sea (UNCLOS) signed at Montego Bay on 10 December 1982, UN Treaty Series, Vol. 1833, p. 3.

plication of EU law which falls under the exclusive jurisdiction of the ECJ.<sup>63</sup> Finally, it may be conjectured that the impact of EU law may also extend to international *investment* arbitration whenever this kind of arbitration is based on Bilateral Investment Treaties between two EU Member States.<sup>64</sup>

### 3.2 Allocation of Jurisdiction in EU law: a Forum Shopper's Delight?

#### 3.2.1 *The Hierarchy of Lis Pendens and Agreements on Jurisdiction*

The general rule on *lis pendens* states that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, the court first seised shall first establish whether it has jurisdiction over the dispute.<sup>65</sup> Should the court first seised decline jurisdiction, the court *second* seised may then proceed to examining the dispute at issue. Moreover, according to the ECJ, in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction.<sup>66</sup> However, this general rule of *lis pendens* becomes more complicated if the dispute at hand is characterised by the presence of an agreement conferring jurisdiction. The question then becomes should the general rule still prevail even if the court second seised is the court upon which the parties have conferred exclusive jurisdiction by virtue of a jurisdiction clause?

The basic starting point for the ECJ in evaluating jurisdiction clauses has been to view the courts of a Member State designated in the jurisdiction clause as having exclusive jurisdiction to pronounce on their competence, that is, the validity of such a clause.<sup>67</sup> However, the Court has also had to consider not only the respect for an agreement conferring jurisdiction but also the need to adhere to the chronological order in which courts are seised of the dispute. In other words, these conflicting interests have had to be balanced, resulting in the juxtaposition of Articles 27 (*lis pendens*) and 23 (agreement conferring jurisdiction) of the Regulation. The ECJ adopted

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63 Case C-459/03 *Commission v Ireland (the MOX Plant)*, paras. 123 to 126.

64 See, to that effect, Wehland 2009, p. 319.

65 Article 27 of the Brussels I Regulation. For a comprehensive account on various questions regarding *lis pendens*, see McLachlan 2009.

66 See, to that effect, Case C-351/89 *Overseas Union*, para 23.

67 See, to that effect, Case C-269/95 *Benincasa*, para 32.

the following solution in the case *Gasser*<sup>68</sup>: the court first seised must have priority to pronounce on its competence before the court second seised, *notwithstanding* the fact that the court second seised has been designated by the parties to the dispute as the court having exclusive jurisdiction. Thus the ECJ granted priority to the order in which the courts are seised over any agreement by which the parties may have conferred jurisdiction on a particular court. As a result, any court second seised must therefore stay proceedings until the court first seised has declared that it has no jurisdiction.<sup>69</sup>

### 3.2.2 *Exclusive Forum Clauses and Anti-Suit Injunctions*

The problems of the approach in *Gasser* were soon to be highlighted by the subsequent ECJ ruling in the case *Turner*<sup>70</sup>. Traditionally, if proceedings are commenced in breach of an exclusive forum clause designating an English court (or arbitral tribunal) as competent to resolve the disputes in the matter, the English judge is presumed to issue an injunction unless it is shown that there are strong reasons as to why the anti-suit injunction should *not* be granted.<sup>71</sup> In the *Turner* case the ECJ held that the courts of a Member State cannot grant an anti-suit injunction in support of the proceedings in the court second seised.<sup>72</sup> What is more, the ECJ stated expressly that the grant of an anti-suit injunction would not be permissible even if the court not designated by the agreement were seised in bad faith with a view to frustrating the existing proceedings.<sup>73</sup> This is because, according to the ECJ, the anti-suit injunction constitutes interference with the jurisdiction

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68 Case C-116/02 *Gasser*.

69 *Ibid.*, para 54.

70 Case C-159/02 *Turner*.

71 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (CA), For more on the so-called "Angelic Grace" principles, see Raphael 2008, p. 173–182.

72 Case C-159/02 *Turner*, para 31. It may be noted that the question of the compatibility of an anti-suit injunction with EU law had been already raised earlier. In the case *Alfred C. Toepfer International GmbH v Societe Cargill France* [1997] EWCA Civ 2811, the English Court of Appeal decided to refer the question to the ECJ; however the case settled. See, Nurmela 2005, p. 144. Another reference was made in Case C-24/02 *Marseille Fret*. In that case, however, the ECJ declared that it did not have jurisdiction to reply to the questions posed by a French court (*Tribunal de commerce de Marseille*) on grounds that the referring court was not a court of final instance in the sense of Article 68 EC. As observed in footnote 44, Article 68 EC has since been repealed by the Treaty of Lisbon.

73 Case C-159/02 *Turner*, para 31.

of the foreign court and runs counter to the principle of mutual trust which underpins the EU judgments regime.<sup>74</sup>

The Court's reasoning in *Gasser* and *Turner* may be understood with respect to the operational needs of the Brussels I<sup>75</sup> regime. However, the outcome of the solution adopted by the ECJ may certainly be criticised: the possibility to seise whatever court in any Member State, in breach of an existing agreement conferring jurisdiction, is likely to encourage actions brought in bad faith. The availability of such dilatory actions provides an undue incentive for forum shopping which aims to prolong the duration of proceedings.<sup>76</sup> In according prevalence to the idea of the mutual trust in the interaction of the courts of the Member States<sup>77</sup> over respecting the trust in private agreements conferring jurisdiction<sup>78</sup>, the ECJ has arguably legitimised the use of dilatory proceedings in the courts of other Member States.<sup>79</sup> Arguably, also the fact that a clause conferring jurisdiction is seen as not conferring exclusive jurisdiction, in the sense that no other court could be seised by the parties, may erode the confidence that economic operators have for the European legal system. In turn, this might result in large-scale commercial litigation being driven out of the European Union.<sup>80</sup>

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74 *Ibid.*, para 28.

75 To be precise, the judgment in question, although delivered in 2004, concerns still the 1968 Brussels Convention.

76 Such dilatory proceedings are commenced before the courts of states where the judiciary is known to act slowly. One such Member State is Italy, as was the case in *Gasser*, and such actions have commonly become known as "Italian torpedos". The risk of conflicting judgments is particularly high in the field of patent litigation. See, e.g. Betti 2008.

77 See Preamble to the Brussels I Regulation, Recital 16.

78 See *ibid.*, Recital 14.

79 The ECJ may soon pronounce again on a question of parallel proceedings, because the Irish Supreme Court has referred on 30 January 2009 a question for a preliminary ruling in the case *Goshawk Dedicated Ltd & Others v Life Receivables Irl Ltd* [2009] IESC 7. It may be estimated that at least the ECJ will not be reasoning on the basis of the principle of mutual trust, since both sets of proceedings are not within the EU, but take place namely in the United States and Ireland.

80 To this effect, Muir Watt 2007.



In general, lawyers from common law jurisdictions have criticised the ECJ judgments sharply.<sup>81</sup> From a doctrinal viewpoint, the ECJ judgments have been seen to create unnecessary rigidity by imposing inflexible rules where the system would call for flexibility.<sup>82</sup> It is true that in a whole series of recent ECJ judgments, the common denominator has been the apparent difficulty of English private international law and that of the European Union to coexist peacefully.<sup>83</sup> The English judge has traditionally been free to address questions of competence by, for example, declining jurisdiction in favour of a more suitable court by way of the doctrine of *forum non conveniens*<sup>84</sup> or, in a situation where proceedings are commenced in a foreign jurisdiction, an anti-suit injunction to restrain those proceedings may have been issued. Following the rulings by the ECJ, these measures are no longer available under the Brussels I Regulation.

In addition, the practical implications of the ECJ case law are feared by many to prove disastrous.<sup>85</sup> The dreary prospects include, in particular, diminished numbers of large-scale commercial transactions and dispute resolution in Europe as well as – following the judgment in *West Tankers* – reduced attractiveness of European arbitral seats, such as London, as compared with other major arbitration centres, such as New York or Singapore.

All in all, it is against this line of case law that the judgment in the *West Tankers* case should be assessed. The situation in that case was basically the same as in *Turner*: the question of whether an anti-suit injunction may be granted, except that in support of *arbitration*, rather than ordinary litigation. Until the *West Tankers* judgment the ECJ case law remained thus unclear as

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81 According to Trevor Hartley, the decisions have caused “something of a crisis of confidence among English lawyers” towards the ECJ; while another commentator, Adrian Briggs, professor of private international law at Oxford University, has already earlier put the matter rather more pointedly by stating that “the concreting over of the common law conflict of laws is the one activity which never seems to require an environmental impact assessment.” See, respectively, Hartley 2006, p. 183; and Briggs 2002, preface, v.

82 Harris 2008, pp. 368–369.

83 Obvious examples include e.g. Case C-159/02 *Turner*; and Case C-281/02 *Owusu*.

84 This article does not purport to describe the doctrine of *forum non conveniens* in great detail. However, it is briefly noted that a stay of proceedings may be granted under the doctrine if another forum is shown to be clearly more appropriate for the proceedings at issue. See, to that effect and more generally, e.g. *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460. On the question of *forum non conveniens* in relation to European law, see Case C-281/02 *Owusu*.

85 See, to this effect, Harris 2008, pp. 368–369.

to whether anti-suit injunctions could be granted in a situation where the subject-matter of the dispute would have to do with arbitration, which, by definition, should fall outside the scope of the Brussels I Regulation.<sup>86</sup>

## 4 The Effect of the *West Tankers* Case

### 4.1 Analysis of the Judgment

#### 4.1.1 Principal Reasoning: *Effet Utile* of the Regulation

As already mentioned, in the *West Tankers* ruling, the ECJ considered anti-suit injunctions in support of arbitration proceedings to be incompatible with the Brussels I Regulation. In fact, the Court stated that the English proceedings, where the injunction was granted, did have arbitration as their principal subject-matter and the proceedings were, therefore, outside the scope of application of the Regulation by virtue of Article 1(2)(d). However, the Court went on to rule that

“[...] even though [such] proceedings do not come within the scope of [the] Regulation [...], they may nevertheless have consequences which undermine its *effectiveness*, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters.”<sup>87</sup>

In particular, the ECJ stated that as the parallel Italian court proceedings, on the other hand, did come within the scope of application of the Regulation, the anti-suit injunction was therefore “obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation”<sup>88</sup>. Thus the effect of the anti-suit injunction was unacceptable and was deemed incompatible with the effective functioning of the Regulation. The main argument for rejecting the anti-suit injunction by the ECJ was, therefore,

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86 Since according to Article 1(2)(d), the Brussels I Regulation “shall not apply to arbitration”.

87 Case C-185/07 *West Tankers*, para 24. Emphasis added.

88 *Ibid.*, para 30. Furthermore, it is settled case law of the ECJ that “the application of national procedural rules may not impair the effectiveness of the [Regulation].” See, to that effect, Case C-365/88 *Hagen*, para 20.

the doctrine of *effet utile*, that is, the principle of practical effectiveness, of European Union law.

#### 4.1.2 *The Idea of Mutual Trust*

Secondly, the ECJ also considered that the grant of the anti-suit injunction obstructed the performance of the Italian court. In particular, the Court stressed the importance of “the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under [Brussels I Regulation] is based”, echoing the reasoning in the *Turner* case.<sup>89</sup> This argument can be both endorsed and criticised. In creating a common system for the allocation of jurisdiction in Europe, it is clear that mutual trust as between courts of that area must be present. However, while it is true that this mutual trust is a cornerstone of the Regulation as regards mutual recognition of judgments,<sup>90</sup> it is, as one commentator has observed, “difficult [...] to understand why the principle of mutual trust should lead to consecrating the priority of any court seised (even in bad faith) rather than trusting the courts of the seat of arbitration.”<sup>91</sup> Nevertheless, the ECJ refers to mutual trust only after the discussion on *effet utile* and therefore the judgment is clearly not based solely, or even primarily, on that argument.

#### 4.1.3 *Principle of Competence-Competence and the Autonomy of Arbitration*

The New York Convention provides that a court, when seised of an action in a matter in respect of which the parties have made provision for arbitration, will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration clause is null and void, inoperative or incapable of being performed. The ECJ justified its reasoning thirdly by stating that where a party claiming the arbitration agreement to be “null and void, inoperative or incapable of being performed”<sup>92</sup>, the anti-suit injunction would effectively have the effect of depriving that party from the option to have the validity of the arbitration agreement examined by the, in

89 Case C-159/02, *Turner*, para 24.

90 See, Recitals 16 and 17 of the Preamble to the Regulation.

91 Horatia Muir Watt, comment on the article Kessedjian 2009, available at <http://conflictoflaws.net/2009/kessedjian-on-west-tankers/>, accessed on 1 November 2009.

92 In accordance with the wording in Art. II(3) of the New York Convention.

this case, Italian court.<sup>93</sup> Advocate General Kokott reasoned in her Opinion that this result is, in particular, against “the general principle that every court is entitled to examine its own jurisdiction (doctrine of *Kompetenz-Kompetenz*<sup>94</sup>).”<sup>95</sup>

So what about the arbitral tribunal then? The question is whether the arbitral tribunal should also be equally entitled to examine its own jurisdiction? It cannot be inferred from the mere absence of EU rules on arbitration that court proceedings are to be favoured over arbitration proceedings. In *West Tankers*, the ECJ treated the examination of the validity of the arbitration agreement as a “preliminary issue”<sup>96</sup> and an “incidental question”<sup>97</sup> which the national court must be able to deal with in order to pronounce on the question of whether it has jurisdiction or not.<sup>98</sup> It may be argued, however, that the question of the validity of the arbitration agreement cannot be dealt with as a mere preliminary issue.<sup>99</sup>

93 Case C-185/07 *West Tankers*, para 31.

94 It may be noted that the doctrine of *Kompetenz-Kompetenz* may also be construed in a larger sense to encompass the question of state sovereignty and the authority of the state over its own competence. See, e.g. Von Bogdandy–Bast 2010, p. 63.

95 Opinion of Advocate General Kokott in *West Tankers*, para 57. Generally, the principle is recognised widely in national laws and institutional rules on arbitration. For example, in France (Nouveau Code de Procédure Civile, version consolidée au 5 septembre 2009, art. 1458), England (Arbitration Act 1996 ss. 30-32), Finland (Laki välimiesmenettelystä 967/1992, 5 §), and in institutional rules such as LCIA (art. 23), ICC (art. 6), and UNCITRAL (art. 21). However, some variation exists as between different national regimes and the principle is also recognised as “controversial and [as one that] has spawned a range of different national responses”. See, to that effect, Barceló 2003, p. 1123.

96 Judgment in Case C-185/07 *West Tankers*, para 26. Advocate General Kokott elaborated more on the theme in her Opinion, at para 54, by stating that “[t]he existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, as a *preliminary* issue it could not change the classification of the proceedings, the subject-matter of which falls within the scope of the Regulation.” (Italics added.)

97 Judgment in Case C-185/07 *West Tankers*, para 26.

98 The Court discovered support for its reasoning in the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters OJ 1986 C 298, p. 1 (hereinafter Evrigenis and Kerameus Report).

99 See, to this effect, e.g. comment by Horatia Muir Watt on the article Kessedjian 2009, available at <http://conflictoflaws.net/2009/kessedjian-on-west-tankers/>, accessed on 1 November 2009. Also, importantly, critics have pointed out that the Court failed to justify “why proceedings concerning the validity and application of an agreement to arbitrate should be beyond the [...] Regulation’s reach [in accordance with the *Marc Rich* doctrine on subject-matter], whereas a preliminary issue in relation to the very same subject matter falls within the Regulation’s mechanism dealing with allocation of jurisdiction.” See, Dutson–Howarth 2009, p. 339.

At this point, it may be observed as a side remark that it is admittedly highly recommendable that a national court examines, even of its own motion, the possible unfairness of an arbitration clause in a *consumer contract* in ascertaining its own territorial jurisdiction, as the ECJ has held.<sup>100</sup> However, one may wonder whether a check for the validity of an arbitration agreement is really necessary for every arbitration agreement that may come before a national court as a preliminary issue in determining the question of its jurisdiction? Whereas consumer protection is a public policy exception which the national court must observe *ex officio*<sup>101</sup>, it appears that, finally, an action brought against *any* arbitration agreement under the Brussels I regime, even in bad faith, may indeed produce similar effects with an equally extensive scrutiny of the arbitration agreement. If the validity of arbitration agreements is examined simply as a result of bringing an action in the said court, the effectiveness of arbitration will inevitably suffer. Therefore a line has to be drawn somewhere.

In fact, some commentators have suggested that the mere claim of the existence of an arbitration agreement should be sufficient to direct the proceedings to the arbitral tribunal which should then examine its competence, along with the validity and the applicability of the agreement to arbitrate.<sup>102</sup> Furthermore, arguably the 1958 New York Convention requires allocating such, at least practical, priority to the arbitral tribunal.<sup>103</sup> In addition, the subsidiarity of the Brussels I Regulation to the New York Convention is apparent from Article 71(1) of the Regulation.<sup>104</sup> The ECJ's reasoning, namely that the examination of the validity of any arbitration clause falls within the

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100 With respect to Article 6(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). See, to this effect Case C-243/08 *Pannon GSM*, paras. 32 and 35.

101 This is the case "where the court has available to it the legal and factual elements necessary for that task." Case C-243/08 *Pannon GSM*, para 35.

102 Dutson–Howarth 2009, p. 340.

103 According to Catherine Kessedjian, Article II(3) of the New York Convention should be understood so that "it is for the arbitral tribunal to decide on the validity of the arbitration agreement unless (*and only in that case*) it is null and void, inoperative or incapable of being performed." (Italics added). Others have pointed out to the same effect that the cases where the arbitration agreement is null and void, inoperative or incapable of being performed, are extremely rare. See, respectively, Kessedjian 2009; and Dutson–Howarth 2009, p. 339.

104 Article 71(1) reads: "[The] Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments."

scope of the Regulation as a preliminary issue, may be seen as not respecting the intention of the parties to exactly exclude that jurisdiction.<sup>105</sup> After all, the chief purpose of parties' resorting to arbitration is to keep the matter away from ordinary litigation. Arguably, an approach whereby the foreign court would decline jurisdiction – based on the arbitration exception in the Regulation – as soon as it had assured itself of the *existence*, rather than the validity, of an arbitration agreement would be more consistent with reference to the clear wording of the exclusion in Article 1(2)(d) of the Regulation.<sup>106</sup> Furthermore, it can also be suggested that such practice would better guarantee the respect of the principle of competence-competence and that of the autonomy of international arbitration.

#### 4.2 Implications of the Judgment

The widespread interest in the *West Tankers* judgment is principally explained by the general economic significance attached to international arbitration. When it became known in 2007 that the European Court of Justice was to pronounce on a question relating to arbitration – something it does not normally do – curiosity was stirred. With regard to the ECJ's earlier decision in the case *Turner*<sup>107</sup> on the general incompatibility of anti-suit injunctions with EU law, fears were expressed as to the possible outcome of *West Tankers*. The main concern was that arbitration in the United Kingdom<sup>108</sup> would be rendered less attractive if the possibility to issue anti-suit injunctions in support of arbitration proceedings were to disappear. These feelings were enhanced by the importance attached to the issue of jurisdictional competition by the House of Lords in their reference to the ECJ. In particular, Lord Hoffman observed that

105 For a more general overview of party autonomy and EU law, see Kuipers 2009.

106 See also the judgment of the Court of Appeal of Paris in the *Fincantieri* case concerning the Brussels Convention, where it was held that “en présence d'une convention d'arbitrage [...] le juge étatique doit se déclarer incompétent à moins qu'un examen sommaire ne lui permette de constater la nullité ou l'inapplicabilité manifeste de la clause, priorité étant réservée à l'arbitre auquel il appartient de statuer sur sa propre compétence [...]” (Italics added) My translation: “When there is an existing arbitration agreement, [...] the national judge must declare that he is not competent to hear the dispute, where a cursory examination of the validity of the arbitration clause does not indicate the nullity or manifest inapplicability of the clause, since the arbitrator must have priority to pronounce on his own competence.”

107 Case C-159/02 *Turner*.

108 London, in particular, is a major seat for international arbitration.

“it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.”<sup>109</sup>

Nevertheless, it has also been suggested that the importance of the *West Tankers* judgment has been exaggerated.<sup>110</sup> It should also be noted that the courts of many other European arbitration centres, such as Paris, have never had the possibility of granting injunctive relief; a point which has not been seen as crucial to their success. In addition, although many of the reactions to the judgment have been rather grim,<sup>111</sup> the outcome of the judgment was largely predictable, considering the ECJ’s reasoning in the earlier cases.<sup>112</sup> However, following the judgment, the arbitration exception of the Brussels I Regulation may be viewed differently. Considering that the Regulation is not supposed to apply to arbitration, on the face of it, it is not an overstatement to say that the boundaries of the exception to the Regulation’s scope of application have been blurred by the *West Tankers* judgment. In any event, the judgment should also be understood as being given at a time when the

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109 Opinions of the Lords of Appeal for Judgment in the cause *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpaA and others* [2007] UKHL 4, p. 8.

110 See, to that effect, Dutson–Howarth 2009, p. 337. The authors of the article place more importance on factors such as the expertise of London-based counsel and arbitrators and the commercial importance of London in international trade.

111 With reference to the case law described above, one commentator has noted that “if you’re going to produce poor decisions, [...] you might as well do it consistently.” See George 2008. An even gloomier view was expressed by Adrian Briggs who stated that “[t]he judgment just goes to show that you can expect the worst and still be disappointed.” Comment on the article Hess 2009, available at <http://conflictoflaws.net/2009/west-tankers-comment-by-professor-hess/>, accessed on 1 November 2009.

112 In particular, Case C-116/02 *Gasser*; and Case C-159/02 *Turner*.

Brussels I Regulation is in a process of revision.<sup>113</sup> Therefore, the judgment may also be seen as a political decision to defend the system of the Brussels I Regulation as well as, more generally, the primacy of EU law.<sup>114</sup>

## 5 Alternative Solutions to Anti-Suit Injunctions in the European Union

### 5.1 The Situation Post-West Tankers

Firstly, lest it be forgotten, the grant of anti-suit injunctions remains available in the courts of common law jurisdictions whenever vexatious proceedings are commenced in overseas forums; that is, outside the European Union.<sup>115</sup> Moreover, the anti-suit injunction remains also available in jurisdictions outside the territorial scope of the Regulation, as the Regulation does not affect the powers of courts in third countries, that is, non-EU Member States, to restrain proceedings within EU Member States.<sup>116</sup> Although the grant is no longer possible by a court of a Member State in support of an arbitration agreement when proceedings are commenced in the courts of another Member State, many commentators have been quick to point out that this is not such a crucial issue, and that other kinds of weapons can be found in the arsenal of the common law.<sup>117</sup> In order to illustrate this point, one such weapon, with its strengths and limitations, is presented in the following: namely, an application for declaratory relief.

### 5.2 Declaratory Relief

#### 5.2.1 *Anti-Suit Injunctions vs. Declaratory Relief*

In general terms, declaratory relief, also called a declaratory judgment is a judgment of a court in a civil case which declares the rights, obligations or

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113 The plans for the revision of the Regulation are dealt with in more detail in Chapter 6. Propositions to reform the Regulation include e.g. the deletion of the arbitration exception and the adoption of a provision creating a hierarchy of courts allocating priority to the court agreed on in choice of court agreements.

114 See, to this effect, Hess 2009, available at <http://conflictoflaws.net/2009/west-tankers-comment-by-professor-hess/>, accessed on 1 November 2009.

115 The principle has been relied upon in a recent English judgment in the case *Shashoua v Sharma* [2009] EWHC 957 (Comm).

116 E.g. Channel Islands have been suggested as a particularly convenient jurisdiction to secure anti-suit injunctions also post-*West Tankers*. See, Balthasar 2009.

117 See, e.g. Van Waeyenberge 2009, p. 302; and Dutson–Howarth 2009, p. 345



duties of each party in a dispute.<sup>118</sup> The general EU law approach of the ECJ towards arbitration may also be applied to declaratory judgments in that they may fall outside the scope of the Regulation whenever they concern arbitration. As the ECJ pointed out in the judgment in *West Tankers*, the English proceedings which were commenced in support of the arbitration agreement did not come within the scope of the Regulation: in other words, they were covered by the arbitration exception in Article 1(2)(d). This is because the Regulation does not apply to proceedings, the *principal subject-matter* of which is arbitration.<sup>119</sup> To answer the question of when the subject-matter of proceedings is arbitration, the Court has further stated that “arbitration is the subject-matter of proceedings where they serve to protect the right to determine the dispute by arbitration.”<sup>120</sup> The same principle, the protection of arbitration proceedings, may be applied to declaratory judgments.

The important distinction between a declaration and the grant of an anti-suit injunction is that, arguably, a declaration given by the court of the arbitral seat does not interfere with the proceedings which are under way in another Member State. Moreover, those proceedings which aim to protect arbitration fall outside the scope of Brussels I Regulation. Therefore, any judgment handed down in another Member State need not be recognised under the Brussels I Regulation<sup>121</sup> by the court granting the application for a declaration in proceedings which do not fall within the scope of the Regulation themselves. To this effect, Gloster J. stated in a “post-*West Tankers*” case, *The Wadi Sudr* that

“[...] the judgments [given in another Member State] are not required to be recognised [...] in proceedings [...] which are not themselves

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118 The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. To this effect and for more on the concept of declaratory relief, see, e.g. Dharmananda 2009, pp. 25–29.

119 Case C-190/89 *Marc Rich*, para 26; and Case C-391/95 *Van Uden*, para 48.

120 The position was taken by the ECJ in Case C-391/95 *Van Uden* and was repeated by in the *West Tankers* case, see paras. 15, 22 and 23.

121 In particular, with regard to Art. 33(1) which provides that “[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”

proceedings within the Regulation, because, in the latter proceedings, the Regulation simply does not apply.”<sup>122</sup>

It must be held that the logic followed in *The Wadi Sudr* case is persuasive.<sup>123</sup> One should bear in mind that in order to determine whether a dispute falls within the scope of the Regulation, reference must be made solely to the subject-matter of the proceedings. When that subject-matter is arbitration, it follows logically that in proceedings where a piece of legislation, that is, the Brussels I Regulation, does not apply in the first place, one cannot suddenly be required to take into account that law; solely on account that court proceedings are commenced elsewhere.

As the declaratory judgment does not directly interfere with the foreign proceedings, it may be assumed that the grant of such relief does not, therefore, directly clash with the doctrines underpinning the *West Tankers* judgment either.<sup>124</sup> It is therefore possible to obtain a declaratory judgment as to the validity of an agreement to arbitrate. This declaration may then be used, for example, in order to gain a stay in the proceedings in the other Member State or to resist the recognition and enforcement of a foreign judgment in the home state.<sup>125</sup>

### 5.2.2 Possible Non-Recognition of Declaratory Judgments under Brussels I Regulation

Nevertheless, it has also been suggested that such declaratory judgments on the validity of an arbitration agreement go too far in limiting the scope of the arbitration exception excessively and that such judgments should not benefit from simplified mechanism of circulation under the Regulation.<sup>126</sup> A declaratory judgment on the validity of the arbitration clause should

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122 *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWHC 196 (Comm), para 94.

123 Moreover, the idea is not novel. Advocate General Darmon pointed out in his Opinion in the *Marc Rich* case, at para 88, that “in no circumstances can the existence of another action pending before another court entail the result that application of the [Brussels] Convention is extended to the dispute concerned if it was not already covered by the Convention by virtue of its subject-matter.” This passage was also relied upon by Gloster J. in her reasoning.

124 To this effect, Dutson–Howarth 2009, p. 345.

125 See, to this effect, *ibid.*

126 Mourre–Vagenheim 2009, p. 79.

therefore not be recognised under the Brussels I Regulation *exactly* for the reason that arbitration is excluded from the Regulation. This was the position taken by the *Cour d'appel de Paris* (Court of Appeal of Paris) in the case *Fincantieri*<sup>127</sup>, in which an Italian court had given a declaratory judgment on the validity of an arbitration agreement between the parties, one of which then sought recognition and enforcement of that Italian judgment in the French court. However, the Paris court considered that the Italian judgment was given on a matter which was outside the scope of application of the Brussels I Regulation and therefore could not be recognised by virtue of the Regulation.<sup>128</sup>

### 5.2.3 Doubts about the Compatibility of Declaratory Relief with EU Law

Moreover, the use of declaratory judgments in the way described above might be seen by some as a way to circumvent the *effet utile* of the Brussels I Regulation. While it is clear that a declaration would not interfere with the proceedings in another Member State in the same way as an anti-suit injunction does; considering that a declaratory judgment would nonetheless enable a litigant to go around the “first court seised” – rule, it begs the question whether the ECJ would approve of the solution. Finally, considering that the matter does not appear wholly clear beyond all doubt, this matter may yet come before the ECJ in the form of a reference for a preliminary ruling.

Finally, the purpose of this cursory presentation on the application for declaratory relief is simply to serve as an example of an alternative strategy as to the obtention of injunctive relief to combat vexatious foreign proceedings. While anti-suit injunctions may not be granted in the same way as before the *West Tankers* ruling, other means to challenge the foreign jurisdiction may remain available. Whereas this may regrettably encourage tactical manoeuvring by litigants, it may nonetheless mitigate the importance of the fact that anti-suit injunctions are contrary to the Brussels I Regulation.

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127 *Fincantieri* judgment of 15 June 2006.

128 This solution is also endorsed by e.g. Hess, Pfeiffer and Schlosser 2008, p. 56.

## 6 The Future of the Arbitration Exception

### 6.1 West Tankers: Confusion and an Unsatisfactory Outcome

It is clear that so far the interest has not only been confined to examining the impact of the judgment on anti-suit injunctions. Rather, notwithstanding the immediate practical effects that the *West Tankers* judgment may have on arbitration in Europe, the judgment has brought to the fore the overall ambiguities relating to the arbitration exception of the Brussels I Regulation.

First of all, it may be asked following the judgment in *West Tankers* whether the strict *lis pendens* rule upheld in the case *Gasser* operates also in the context of the enforcement of an arbitral award. In other words, is it possible for a litigant wishing to “torpedo” the enforcement of the arbitral award to invoke the invalidity of the arbitration agreement before the court in a Member State different from the Member State where the arbitral proceedings take place? If this were true, it would indeed paralyse the enforcement of the award. Needless to stress, such a solution would be contrary to the ideology of the Regulation and, as such, both disconcerting and totally unacceptable.

Secondly, it may be noted that the approach adopted in *West Tankers* concerning the scope of the arbitration exception results in a rather bizarre situation. When the validity of an arbitration agreement is contested in one Member State as a preliminary issue, the dispute may in effect be characterised as falling *within* the scope of the Regulation in that jurisdiction. However, in another Member State the same dispute may be characterised as falling *outside* of its scope as the proceedings before arbitrators and the courts of the arbitral seat exercising ancillary jurisdiction have arbitration as their principal subject-matter. If both the judge of the court in the first Member State and the arbitrator in the other Member State persist to go on with the respective proceedings, parallel judgments will follow. In such a case the court judgment would be recognisable by virtue of the Brussels I Regulation and the arbitral award by virtue of the New York Convention. Needless to say, the result is very unsatisfactory; particularly if the decisions

of the court and the arbitral tribunal are in conflict with each other. Apparently Advocate General Kokott referred to this kind of situation in her Opinion in *West Tankers* and stated that “[i]nstead of a solution by way of [anti-suit injunctions], a solution by way of law is called for.”<sup>129</sup> Considering the critique of anti-suit injunctions presented earlier in this article, it is easy to agree with Advocate General that the solution to this functional deficiency in the Regulation is surely not best resolved by the use of unilateral injunctions. In this respect, the *West Tankers* case has clearly highlighted the need to amend the Regulation to remedy the situation.

## 6.2 EU Commission’s Solution: Deletion of the Arbitration Exception

The problems of the situation are reflected in the calls by the EU Commission to delete, at least in part, the arbitration exception from the Regulation. This proposition is endorsed by the drafters of the so-called Heidelberg Report<sup>130</sup> as well as the Commission’s recent Green Paper on the Brussels I Regulation<sup>131</sup>. It is emphasised that the reason for deleting the arbitration exception is not to bring proceedings in arbitral tribunals within the scope of application of the Brussels I Regulation. The Commission underlines that the possible deletion of the exception would not be “for the sake of regulating arbitration”, but rather to ensure the smooth circulation of judgments in Europe and the prevention of parallel proceedings.<sup>132</sup> As a matter of fact, since the Regulation governs proceedings in, or judgments given by, a court of a Member State – not arbitral tribunals<sup>133</sup> – the Regulation would not apply to arbitration proceedings even in the absence of an explicit arbitration exception.<sup>134</sup>

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129 Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*.

130 Hess, Pfeiffer and Schlosser 2008. See particularly on the abrogation of the arbitration exception, Schlosser 2009, pp. 45–48.

131 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, Brussels, 21.4.2009, COM(2009) 175 final, pp. 8–10.

132 *Ibid.*, p. 8.

133 The ECJ has noted that generally, an arbitral tribunal is not to be considered as a “court or tribunal of a Member State” within the meaning of Article 177 of the Treaty [now, in amended form, Article 267 TFEU]. See, to that effect, Case 102/81 *Nordsee*, para 10.

134 Schlosser 2009, p. 45.

However, since court proceedings in support of arbitration might come within the scope of the Regulation with the deletion of the arbitration exception, the Commission is also contemplating the possibility of granting exclusive jurisdiction to the courts of the Member State of the place of arbitration to determine the questions relating to such proceedings.<sup>135</sup> Other proposed amendments include the introduction of a rule permitting a Member State to refuse to recognise or enforce a judgment on the validity or application of an arbitration agreement, where that judgment would be irreconcilable with an arbitration agreement under the national law of the Member State or an arbitral award that is enforceable in that Member State under the New York Convention.<sup>136</sup>

### 6.3 Conclusion: Development of EU Arbitration Law?

The precise effects of the possible amendments to the arbitration exception are difficult to envisage. However, it is clear that the Commission is proposing changes to the Regulation which bear an impact on arbitration – so far a field untrodden by the European legislator. It is true that the current state of affairs with regard to the problems described above is unsatisfactory. Therefore a solution is called for. However, international arbitration is transnational by definition and aspires to be universal in nature. Therefore it goes against the underlying postulate of arbitration to "regionalise arbitration laws".<sup>137</sup> It is thus questionable whether the problems should be resolved by extending the scope of EU law with respect to arbitration.

Finally, while the discussion on the effects of the *West Tankers* case will surely abate in the future, the discussion on the reform of the arbitration exception of the Brussels I Regulation is, on the contrary, likely to become more intense. The Commission's proposals in the Green Paper have already faced sharp criticism.<sup>138</sup> It remains to be seen how, or if, the arbitration exception in the Brussels I Regulation will change. All in all, the *West Tankers* judgment has highlighted the need for European coordination of legislation in relation to international arbitration.

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135 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, Brussels, 21.4.2009, COM(2009) 175 final, p.9.

136 *Ibid.*, p. 9. See also, Pullen 2009, pp.58–59 and the articles referred to in footnotes 28 and 29.

137 Mourre–Vagenheim 2009, p. 83.

138 See, e.g. Pinsolle 2009, pp. 62–65; and Pullen 2009, pp. 58–59.

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