

THEMIS 2011

JUDICIAL COOPERATION IN CIVIL MATTERS

**Brussels I Regulation and Arbitration – Trading
Torpedoes for Trust?**

- Commission's Proposal on Brussels I Regulation -

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(Semi-Final B: Lisbon)

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A. INTRODUCTION

1. The Treaty on the Functioning of the European Union (*the TFEU*)¹ imposes a duty of the European Union (*the EU*) to develop judicial cooperation in civil matters having cross-border implications.² Such cooperation may be based on the adoption of measures for the approximation of the laws and regulations of the Member States. Thus, as one imperative of the TFEU, judicial cooperation in civil matters aims to tackle obstacles deriving from incompatibilities between the various legal and administrative systems by means of closer cooperation between the authorities of Member States. The main pillar is thereby the principle of mutual recognition and enforcement of judgements and of decisions resulting from extrajudicial cases.³
2. As an important milestone in enhancing the judicial cooperation in compliance with its duty set out by the TFEU the Council of the EU adopted the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (*the Brussels I Regulation* or *Regulation*).⁴ Despite of the positive effects achieved by clear common rules introduced by the Regulation, in some areas its application opened up possibilities for abuse contrary to the interests of justice and legal certainty.⁵
3. One of the major abusive tactics that the Regulation was faced with has been the practice of “torpedo” claims. It represents an attempt by one party to prevent the opposing party from bringing its claim before another state court or an arbitration tribunal. Under the Brussels I Regulation a party might be prevented from bringing its claim if the opposing party files its law suit with a national court first. The court first seised will then have jurisdiction forcing the court seised second to decline

¹ Consolidated Version of the Treaty available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

² See Art. 81 TFEU.

³ See Judicial Cooperation in Civil Matters available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/index_en.htm.

⁴ The text of the Brussels I Regulation with amending acts is available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm.

⁵ See House of Lords, Green Paper on the Brussels I Regulation. Report with Evidence, para 98.

jurisdiction. Such tactics run counter to the principle of mutual trust serving as a foundation of the judicial cooperation and contradict its spirit.

4. This and similar problems gave rise to intensive debate among legal scholars and practitioners calling for a revision of the Brussels I Regulation. In December 2010 the European Commission (*the EC* or *the Commission*) finally presented its long-awaited proposal for a reform of the Brussels I Regulation.⁶ This paper aims to analyze one of the cornerstones of the Proposal which aims to tackle the problems arising out of the interface between the Regulation and arbitration. For this purpose, first an overview of the current regulations (**B.**) and major deficiencies in regard to the interaction with arbitration proceedings (**C.**) will be provided. A review of the suggested approaches as well as a final proposal of the EC will follow (**D.**). Finally, the authors will scrutinize whether the implementation of the Proposal will be effective enough to prevent legal uncertainties induced by the deficiencies of the interface of the Regulation and arbitral proceedings (**E.**).

B. THE RULES AS THEY ARE – THE STATUS QUO

I. Brief Overview of the Brussels Regime or ‘How We Got There’

5. The Brussels I Regulation is one of the regulations representing the so-called Brussels Regime. The Brussels Regime is a set of rules regulating the question of jurisdiction in legal disputes of civil or commercial nature between parties resident in different Member States of the EU and the European Free Trade Association (*the EFTA*). Its detailed rules assign jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgements.⁷
6. The Brussels Regime consists of three bodies of regulations: The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and

⁶ See European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 14 December 2010 (*the Commission’s Proposal* or *the Proposal*), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF>.

⁷ See European Union, available at: <http://www.brussels.info/european-union/>.

Commercial Matters (*the Brussels Convention*),⁸ The Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (*the Lugano Convention*)⁹ and the Brussels I Regulation. The Brussels Convention was signed by the Member States of the EU with the aim of increasing economic efficiency and promoting the single market by harmonising the rules on jurisdiction and preventing parallel litigation. The Lugano Convention is almost identical and was initially agreed with then six members of the EFTA.

7. The Regulation has largely supplanted the two previous conventions and is directly applicable to all EU Member States. Based on the principle of mutual trust,¹⁰ it aims at easier and more uniform rules to enable faster and simpler procedures for civil cross boarder litigation within the EU.¹¹ All three regulations are broadly similar in content and are applicable depending on the domicile of the defendant: the Regulation applies where the defendant is domiciled in a Member State and the Lugano Convention applies when the defendant is domiciled in Iceland, Norway or Switzerland.

II. Exclusion of Arbitration From the Scope of the Brussels Regime

8. The Brussels Regime applies in legal disputes of civil and commercial nature. However, there are some exceptions as to the scope of its application. The Regulation contains the same exclusion in regard to arbitration as it was already contained in the Brussels Convention. According to Art. 1 (2) of the Brussels I Regulation

2. The Regulation shall not apply to

(a) [...]

(d) arbitration.

9. Although arbitration represents a form of alternative dispute settlement as a legal mechanism for the resolution of disputes outside state courts, arbitration proceedings comprise several intrinsic legal issues which, if disputed, have to be submitted to the

⁸ The text of the Brussels Convention is available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:HTML).

⁹ The text of the Lugano Convention is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41988A0592:EN:HTML>.

¹⁰ See Recitals 16 and 17 of the Regulation.

¹¹ See Recitals 1 and 2 of the Regulation.

national courts for a final decision, e.g. disputes concerning appointment of an arbitrator, requests for provisional measures such as a freeze order or an injunctive relief, disputes in regard to the enforcement of arbitral awards and the validity of arbitration agreements. Thus, an arbitration procedure is never completely exempted from the influence of national courts. The language of the Regulation, however, does not indicate whether the scope of the exception covers these specific questions.

10. The exclusion of arbitration from the Brussels I Regulation was not specifically discussed in the preparatory reports. The Jenard Report on the Brussels Convention,¹² which contained the same wording in regard to the exclusion of arbitration, presents two reasons for the exclusion – (i) the existence of many international agreements on arbitration and (ii) the preparation of a European Convention providing the uniform law on arbitration. The Schlosser Report¹³ referred in its reasoning for the exclusion to the fact that all Member States have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*)¹⁴ which regulates matters of jurisdiction when a court is seised with a matter in respect to the recognition and enforcement of arbitral awards.

C. ARBITRATION EXCLUSION IN PRACTICE OR ‘FIRST SUE, FIRST SERVE’

11. The scope of the exclusion of arbitration has been subject of an intensive debate since the Brussels Convention came into force.¹⁵ The main disputed issues relate to ancillary proceedings (**I.**), provisional measures (**II.**) and parallel proceedings (**III.**). The European Court of Justice (*ECJ*) has rendered three important decisions dealing with these issues. However, they did not deliver all the necessary answers as to the applicability to the Regulation and to the competence of the national courts to hear matters relating to arbitration.

¹² Jenard, P, Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, 5 March 1979, OJ No C 59.

¹³ Schlosser, P, Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol of its Interpretation by the Court of Justice, 5 March 1979, OJ No C 59.

¹⁴ The text of the New York Convention is available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.

¹⁵ Svobodová K., Arbitration Exception in the Regulation Brussels I, p 1.

I. Ancillary Proceedings – *the Marc Rich Case*

12. One of the first cases where the ECJ had to rule on a matter relating to the interface between arbitration and court proceedings was the case of *Marc Rich & Co. AG v Società Impianti PA (March Rich Case)*.¹⁶ It dealt with ancillary matters to arbitration proceedings¹⁷ and was decided under the Brussels Convention. The dispute arose out of the sales contract concluded between Marc Rich incorporated in Switzerland and Impianti incorporated in Italy.
13. After Marc Rich complained that the received cargo was seriously contaminated Impianti summoned Marc Rich to appear before the Italian court in Genoa in an action for declaration that it was not liable to Marc Rich. Marc Rich, relying on the existence of arbitration clause, submitted that the Italian court had no jurisdiction and commenced arbitration in London in which Impianti did not participate. Subsequently, Marc Rich applied to the High Court of Justice in London to appoint an arbitrator which granted leave to serve an originating summons on Impianti in Italy.
14. Impianti requested that order to be set aside. It contended that the dispute between the parties was the question whether or not the contract contained an arbitration clause and therefore fell within the scope of the Convention and should be dealt with in Italy. The High Court held that the Brussels Convention did not apply. The Court of Appeal decided to stay the proceedings and referred several questions to the ECJ for a preliminary ruling.
15. The ECJ found that the contracting parties to the Brussels Convention “*intended to exclude arbitration in its entirety, including proceedings brought before national courts*”. It further stated that arbitration exception applies not only to arbitration proceedings but also to court proceedings in which the subject matter is arbitration.¹⁸ Thereby the subject matter is determined by referring to the nature of the main claims

¹⁶ *The Marc Rich Case*, C-190/89, 25 July 1991, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0190:EN:PDF>.

¹⁷ Ancillary proceedings may generally include such issues as appointment of arbitrators, determination of the seat of the arbitration and extension of time limits. See Illmer M, *Brussels I and Arbitration Revised – The European Commission’s Proposal COM(2010)748 final-*, p 5.

¹⁸ *The Marc Rich Case*, para. 26.

raised in the respective case. Whether the request made by the parties is one of a preliminary nature or not is irrelevant:

Article 1 (4) of the Convention must be interpreted as meaning that the exclusion provided 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.¹⁹

16. Therefore, Marc Rich could apply to the High Court of Justice for the appointment of an arbitrator even though the court first seised was the one in Italy.

II. Provisional Measures - *the Van Uden Case*

17. In the case *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line (the Van Uden Case)*²⁰ the ECJ dealt with the question of applicability of the Brussels Convention to the provisional measures applied for by a party to arbitration. The dispute arose between a Dutch company and Kommanditgesellschaft in Firma Deco Line and Another (*Deco Line*) incorporated in Germany.
18. Based on the contractual claim for unpaid invoices Van Uden has commenced arbitration proceedings against Deco Line in Netherlands. In addition, Van Uden applied to the President of the Rechtbank Rotterdam for an interim injunction securing this debt.²¹ Deco Line in its turn objected to the jurisdiction of the court arguing that it could only be sued in Germany as place of its incorporation. The Rechtbank dismissed Deco Line's allegations stating that an interim relief sought must be considered as a provisional measure according to Art. 24 of the Convention²²:

Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of the State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

¹⁹ *The Marc Rich Case*, paras 13-29.

²⁰ *The Van Uden Case*, C-391/95, 17 November 1998, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0391:EN:HTML>.

²¹ *The Van Uden Case*, paras 2-10.

²² Currently Art. 31 of the Brussels I Regulation.

19. Upon appeal the Hoge Raad applied for a preliminary ruling of the ECJ.²³ The questions imposed on the ECJ covered the question whether jurisdiction to hear application for interim relief could be established on the basis of Art. 24 and on the basis of Art. 5 (1) of the Brussels Convention stating that

A person domiciled in A Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question.

20. The ECJ ruled that there are no courts of any state that have jurisdiction as to the substance of the case if a valid arbitration agreement is in place. It further stated that

It is only Article 24 that a court may be empowered to order provisional or protective measures. Article 24 cannot be relied on to bring within the scope of the Convention measures relating to matters which are excluded from it.²⁴

21. However, the ECJ established that provisional measures are not in principle ancillary to arbitration proceedings as they are ordered in parallel as measures of support. The question whether such measures fall within the scope of the Brussels Convention depends therefore not on their own nature but rather on the nature of the rights they serve to protect. Thus, the ECJ confirmed that the decisive feature in regard to the scope of the applicability of the Convention is the subject matter lying in the heart of the proceedings. Thus, the Regulation applies in cases where provisional measures concern the performance of the contract as such and not the arbitration proceedings.

III. Parallel Proceedings - *the West Tankers Case*

22. The deficiency of the interface between the Regulation and arbitration hit its peak in the dispute *Allianz SpA, formerly Riunione Adriatica di Sicurtá SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. (The West Tankers Case)*.²⁵ In this

²³ *The Van Uden Case*, paras 11-17.

²⁴ *The Van Uden Case*, paras 19-34.

²⁵ *The West Tankers Case*, C-185/07, 10 February 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0185:en:HTML>.

case the ECJ had to decide whether a torpedo action can be prohibited by a national court or whether such a measure contradicts the Brussels I Regulation.

23. A “torpedo claim” or a “torpedo action” is a claim brought before a state court in the attempt to prevent the opposing party from bringing its claim before another state court or an arbitration tribunal. Mostly the torpedo claim is a claim for negative declaratory relief, i.e. the torpedo party wants the relevant court (a “torpedo court”) to find that the opposing party has no claim. Often such proceedings can relate to the existence, validity, scope of effects of the underlying arbitration agreement or the merits of the case with the subsequent problem of reciprocal recognition and enforcement of conflicting decisions.²⁶ The torpedo action will often be brought before a court that is known to decide against arbitration agreements, in the hope that the arbitration agreement will be found invalid and the arbitration will not take place.
24. After a vessel owned by West Tankers and chartered by Erg Petroli Spa, collided with a jetty owned by Erg in Italy, Erg claimed compensation from their insurances Allianz and Generali and began arbitration proceedings in London for recovery of the excess. West Tankers in its turn denied any liability. After compensation had been paid to Erg Allianz and Generali launched court proceedings against West Tankers in Italy to recover the sum they paid to Erg. West Tankers alleged that the court in Italy has no jurisdiction because of the validly concluded arbitration agreement. In addition, West Tankers filed proceedings at the High Court in the United Kingdom for an anti-suit injunction restraining Allianz and Generali from continuing their proceedings in Italy.
25. Within a request for a preliminary ruling the ECJ was asked whether it is consistent with the Regulation for a court of a Member State, designated under an arbitration agreement as the jurisdiction of choice, to make an order to restrain a person from commencing court proceedings in another Member State on the basis that such proceedings are in breach of the agreement. The ECJ ruled that, first,

²⁶ See Illmer M, Brussels I and Arbitration Revised – The European Commission’s Proposal COM(2010) 748 final-, p 7.

[...] an anti-suit injunction is contrary to the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.²⁷

26. Thus, the ECJ referred to the general rule that apart from few exceptions the Regulation does not empower a court of one Member State to rule on jurisdiction of a court of another Member State. In addition, it found that an anti-suit injunction runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions if it obstructs the court of another Member State in the exercise of the powers conferred on it by the Regulation, namely "to decide, on the basis of the rules defining the material scope of the Regulation, including Art. 1 (2) (d), whether the Regulation is applicable".
27. Finally, it stated that if by means of an anti-suit injunction the national court would be 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 party, 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 Art. 5 (3) of the Regulation²⁸ and would thus be deprived of a form of judicial protection to which it is entitled.
28. Thus, in summary, the ECJ provided in the presented decisions solutions in regard to the interface issues relating to ancillary proceedings and provisional measures. It thereby identified in both cases the subject-matter of the main dispute as a decisive criterion for the applicability of the Regulation. Further, the ECJ ruled that such counter-measures to parallel proceedings as anti-suit injunctions do not comply with provisions of the Regulation, thus, leaving no room for effective mechanisms to avoid parallel proceedings.²⁹

²⁷ *The West Tankers Case*, p 1.

²⁸ Art. 5 (3) of the Regulation states that "*A person domiciled in a Member State may, in another Member State, be sued: [...] 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur [...].*"

²⁹ See Illmer M, Brussels I and Arbitration Revised – The European Commission's Proposal COM(2010)748 final-, p 11.

D. THE EUROPEAN COMMISSION’S PROPOSAL COM(2010) 748 FINAL

I. On the Eve of the Commission’s Proposal

29. Deficiencies emerging from the interface of the Regulation and arbitration induced numerous discussions and suggestions striving to provide possible solution for incurring problems. In addition, the EC was obliged under Art. 73 of the Regulation to evaluate the operation of the Regulation and to present a respective report.

30. Carried out on behalf of the EC Report on the Application of Regulation Brussels I in the Member States (*the Heidelberg Report*) was published in September 2007.³⁰ In relation to arbitration the Heidelberg Report suggested to delete the arbitration exclusion completely, although most of the national reports were critical towards possible extension of the Regulation to arbitration.³¹ The questions of recognition and enforcement of arbitral awards should thereby be kept outside the Regulation’s scope, giving full effect to the New York Convention. However, the prevalence of the New York Convention does not exclude provisions concerning interfaces between the Regulation and the Convention, such as the enforcement of an arbitration agreement, ancillary measures, recognition and enforcement as well as conflicts between arbitral awards and judgements.³²

31. To tackle the problem of the possible existence of parallel proceedings and conflicting judgements the authors suggested including the following provision as a new Art. 27 A of the Regulation:

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 place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity and/or the scope of that arbitration agreement.³³

³⁰ Hess B, Pfeiffer T, Schlosser P, Report on the Application of Regulation Brussels I in the Member States, available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

³¹ The Heidelberg Report, paras 109-114.

³² The Heidelberg Report, paras 116-120.

³³ The Heidelberg Report, para 134.

32. Based on the Heidelberg Report the EC published a report³⁴ and a green paper³⁵ accompanying the Report and inducing almost 100 contributions from the public.³⁶ The Report and the Green Paper indicated possibilities of a complete and partial deletion of the arbitration exclusion.³⁷ In regard to the problems concerning the parallel proceedings the priority was suggested to be granted to the courts at the seat of the arbitration to decide on the validity of arbitration agreements, potentially supplemented by a time limit and a uniform conflict rule on the law applicable to the validity of arbitration agreements. In addition, the EC suggested enhancing recognition and enforcement of arbitral awards across the EU supplementing the New York Convention.³⁸
33. Finally, in June 2010, the EC appointed an international expert group on the interface of the Regulation and arbitration which agreed on a joint recommendation and proposal in October 2010.³⁹

II. The Final Version of the Proposal - ‘Thou Shalt Not Sue in Foreign Land’

34. To counter the legal uncertainties for the parties and the danger of conflicting judgements/awards originating from the ECJ jurisprudence, the Commission has introduced a solution for the above-mentioned deficiencies in its Proposal. It represents a compromise between the most distinctive positions. Recitals 11 and 30 (1.) define parameters for the partial deletion of the arbitration exclusion. Art. 36 of the Proposal incorporates jurisprudence the ECJ in regard to provisional measures (2.) The partial deletion in Art. 1 (2) (d) of the Regulation is thereby linked with the new

³⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 21 April 2009 (*the Report*), COM(2009) 174 final.

³⁵ Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 21 April 2009 (*the Green Paper*), COM(2009) 175 final.

³⁶ A list of all contributions is available at: http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm.

³⁷ The Green Paper suggested that a (partial) deletion of the arbitration exclusion from the scope of the Regulation could improve its interface with court proceedings. See The Green Paper, p 9.

³⁸ See also Illmer M, Brussels I and Arbitration Revised – The European Commission’s Proposal COM(2010)748 final-, p 13.

³⁹ See Illmer M, Brussels I and Arbitration Revised – The European Commission’s Proposal COM(2010)748 final-, p 13.

lis pendis tool introduced in Art. 29 (4) of the Proposal, whereas the term “*seizure*” of the newly tool is specified in Art. 33 (3) of the Proposal (3.).

1. Recitals – the Framework

35. To give the new modifications the right frame, Recitals 11 and 20 of the Proposal straighten out that

(11) This Regulation does not apply to arbitration, save in the limited case provided for therein. [...]

(20) The effectiveness of arbitration agreements should be also improved [...]. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. [...]

36. Prior to the Proposal, the preclusion of these matters was only stated in the respective reports. Thus, their position in the Regulation marks a clear borderline to the governance by either the New York Convention or national arbitration laws. This ensures parties to arbitration proceedings that these matters are not covered by the Regulation giving full effect to the predominance of the New York Convention.

2. Incorporation of the ECJ jurisprudence in Article 36 of the Proposal

37. Ancillary and provisional matters work well in practice as a consequence of the ECJ jurisprudence established in *the Marc Rich Case* and *the Van Uden Case*. Developed approaches are now incorporated into the language of the Proposal. Art. 36 regulates specifically jurisdiction of courts and tribunals over provisional measures “*as may be available under the law of the State, even if, the courts of another State or an arbitral Tribunal have jurisdiction as to the substance of the matter*”.

3. The ‘right’ balance between the Regulation and Arbitration?

38. Parallel proceedings resulting from torpedo actions remain the main problem for effective/efficient judicial cooperation within the scope of the Regulation. To confront such “*arbitral terrorism*”⁴⁰ the other party has several options: (i) to strive for an anti-suit injunction; (ii) to file a declaratory (counter-) relief for the arbitration

⁴⁰ Bishop D., Combating arbitral terrorism: Anti-arbitration injunctions increasingly threaten to frustrate the international arbitral system, <http://www.kslaw.com/library/pdf/bishop7.pdf>.

agreement's validity; (iii) to challenge the jurisdiction of the torpedo court and (iv) in the end to claim damages for breach of the arbitration agreement. These counter measures have (by now) all either lost their power of impact or were never really particular effective.

39. The anti-suit injunctions are primarily available before English courts. They are usually granted for a breach of the legal right not to be sued before the state courts and are therefore limited in case of questions concerning the arbitration agreement.⁴¹ Further they cannot be directed to the torpedo court, but at the claimant in the torpedo proceedings.⁴² Ultimately since the ECJ ruled in the *West Tankers* case that anti-suit injunctions in support of arbitration agreements are incompatible with the Regulation, they are no longer useable in order to counter a torpedo action before a court of a Member State.⁴³
40. A declaratory (counter-) relief is under the current regime a less attractive option as it is not able to prevent parallel proceedings due to its lack of a legal consequence that either results in exclusive jurisdiction or in mandatory stay/dismissal. The only binding result that could be derived from such a declaratory relief would be in the span of Recognition of the decision on the relief. A field that is not subject to Brussels I Regulation.
41. The third anti-measure is achieved through the challenge of jurisdiction under the respective national laws of the torpedo court. This challenge is in reality rather ineffective as the courts chosen for torpedo actions are the ones being notorious for their time consuming procedures on jurisdiction questions.
42. To counter a torpedo action with a claim for damages for breach of the arbitration agreement is mainly ineffective because it may be not available under the applicable

⁴¹ *Donohue v Armco Inc*, (2002) 1 All E.R. 749 paras. 24, 45.

⁴² Illmer M., *Brussels I and Arbitration Revisited - The European Commission's Proposal COM(2010) 748 final - Private Law Research Paper No. 11/6*, p. 8.

⁴³ Anti-suit injunctions issued by an Arbitral Tribunal are not an alternative, prior to the constitution of the Tribunal the measure is not available and if issued it is not very effective due to its lack of the coercive powers of contempt of court; see Stuart Dutton/Mark Howarth, *After West Tankers - Rise of the „Foreign Torpedo“? Arbitration* 75 (2009) 334-348 (345 f.).

national laws. With this in mind the Commission chose to balance the interface of the Regulation and arbitration to present a relief for the vulnerability of arbitration agreements in relation to torpedo actions brought before state courts, thereby preventing inefficient parallel proceedings and the resulting, potentially conflicting, decisions on the arbitration agreement's validity and/or on the merits.⁴⁴ The newly drafted articles try to present an effective mechanism to avoid parallel proceedings.

a. A partial solution to implement a new mechanism for pending lawsuits

43. Art. 1 (2) (d) of the Commission Proposal provides

[...] this Regulation shall not apply to arbitration, save as provided for in Articles 29, paragraph 4 and 33, paragraph 3.

44. Art. 29 (4) of the Proposal is the innovation that governs the right of way of the proceeding of the state court which jurisdiction fulfils the requirements of Art. 29 (4): once a party brings proceeding before the seat courts, it is exclusively for these courts to determine the validity of the arbitration agreement.

b. Was the goal of a uniform conflict rule achieved with Articles 29 and 33 of the Proposal?

45. Art. 29 (4) of the Commission Proposal provides

Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine [...].

46. Art. 33 of the Commission Proposal provides

⁴⁴ COM(2010) 748 final, p. 4.

[...] an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution.

47. In this provision the principle of mutual trust among the Member States' courts⁴⁵ experiences realization to the fullest. Hence, it affords a high degree of trust to the seat courts and the arbitral tribunal since the ruling on the arbitration agreement's validity is binding upon any other Member States' courts. To experience the benefits of the new rule, two procedural requirements have to be fulfilled prior to the application of the *lis pendis* mechanism.
48. The challenge of the torpedo courts jurisdiction has to be based on the arbitration agreement according to Art. 29 (4) of the Proposal. As Art. 29 (4) only addresses the legal basis of the challenge, the procedural details in each individual case are governed by the national laws. These national laws are in the majority of the cases consistent with Art. II (3) NYC.⁴⁶
49. Art. 29 (4) of the Proposal further requires in order to initiate the *lis pendis* tool, that either a court or an arbitral tribunal is seised. Art. 33 (1) of the Proposal establishes "seizing" for courts and Art. 33 (3) of the Proposal defines "seizing" where an arbitral tribunal is appointed to the task of solving the dispute. In regard of arbitral proceedings it is held that, the nomination of an arbitrator by one party or a request for arbitration addressed to an arbitral institution, authority or state court is to be interpreted as seizing. However, one has to bear in mind before that the provision constraints the challenge to be seised before state court at the seat of the arbitral tribunal or before the arbitral tribunal itself. If this is requirement is not observed by the challenging party the *lis pendis* rule of Art. 29 (4) of the Proposal does not apply! In this case the torpedo court could render the arbitration agreement invalid and proceed to decide on the merits. In the end a recognizable and enforceable court decision is the result that falls absolutely within the scope of the Regulation.

⁴⁵ See Recital 16 & 17 of the Regulation.

⁴⁶ Considering the current status of the New York Convention http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

50. The newly created *lis pendis* mechanism of Art. 29 (4) of the Proposal differs from the *lis pendis* mechanism established through several decisions of the ECJ. The main difference is that chronology does not establish priority. Only the courts at the seat or the arbitral tribunal are the competent ones. However there is no sanction rule in Art. 29 (4) of the Proposal, if the torpedo court proceeds with its ruling although it should stay. In light of the main goal of Brussels I, namely to create mutual trust between the courts of Member States it is a reasonable decision to abandon the idea of sanctions.
51. The rule of Art. 29 of the Proposal has a final and binding effect for the torpedo courts proceeding, in case of a valid arbitration agreement it has to declare itself incompetent and in case of an invalid arbitration agreement it would *per se* have jurisdiction under the principles of Brussels I. In the later stage of Enforcement of the foreign award each Member State court applies the NYC and is bound by the seat courts or arbitral tribunals decision without any perceptible deviations from the previous enforcement proceedings.

E. EVALUATION OF THE COMMISSION PROPOSAL – STILL ROOM FOR IMPROVEMENT

52. While the proposal finds the support by the authors of this article (I.), critical points that may lead to difficulties in the application of the new rules remain (II.). Hence, suggestions as to the practical application of the Brussels I Regulation are made (III.).

I. Approval for the Commission Proposal

53. The new Commission Proposal achieves the goals of the amendment without putting established principles of the arbitration procedure at risk.
54. Should the Commission Proposal be accepted, a torpedo scenario such as the one displayed in *West Tankers* will not be possible anymore. The parties to an arbitration agreement will have clear cut rules as to the question of jurisdiction of a court in all matters concerning the arbitration procedure. This may well be considered as the single main objective of the European Commission and it will have been achieved.

55. After the decision rendered by the ECJ in *West Tankers* the arbitral tribunal does not have the power to grant an anti-suit injunction to prevent a party from suing in another Member State. This, however, currently presents a danger of irreconcilable judgments since the arbitration tribunal may find in favour of arbitration while the court seised may find that the arbitration agreement is not valid and declare it void. With the Commission Proposal in force the risk of irreconcilable decisions will be averted since the court seised will be under the requirement to stay proceedings if the arbitral tribunal is seised with the matter.

II. Critique of the Commission Proposal

56. The Commission Proposal still shows some incapacities that need to be addressed in the future in order to clarify these issues. While the European Commission is setting up rules with the Member States of the European Union in mind, it must not be forgotten that these very states are members to other conventions and treaties. The ratification of a treaty or convention brings obligations that members need to fulfil. Setting up rules that contravene the obligations under such conventions puts the Member States in the uncomfortable position to decide whether to follow the affected convention or whether to adhere to the European rules. In this regard the German Chambers of Industry and Commerce warned against creating an "Insellösung" i.e. an island solution that is focusing on a regional level only and forgetting about the rest of the world.
57. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one example. In Art. II (3) it puts the obligation on the states that have ratified it, to refer the parties to arbitration, unless it finds that the arbitration agreement is "null and void, inoperable or incapable of being performed". Under the New York Convention the respective court is thus required to decide on the arbitration agreement, whereas the Commission Proposal requires that the court stay its proceedings.

III. Position of the Parliament

58. The European Parliament has, in its resolution of 7 September 2010, opposed the proposal of the European Commission.⁴⁷ It strongly opposes even a partial deletion of the arbitration exclusion. The Parliament suggests a further extension of the exclusion. Further, it prefers a reliance on national solutions and a reliance on the New York Convention 1958 the New York Convention. Extending the deletion would, however, contradict the principle of trust and would constitute a countermeasure to the cooperation in civil matters. The West Tankers case has shown the parties to an arbitral agreement that it is possible to torpedo the arbitral proceeding without facing any serious repercussions for such a dilatory tactic. The National Navigation case showed the parties the procedure that needs to be applied in parallel proceedings.
59. An extension of the deletion would entrench the dilemma that was caused by the application of Art. 1 (2) (d) of the Brussels I Regulation in the West Tankers case. If, however, the parties were free to obstruct the procedure with torpedo tactics the trust in the decisions rendered by the courts of other Member States would fade. Arbitration practitioners would choose seats of arbitration outside of the European Community leading to a tremendous loss in the arbitration market. The Parliament is therefore well advised to rethink its position in order to keep the arbitration market in the European Union.

F. SUMMARY

60. While some areas of the Regulation will need improvement, the Commission Proposal will lead to clear cut rules on the interface between arbitration and the Regulation. Knowing that the courts in the respective cases had the obligation to rule on the case because of the Regulation and not because of some dilatory or torpedo action of a party will lead to more trust in the European Community and will lead to a better cooperation of the courts.

⁴⁷ European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0304>