

# Towards a New Interface Between Brussels I and Arbitration?

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## ABSTRACT

Arbitral tribunals and state courts are currently called upon to coexist in the European Judicial Space without being clearly coordinated with each other. The author wonders whether Regulation (EU) No 1215/2012, irrespective of restating the arbitration exclusion, brings a novelty in this regard by way of Recital 12—which sets out the arbitration exclusion’s scope—and Article 73(2)—which safeguards the 1958 New York Convention. Certain well known issues concerning the interface between Brussels I and arbitration—such as the risk of conflicting decisions either on the merits or on the arbitration agreement, the defence against derailing or delaying tactics flouting an arbitration agreement, the enforcement of anti-suit injunctions or judgments awarding damages for breach of the obligation to arbitrate—have been reviewed so as to appreciate whether and to what extent things have really changed.

## 1. FROM ‘BRUSSELS I’ TO ‘BRUSSELS I BIS’: THE ARBITRATION EXCLUSION AGAINST A BACKDROP OF PARALLEL PROCEEDINGS AND CONFLICTS BETWEEN JUDGMENTS AND AWARDS

Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, ‘Brussels I Regulation’) does not apply to arbitration (Article 1(2)(d)),<sup>1</sup> nor does Regulation No 1215/2012 of 12 December 2012 (hereinafter, ‘Brussels I bis Regulation’), which, as of 10 January 2015, became fully operative by recasting the former (Article 1(2)(d)).<sup>2</sup>

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1 [2001] OJ L12/1.

2 [2012] OJ L351/1. For a general overview of the recasting, see *inter alia* J-P Beraudo, ‘Regards sur le nouveau Règlement Brussels I sur la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale’ (2013) 140 *Journal du droit international* 741; A Leandro, ‘Prime osservazioni sul regolamento (UE) n. 1215/2012 (“Bruxelles I bis”)’ (2013) 8 *Il giusto processo civile* 583; PA Nielsen, ‘The New Brussels I Regulation’ (2013) 50 *CML Rev* 503.

The Brussels I *bis* Regulation did not follow the European Commission in its Proposal of 2010<sup>3</sup> that had suggested inserting certain arbitration-oriented rules.<sup>4</sup>

Recital 12 of the Brussels I *bis* Regulation sets out the arbitration exclusion's scope.<sup>5</sup> Besides, Article 73(2) provides a safeguard clause for the New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards (hereinafter, 'New York Convention') that, according to Recital 12, 'takes precedence' over the Regulation.<sup>6</sup>

As a result, the reiterated arbitration exclusion, coupled with the affirmation of the precedence of the New York Convention, seems to leave the door open for scenarios of parallel proceedings (and conflicting decisions) between courts of Member States, as well as between courts and arbitral tribunals, even from the Brussels I *bis* perspective.

It is well known how parallel proceedings may arise between courts on the assessments concerning the arbitration agreements, on the measures in support of arbitration, and on the annulment, review, recognition and enforcement of arbitral awards (albeit parallel proceedings may naturally arise at the enforcement stage due to assets being located in several Member States).<sup>7</sup>

- 3 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (COM(2010) 748) final of 14 December 2010.
- 4 After reaffirming the arbitration exclusion as a general rule (art 1(2)(d))—especially as regards forms, existence, validity and effect of the arbitration agreement, arbitrators' power, arbitration proceedings, as well as annulment, recognition and enforcement of arbitral awards (Recital 11)—the Proposal provided for certain devices against parallel proceedings so as to protect the arbitration agreement where the seat of arbitration was located in a Member State (see n 10). See M Illmer, 'Brussels I and Arbitration Revisited – The European Commission's Proposal COM(2010) 748 final' (2011) 75 *RabelsZ* 645; MV Benedettelli, "'Communitarization" of International Arbitration: A New Spectre Haunting Europe' (2011) 27 *Arb Intl* 583; L Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonization?' (2011) 7 *J Priv Intl L* 423; V Lazić, 'The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How "Much Ado about Nothing" Can End Up in a "Comedy of Errors" and in Anti-suit Injunctions Brussels-style' (2012) 29 *J Intl Arb* 19. On the arbitration facets of the Green Paper that inaugurated the recasting process see R Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation 44/2001. Application and Enforcement in the EU (National Reports)* (Hart Oxford 2008) 31ff and 49ff; C Kessedjian, 'Le Règlement 44/2001 et l'arbitrage' (2009) *Revue de l'arbitrage* 699; A Vagenheim, 'Should Arbitration Be Included in EC Regulation 44/2001?' (2009) 27 *ASA Bull* 588; L Radicati di Brozolo, 'Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation' (2010) 30 *IPRax* 121.
- 5 See in particular S Camilleri, 'Recital 12 of the Recast Regulation: a New Hope?' (2013) 62 *ICLQ* 899; SM Carbone, 'Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del regolamento (UE) 1215/2012' (2013) 27 *Diritto del commercio internazionale* 651, 677ff; G Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) 29 *Arb Intl* 467; LH Wilhelmsen, 'European Perspectives on International Commercial Arbitration' (2014) 10 *J Priv Intl L* 113; T Hartley, 'The Brussels I Regulation and Arbitration' *ICLQ*, available on CJO 2014 doi: 10.1017/S0020589314000359.
- 6 In French version the Convention 'prime' over the Regulation.
- 7 To this regard, see J-F Poudret, 'Conflits entre juridictions étatiques en matière d'arbitrage international ou les lacunes des Conventions de Brussels et Lugano' in KP Berger, WF Ebke, SH Elsing, B Großfeld and G Kühne (eds), *Festschrift für Otto Sandrock zum 70 (Recht und Wirtschaft 2000)* 761ff.

In addition, parallel proceedings between courts and arbitral tribunals may occur as regards the arbitration agreements and the merits of the dispute.<sup>8</sup>

Moreover, the New York Convention allows contracting states to determine the arbitration agreement's effects on their own jurisdiction; decisions by various courts ruling either on the recognition of arbitral awards or on the annulment thereof could ultimately diverge from each other.<sup>9</sup>

Assuming in its *rationale* the *Kompetenz-Kompetenz* principle—according to which the arbitral tribunal may rule on its own jurisdiction—the Proposal aimed at coordinating Member States' courts as regards the effects of an arbitration agreement,<sup>10</sup> thereby 'filling in the gap' of Article II(3) of the New York Convention that neither provides for grounds of jurisdiction in this regard, nor prevents conflicts of jurisdiction among courts seised (incidentally or principally) to rule on the arbitration agreement.

Since even the Proposal's purpose to deal in such a minimalist way with arbitral matters has been abandoned, the European Union (EU) legislator seems to have discarded, with it, the aims of removing the uncertainty and the instability that undermine international commercial relations in case of conflicts of jurisdiction, or parallel proceedings between arbitral tribunals (having jurisdiction due to arbitration agreements) and courts (having jurisdiction under the Brussels I Regulation).

The main alarm in this regard stems from the so-called 'torpedo actions',<sup>11</sup> that is, when a party launches court proceedings in breach of an obligation to arbitrate: that party may plead either for the arbitration agreement to be annulled (or declared inoperative) or for the merits, counterclaiming in this case the invalidity of an arbitration agreement against the other party invoking arbitral jurisdiction. A party could so act for tactical reasons, such as the expectation of obtaining a more favourable decision from the courts in its home jurisdiction than from a foreign arbitral tribunal, or the derailing or delaying of arbitration proceedings.<sup>12</sup>

8 Member States parties to the European Convention on the international commercial arbitration (Geneva, 21 April 1961) achieve a *minimum* coordination with each other when the court is seised after the arbitral tribunal has been requested to rule on the arbitration agreement: art VI (3) binds that court to stay its ruling until the award is made, unless there are 'substantial reasons to the contrary'.

9 As an example—though not frequently occurring—an award may be recognized in one state even if it has been annulled in the state of the seat of arbitration and (therefore) not recognized in other states: see J-F Poudret and S Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet and Maxwell 2007) 847ff and 909ff; D Holloway, 'Avoiding Duplicative Litigation about Arbitration Awards Within the EU' (2011) 2 JIDS 435; P Mayer, 'Conflicting Decisions in International Commercial Arbitration' (2013) 4 JIDS 407, 410ff; L Radicati di Brozolo, 'The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao Lignite' (2014) 25 Am Rev Intl Arb 47.

10 Proposed art 29(4) intended to bind the courts seised of a dispute referred to arbitration to stay proceedings if their jurisdiction had been contested on the basis of an arbitration agreement and an arbitral tribunal had been seised of the case, or court proceedings relating to the arbitration agreement had commenced in the Member State of the seat of arbitration.

11 There is conceptual difference between 'torpedo' in arbitral matters and the 'Italian torpedo' properly frustrating choice of courts agreements by way of the *lis alibi pendens* mechanism. On the Brussels I *bis* rules improving the choice of courts' agreements against 'Italian torpedos', see extensively Carbone (n 5).

12 See, in general, E Gaillard, 'Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international' (1990) *Revue de l'arbitrage* 760; A Pullen, 'The Future of International Arbitration in

That being said, one may wonder whether Recital 12 and Article 73 may mitigate the lack of coordination between courts (as to arbitral matters) and between courts and arbitral tribunals (at a more general level), in spite of the expressed arbitration exclusion of Article 1(2)(d).

In other words, the question of whether the combination between Recital 12 and Article 73(2) of the Brussels I *bis* Regulation frames a new interface between arbitration and jurisdiction within the European Judicial Space arises.

## 2. RECITAL 12 AND THE NEW YORK CONVENTION SAFEGUARD CLAUSE PROVIDED IN THE BRUSSELS I *BIS* REGULATION

Recital 12 explains the arbitration exclusion, somewhat moving from principles upheld by the European Court of Justice (ECJ).<sup>13</sup>

It states that no Regulation's provision prevents the courts of a Member State, seised to settle a dispute to which an arbitration agreement is related, from referring the parties to arbitration, from staying or dismissing the proceedings or from ruling on whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with national law.

The recognition and enforcement of judgments provided by the Regulation do not regard principal or incidental decisions concerning the arbitration agreement. Inversely, the Regulation covers judgments pronounced on merits by courts that have preliminarily found the arbitration agreement null, inoperative or incapable of being performed.

Recognition and enforcement of judgments on merits do not affect the courts' competence on the recognition and enforcement of arbitral awards resulting from the New York Convention, which takes precedence over the Regulation.

Finally, Recital 12 leaves principal and accessory proceedings related to arbitration out of the Regulation.<sup>14</sup> These, in particular, are proceedings relating to the constitution of an arbitral tribunal, the arbitrators' powers, the conduction of the arbitration, and the annulment, review, appeal, recognition and enforcement of an arbitral award.<sup>15</sup>

The clause embodied in Article 73(2) reflects, in turn, the features currently marking the interface between the Brussels I Regulation and the New York Convention, thus stressing that the rules devoted to the enforcement of an arbitral award are autonomous and not jeopardized by those concerning judgments. As a consequence, Article 73 requires the Brussels I regime not to affect the New York one.

When affirming the 'precedence' of the New York Convention, Recital 12 should be framed within the relationship between the regimes as well. One cannot infer, in particular, from that 'precedence' a rule on the prevalence of the award over the

Europe: West Tankers and the EU Green Paper' (2009) 4 Intl Arb L Rev 56; J Horvath and S Wilske (eds), *Guerrilla Tactics in International Arbitration* (Kluwer 2013).

13 See Case C-190/89 *Marc Rich* [1991] ECR I-3855; Case C-391/95 *Van Uden* [1998] ECR I-7091; Case C-185/07 *West Tankers* [2009] ECR I-663.

14 *Marc Rich*, *ibid*, as regards the proceedings to nominate an arbitrator.

15 See n 45 as to the court's competence to grant provisional measures in support of rights disputed before an arbitral tribunal.

judgment where their recognition or enforcement is sought in the same Member State.<sup>16</sup> As a matter of fact, admitting this rule would imply admitting the existence of an obstacle to the recognition and enforcement of a judgment based on the prevalence of the award: an obstacle indeed operating regardless of the sequence in which award and judgment are to be recognized or enforced in that state.

Then again, as the Regulation's rules on recognition and enforcement are limited to judgments and the Regulation affirms the 'arbitration exclusion', such an obstacle lacks underpinning. Furthermore, neither did the Proposal—in spite of its efforts to coordinate arbitration and jurisdiction—arrive at inserting into the recasting process similar grounds to refuse the enforcement of a judgment.

However, it should not be overlooked that the precedence of the New York Convention as a 'regime' does not *per se* imply favourable effects for an award, as recognition and enforcement of the latter may be refused by virtue of Article V of the Convention.

At any rate, a safeguard clause (Article 73(2)) which, according to Recital 12, states the Convention's 'precedence' seems to lack usefulness, or at least triggers a sort of ambiguity, as it addresses a matter expressly excluded from the Regulation.

Therefore, all that remains is to appraise the true usefulness of such provisions and to remove the veil of the said ambiguity.

To this end, it may prove fitting to start by assessing the consequences of a 'torpedo action' under the new provisions.

### 3. APPRAISING THE CONSEQUENCES OF A *TORPEDO ACTION* IN LIGHT OF THE 'NEW' REGIME

After declaring the arbitration agreement not enforceable, the court will rule on the merits. This should not prevent the arbitral tribunal from starting/continuing the proceedings or handing down the award,<sup>17</sup> nor should it prevent, beforehand, a court of a different Member State from ruling on the same arbitration agreement's validity and enforceability.

As stated above, both Recital 12 and the New York Convention admit the coexistence of different decisions as to the arbitration agreement, even if the decisions are at odds with each other. When two proceedings are pending before different courts, grounds of *lis alibi pendens* could lead one to be stayed in favour of the other. However, if the proceedings at stake principally concern the arbitration agreement, the stay will be governed by national rules—neither the Brussels I Regulation (due to the arbitration exclusion), nor the New York Convention (not devoted to coordinating courts' proceedings) apply in this regard.

The major problems arise after the court has pronounced the judgment on the merits, whenever: (i) the judgment is to be enforced in the Member State—probably that

16 As P Clifford and O Browne seem to argue in 'Reform of the Brussels Regulation - Latest Developments and the "Arbitration Exception"' in *LW in Practice - The London Dispute Newsletter*, April 2013 <[www.lw.com](http://www.lw.com)> accessed 6 January 2015; similarly F Salerno, 'Il coordinamento tra arbitrato e giustizia civile nel regolamento (UE) n. 1215/2012' (2013) 96 *Rivista di diritto internazionale* 1146, 1185. For views akin to ours see Camilleri (n 5) 912; Nielsen (n 2) 510ff; Carducci (n 5) 476.

17 H Van Houtte, 'May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Convention?' (1997) 13 *Arb Intl* 85.

of the seat of arbitration—whose courts are still ruling on the arbitration agreement; or (ii) an arbitration has been commenced or concluded in the state where recognition and enforcement are sought; or, finally (iii) judgment and award are to be enforced in a Member State other than that of origin and that of the seat of arbitration.<sup>18</sup>

Case (i) should be appraised under Recital 12, which affirms: ‘*nothing* in [the] Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement’ from ruling on the effect of the arbitration agreement on their own jurisdiction (emphasis added). Such provision undoubtedly also addresses the Brussels I rules on recognition and enforcement so as to prevent them from restraining courts of other Member States from appraising the same arbitration agreement.

Moreover, as noted above, the New York Convention safeguard clause secures the power of courts before which the arbitration agreement is at issue to determine how such an agreement impinges on their own jurisdiction.

On the contrary, nothing in Recital 12 and Article 73(2) could lead to barring recognition and enforcement of judgment in the Member State where proceedings are pending as to the arbitration agreement. Recital 12 forecasts, in fact, the recognition (and the enforcement) of judgments that a court hands down after deciding on the arbitration agreement, regardless of the Member States in which the recognition is sought, thus also including the state whose courts are assessing the arbitration agreement’s validity and enforceability.

Furthermore, only a refusal on the grounds of lack of jurisdiction (eg because the court of origin would have declared its jurisdiction after wrongly appraising the arbitration agreement) should logically impede recognition of the judgment on the merits, but such a refusal is not admissible in the Regulation regime, apart from exceptions not relevant here.<sup>19</sup>

As a result, recognition and enforcement of the judgment on the merits should take place despite the fact that Recital 12 (in clarifying the arbitration exclusion) allows for new evaluations on the arbitration agreement in the requested Member State.

Turning to case (ii)—related to the impact of recognition and enforcement of a judgment over a pending arbitration—the New York Convention ‘clause’ lacks relevance, as neither an award *exequatur* nor the courts’ ascertainment on the arbitration agreement comes up.<sup>20</sup> Recital 12, in turn, preserves the ‘competence of the court of the Member States on the *recognition and enforcement of arbitral awards* in accordance with’ the New York Convention, thereby assuming that the awards move away from the Member State of the seat of arbitration (emphasis added).

18 Such a problem has been widely discussed in literature: see particularly B Audit, ‘Arbitration and the Brussels Convention’ (1993) 9 *Arb Intl* 1; more extensively Poudret (n 7); S Besson, ‘Le sort et les effets au sein de l’Espace judiciaire européen d’un jugement écartant une exception d’arbitrage et statuant sur le fond’ in J Haldy, J-M Rapp and P Ferrari (eds) *Etudes de procédure et d’arbitrage en l’honneur de Jean-François Poudret* (Stämpfli 1999) 329ff; Holloway (n 9) 439ff; Mayer (n 9) 412ff; Hartley (n 5) 22ff.

19 Mayer (n 9) 415. As a consequence, measures such as ‘anti-enforcement injunctions’ supporting the arbitral proceedings seem incompatible with the Brussels I *bis* Regulation: *contra*, Camilleri (n 5) 906ff.

20 It is worth bearing in mind that the New York Convention deals with the recognition and enforcement both of awards ‘made in the territory of a State other than the State where the recognition and enforcement of such awards are sought’ and of those ‘not considered as domestic awards in the State where their recognition and enforcement are sought’ (art I (1)).



The extent to which recognition and enforcement of a foreign judgment affect the arbitral tribunal activity depends greatly on whether the award has been issued.

If an award has, in fact, been issued, one can invoke the principle of *res iudicata* in defence of the award (see further). By contrast, if the award has not been issued, the judgment, once recognized, should prevent the arbitral proceedings from continuing,<sup>21</sup> even though the recognition does not bar *per se* (as noted) a new assessment on the arbitration agreement.

As regards case (iii)—which refers to judgment and award to be enforced in a Member State other than that of origin and that of the seat of arbitration—the New York Convention ‘clause’ (as spelt out in Recital 12) seems to provide for certain devices devoted to preventing conflicts in the requested state.<sup>22</sup>

Actually, the ‘clause’ does not apply to any conflict between a judgment and an award recognized or enforced either subsequent or precedent to the other.<sup>23</sup> Should such a conflict fall within the Brussels I or the New York regime, depending on the ‘act’ to be enforced, it would be settled through the principle of *res iudicata* if,<sup>24</sup> on the one hand, the judgment and the award concern the same dispute, and assuming, on the other that the principle covers their effects in the requested Member State.

In particular, the principle of *res iudicata* belongs to the *ordre public procédural*, pursuant to which recognition and enforcement may not be allowed due to the need for legal certainty and stability within a state as well as for the protection of the state’s internal harmony.<sup>25</sup>

Thus, the principle acts by virtue of Article V(2)(b) of the New York Convention if the recognition of the award is sought after the judgment has amounted to *res iudicata* in the requested Member State,<sup>26</sup> which would occur even if the recognition

21 Peculiar problems arise when the judgment is challenged in the court of origin: given that in such cases the judgment lacks *res iudicata* in the requested Member State, its recognition should not affect arbitral proceedings commenced therein. On the contrary, the recognition of a judgment ruling only on the arbitration agreements will be governed by the national law of the Member State of the seat of arbitration (unless the state of origin and the state of the seat have entered into bilateral treaties) as the Brussels I Regulation does not apply.

22 Although Recital 12 refers to decisions ‘on the substance of the matter’, it should also address provisional measures in accordance with the definition of judgments set out in art 2(a). Recital 12 should, therefore, include measures granted by the court having jurisdiction on the merits. Neither the Brussels I Regulation nor the New York Convention, however, deals with the effect of arbitral awards on such measures. Incidentally, if what will be immediately said on the arbitral *res iudicata* (preventing the recognition of a subsequent concurring judgment) could be extended to a provisional measure (thereby, also preventing recognition thereof), it is hardly conceivable that a provisional measure (enforceable according to the Regulation) might rule out the effects of an arbitral award which, on the one hand, subsequently dismisses the rights protected by the measure itself and, on the other, is enforceable according to the New York Convention.

23 To smooth the reasoning, the arbitral award is supposed to wholly settle the dispute: discussions on the conflicts between judgments and partial award are left out of this article.

24 On the issue see L Radicati di Brozolo, ‘Res iudicata and international arbitral awards’ in P Tercier (ed) *Post Award Issues: ASA Special Series No 38* (Jurisnet 2011) 127ff.

25 See ECJ, Case C-234/04 *Kapferer* [2006] ECR I-2585, point 20; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, points 35 and 36.

26 *Res iudicata* as a principle of public policy has been clearly upheld by the Swiss Supreme Court: for an application preempting the recognition of an arbitral award, see 4A\_490/2009 *Club Atlético de Madrid SAD v Sport Lisboa E Benfica – Futebol SAD and FIFA* <www.bger.ch> accessed 6 January 2015; an English translation can be found on <www.swissarbitrationdecisions.com> accessed 6 January 2015.

was sought in the Member State whose courts have previously declared the arbitration agreement ‘inoperative’ and then ruled on the merits.

If a judgment is to be enforced in a Member State where *res iudicata* surrounds an award, the principle turns up under Article 45(1)(a) of the Brussels I *bis* Regulation.<sup>27</sup> Assuming that the principle of *res iudicata* works under the public policy exception, it would provide grounds for refusing recognition and enforcement without overlapping (or expanding) the reasons related to the ‘irreconcilability’ among decisions which Brussels I *bis* Regulation (like its predecessor) confines to judgments: in other words, the principle of *res iudicata* acts in compliance with the arbitration exclusion. It is worth noting that such a refusal protects the award, even in the Member State of the seat of arbitration.

From a different standpoint, safeguarding the awards’ *res iudicata* ends up protecting the effects of an *exequatur* governed by the New York Convention. In this regard, the Brussels I and New York regimes are coordinated with each other in such a way as to ensure that the Member States keep their conventional obligations secured regarding the award *exequatur* against the enforcement of judgments in their own territory.<sup>28</sup>

#### 4. WHEN THE ‘PRECEDENCE’ OF THE NEW YORK CONVENTION TRULY INTERVENES IN THE CONFLICT BETWEEN JUDGMENTS AND AWARDS

That being said about the value of the principle of *res iudicata*, Article 73 and Recital 12 prove useful, actually, when recognition and enforcement of judgment are sought in a Member State where the award *exequatur* proceedings have already commenced and are still pending.<sup>29</sup>

To appreciate the case, it should be noted that, while arbitral proceedings are less time consuming than those in the courts, those involving recognition and enforcement are quicker in cases of judgments under the Brussels I regime—based on the principle of mutual recognition and even more so thanks to the Brussels I *bis* Regulation—than under the New York one, which is largely implemented in Contracting (Member) States by means of *exequatur* proceedings.

The New York regime’s ‘precedence’, therefore, prevents that the principle of mutual recognition (embodied in the Brussels I system) obstructs courts from ruling on the award *exequatur*.

27 See J-P Beraudo, ‘The Arbitration Exception of the Brussels and Lugano Convention: Jurisdiction, Recognition and Enforcement of Judgments’ (2001) 18 J Intl Arb 13, 25.

28 It can be agreed that, ‘the obligation of States to “recognize arbitral awards as binding” as laid down by art III [of the New York Convention] is undoubtedly crucial to the discussion [concerning the arbitral *res iudicata* in the state where the recognition of a judgment is sought]’: Radicati di Brozolo (n 24) para 4.

29 Other situations arise, for example, when a party requests the court to rule negatively on the grounds for refusing recognition (art 36(2) of the Brussels I *bis* Regulation), while the other party applies for the award *exequatur*. The different situation, in which the party seeking the award *exequatur* also requests the court to rule positively on the grounds for refusing recognition of the judgment, engenders the doubt that such party aims to profit from the New York Convention safeguard clause to freeze automatic recognition of the judgment.



The arbitration exclusion is not affected because Recital 12 and Article 73(2) only address the Brussels I set of rules concerning the circulation of judgments.

However, the New York regime deserves similar protection as long as it works in the instant case. Recital 12 suggests so when stating that the recognition or the enforcement should not jeopardize the court ‘competence’ stemming from the New York Convention, thereby assuming this competence as being operative when the recognition or the enforcement of a judgment is sought.

Inversely, the New York regime’s ‘precedence’ may not cover cases in which the award *exequatur* starts after Brussels I ‘proceedings’ regarding in any way recognition or enforcement have been commenced (eg a case in point being the stay of enforcement accorded as the judgment has been challenged in the Member State of origin).

This author is aware of these events being truly hypothetical due to the aforementioned time difference between arbitral and court proceedings: since an award is normally pronounced prior to a judgment, the request of the award *exequatur* normally anticipates recognition or enforcement of the judgment.

Nevertheless, the aforementioned ambiguity (in a matter excluded from the Brussels I *bis* Regulation) surrounding the relationship between Article 73(2), which saves the New York Convention, and Recital 12, which affirms its ‘precedence’, vanishes: while the Convention prevails over Brussels I *bis* whenever an award *exequatur* is requested prior to the recognition or enforcement of a judgment, the Convention will be no less applicable in the inverse case, but it would not prevent the judgment from having effects according to the Regulation.

##### 5. BRUSSELS I BIS AND THE TREATMENT OF ANTI-SUIT INJUNCTIONS GRANTED IN SUPPORT OF ARBITRATION...

It is well known that the problem of parallel proceedings has been to some extent ‘improved’ by the *West Tankers* judgment, in which the ECJ dealt with a British anti-suit injunction, enjoining a party to refrain from a proceeding launched before an Italian court in breach of a London arbitration agreement.<sup>30</sup>

The ECJ held that such anti-suit injunction flouts the Brussels I rules on jurisdiction and the underpinning principle of mutual trust,<sup>31</sup> as well as the protection of the individual right of access to the courts competent under the Regulation,<sup>32</sup> even

30 *West Tankers* (n 13). The anti-suit injunction was granted on 21 March 2005 by the High Court of Justice (England and Wales), Queen’s Bench Division (Commercial Court) to prohibit the respondent from pursuing proceedings in the Tribunal of Siracusa. On the subject see *inter alia* Z Crespi Reghizzi, ‘“Mutual Trust” and “Arbitration Exception” in the European Judicial Area: the *West Tankers* Judgment of the ECJ’ (2009) 11 *Ybk Priv Intl L* 427; A Mourre and A Vagenheim, ‘The Arbitration Exclusion in Regulation 44/2001 after *West Tankers*’ (2009) 12 *Intl Arb L Rev* 75; P Santomauro, ‘Sense and Sensibility: Reviewing *West Tankers* and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001’ (2010) 6 *J Priv Intl L* 281; A Ababneh and S Alkasawneh-Jordan, ‘The Relationship Between Arbitration and Jurisdiction Within Europe Post the *West Tankers* Case’ (2012) 33 *Bus L Rev* 82.

31 *West Tankers* (n 13) point 24ff. For the risk implied in the enforcement of an anti-suit injunction to jeopardize the mutual trust between Member States ‘legal systems and judicial institutions’ on which the Regulation rests, see earlier Case C-159/02 *Gregory Paul Turner* [2004] ECR I-3565, point 24.

32 *West Tankers* (n 13) point 31.

though what the injunction aims at—that is, sustaining the obligation to arbitration—is excluded from the Regulation itself.<sup>33</sup>

In the ECJ's view, the assessment concerning the jurisdiction on the merits embraces the *exceptio compromissi* raised by the party seeking the injunction, in order that the court seised on the merits may preliminarily rule on the arbitration agreement to decide on its own jurisdiction: the enforcement of an anti-suit injunction may not restrain the court from doing so.

Recital 12 of Brussels I *bis* reaches the same outcome, notwithstanding that decisions concerning the arbitration agreement fall outside the Regulation. Recital 12 states, in fact, on the one hand, that 'nothing in [the] Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement', from addressing the *exceptio compromissi et similia* and, on the other, that the potential subsequent judgment on the merits may circulate abroad in compliance with the Regulation. The link with *West Tankers* clearly turns up taking into account that Recital 12 may refer to the judgment pronounced by a court that exercises jurisdiction on the merits 'under the Regulation' after finding an arbitration agreement null, void or inoperative.

Besides, if it is true that an action on the merits affects the obligation to arbitrate, it is the ECJ's perspective that, even in 'torpedo' cases, such action brings a request for justice that deserves protection in terms of right of access to the courts competent under the Regulation.

It goes without saying that the protection of the right of access to the courts deserves *a fortiori* protection when the action does not veil stalling or deferral tactics: just as an example, courts involved in *West Tankers* addressed the effects of an arbitration agreement on an action brought by a non-signatory and, accordingly, whether the agreement was 'operative' in respect of the plaintiff.<sup>34</sup>

Lastly, putting aside the right of access to the courts, the anti-suit injunction enforcement thwarts the framework set forth by Recital 12 and Article 73 in coordinating the Brussels I *bis* Regulation and the New York Convention. It should be remembered that: (i) the Convention allows any court before which a dispute to be referred to arbitration is brought to rule on the arbitration agreement; (ii) the Brussels I *bis* Regulation does not deal with the coordination between such courts, even when pertaining to Member States; and (iii) the same Regulation safeguards the applicability of the New York Convention.

33 Anti-suit injunctions are typical arbitral ancillary judicial measures that are excluded from the Regulation. Indeed, measures such as the so-called anti-arbitration injunctions granted to prohibit arbitral proceedings are also excluded: the exclusion from the Regulation here depends not on the arbitral auxiliary judicial function but rather on the 'merits' of the request (concerning arbitral proceedings). See M Scherer and T Giovannini, 'Anti-arbitration and Anti-suit Injunctions in International Arbitration: Some Remarks Following a Recent Judgment of the Geneva Court' (2005) 3 Stockholm Intl Arb Rev 201; M Scherer and J Jahnel, 'Anti-suits and Anti-arbitration Injunctions in International Arbitration: A Swiss Perspective' (2009) 12 Intl Arb L Rev 66; Poudret and Besson (n 9) 914ff; Hartley (n 5) 9ff.

34 *Torpedo* purposes do typically pertain to parties to the agreement, but it is well known that even 'non-signatories' may be 'parties' according to the law governing the arbitration agreement: on the issue, for a comparative survey, see Poudret and Besson (n 9) 210ff.

Consequently, if a court by way of an anti-suit injunction might restrain the right of access to the courts of other Member States, as well as the power thereof to adjudicate on jurisdiction, the existence of a coordinating rule should be presumed whereby the court issuing the injunction has priority over the others which, in truth, neither the Brussels I *bis* Regulation nor the Convention provides for.

The incompatibility with the Brussels I system would also arise even if the anti-suit injunction forbidding one party from pursuing litigation before a court competent under the Brussels I *bis* Regulation in breach of an arbitration agreement was issued by an arbitral tribunal.

The question of whether an arbitral anti-suit injunction may circulate to seek such effects was referred to the ECJ in the *Gazprom OAO* case.<sup>35</sup>

For the time being, only the opinion of Advocate General has been delivered.<sup>36</sup> Contrary to that opinion, this author deems that, notwithstanding that the anti-suit injunction comes from an arbitral tribunal, its effects are the same as those of anti-suit injunctions issued by a court, namely the effects to restrain both the exercise of the jurisdiction under the Brussels I rules and the connected right of access to a court.

As a result, the anti-suit injunction should not be enforced in the Member State where it gives rise to such effects. It does not matter that the arbitral anti-suit injunction falls outside the scope of the Brussels I *bis* Regulation, as does indeed the anti-suit injunction granted by a court: the interest in question is, in fact, to protect the Brussels I Regulation *effet utile* against measures like the anti-suit injunctions as far as the functioning of the rules on jurisdiction is concerned.

Turning to the New York Convention, certain doubts on its application to the enforcement of an arbitral anti-suit injunction may be cast.<sup>37</sup> Moreover, should the Convention be applicable, the question arises whether the aforementioned effects make the anti-suit injunction contrary to the public policy under Article V(2)(b). Even assuming that the Brussels I provisions lack value in terms of public policy,<sup>38</sup> the answer seems to be in the affirmative, at least for states in whose legal order the anti-suit injunction is not permitted because of the restriction to the right of access to a court it causes.

It is worth stressing that all what has been said affects neither the admissibility of the anti-suit injunction nor its enforcement within the Member State of origin,<sup>39</sup> but

35 The preliminary ruling was referred on 14 October 2013 from the Lietuvos Aukščiausiasis Teismas (Lithuania). See Case C-536/13 *Gazprom OAO*, still pending. For some remarks on the ECJ's lack of jurisdiction to rule on this case see Hartley (n 5) 13ff.

36 See the opinion of Advocate General Wathelet delivered on 4 December 2014, Case C-536/13 *Gazprom OAO*, not yet published.

37 Given that the arbitral anti-suit injunction qualifies as a provisional measure, there is controversy as to whether it may amount to an 'award' falling within the Convention's scope: GB Born, *International Commercial Arbitration*, vol II (Kluwer 2009) 2009ff, 2020ff, 2358. As for the damages awarded by an arbitral tribunal for breach of the obligation to arbitrate see below, especially nn 42 and 43.

38 Opinion of Advocate General (n 36) point 180ff.

39 Consequently, this author may agree that the 'anti-suit injunction is... the only effective remedy available to an arbitral tribunal in order to rule in favour of the party who considers that the arbitration agreement has been breached by the other contracting party' (opinion of Advocate General (n 36), point 155) but not that the subsequent enforcement of the anti-suit injunction in the Member State where the action in

its enforcement abroad, namely in the Member States where the injunction would impede both the exercise of the jurisdiction under the Brussels I rules and the connected right of access to a court.<sup>40</sup>

#### 6... AND OF THE ENFORCEMENT OF AWARDS AND JUDGMENTS ACCORDING DAMAGES FOR BREACH OF THE OBLIGATION TO ARBITRATE

Strictly linked with the anti-suit injunctions enforcement issue is that of the damages granted for breach of the obligation to arbitrate: both are means to reinforce the arbitration undertakings.

Such damages, here, deserve attention also because the High Court of Justice was asked to determine whether an arbitral tribunal might rule on them without infringing upon the principles enshrined in *West Tankers*. The High Court deemed it so, arguing that the Brussels I arbitration exclusion is so comprehensive as not to affect the arbitral jurisdiction in this regard.<sup>41</sup>

Indeed, while no problems arise as regards the admissibility, legality and enforceability of damages awarded within the Member State of the seat of arbitration, certain problems in terms of consistency with the Brussels I system arise whenever the *exequatur* is sought in the Member States before whose courts the action breaching the obligation to arbitrate has been brought.

In particular, as the Brussels I (*bis*) Regulation allows a party to bring an action in a Member State, the enforcement of the damages award would trigger 'punitive' effects on the same party therein: that is to say, the Member State where the award *exequatur* is sought should simultaneously allow and punish the same action!

breach of the arbitration agreement has been brought does not affect the effective functioning of the rules of the Brussels I Regulation under which the courts affirmed—or may affirm—their own jurisdiction.

40 The same reasoning concerns states parties to the Lugano Convention of 30 October 2007 due to the 'parallelism' between the Convention and the Brussels I system as well as to the ECJ case law's value for judges applying the Convention (see art 1 of Protocol No 2 to the Convention and the Explanatory Report draft by F Pocar [2009] OJ C319/1, 53ff). Hence, recognition and enforcement of anti-suit injunctions supporting the arbitration are to be excluded, pursuant to the *West Tankers* judgment, from the Lugano Convention 'space' as well. See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281, para 59, which conversely deemed the anti-suit injunction admissible in respect of court proceedings commenced outside the EU in breach of an arbitration agreement.

41 *West Tankers Inc v Allianz S p a, Generali Assicurazioni S p a* [2012] EWHC 854 (Comm), [2012] 2 All ER (Comm) 395. See S Bollée, 'L'arbitre peut-il octroyer des dommages-intérêts pour violation de la convention d'arbitrage?' (2012) *Revue de l'arbitrage* 819; Hartley (n 5) 20ff. The English court's views may be summarized as follows. Brussels I regulation does not apply to arbitral awards, including those ruling on the arbitration agreement. As a result, the Regulation does not face the possible contrast between arbitral awards and judgments in this regard. An arbitral tribunal with seat in a Member State may, therefore, declare its jurisdiction on the damages requested by a party in reaction to the other party's action brought before a court in breach of the arbitration agreement. It does not matter that this court is already seised and has not yet ruled on its own jurisdiction. The fact that the arbitral jurisdiction might affect the party's right of access to a court competent under the Regulation (right to be implemented in compliance with the EU principle of effectiveness) is relevant only so far as courts are involved. In other words, if a Member State court must refrain from thwarting the right of access to another 'Brussels I court', this duty does not pertain to an arbitral tribunal due to the Brussels I arbitration exclusion. The arbitral jurisdiction over damages from breach of arbitration agreements was also more recently supported by the Swiss Supreme Court: 4A\_232/2013 *X SA v Z Ltd* <www.bger.ch> accessed 6 January 2015.

Moreover, if such state does not permit similar damages (eg due to their incompatibility with the right of access to justice), the ‘punitive’ effects could be perceived as being so contrary to its public policy as to be refused *ex Article V(2)(b) of the New York Convention*.<sup>42</sup>

However, given the lack of uniform rules, public policy in this regard varies from state to state, as do recognition and enforcement of damages awarded beyond the seat of arbitration, inasmuch as the *exequatur* would be theoretically possible (putting aside for a moment the incompatibility with *West Tankers* and Brussels I *bis* principles) if the requested state allowed the damages.<sup>43</sup>

Turning to the damages granted by courts and again assuming their admissibility and legitimacy in the state of origin, arguments against recognition and enforcement in other Member States are stronger: after *West Tankers* and the Brussels I recasting (explained in Recital 12), there is more than one shadow of doubt regarding their consistency with EU law.

Here again, an action in breach of an arbitration agreement brought before a court in a Member State, on a matter under the scope of the Brussels I (*bis*) Regulation would be subsequently deemed unlawful in the same state even though: (i) the Regulation does not prevent that court from ruling on the arbitration agreement before handing down its judgment on merits<sup>44</sup>; and (ii) it allows this judgment to be enforced in other Member States, including the state where the damages for breach of the obligation to arbitrate are claimed.

## 7. CONCLUDING REMARKS

Even after the birth of a new Brussels I Regulation, arbitral tribunals and state courts are called upon to coexist in the European Judicial Space without being clearly coordinated with each other. So are the courts of different Member States as regards the assessment and enforcement of arbitration agreements and awards.

Actually, the decision not to set up a system coordinating arbitral tribunals and courts increases the risk of conflicting jurisdictions, proceedings and decisions (especially as to the force of an arbitration agreement and the subject matter of the dispute to which the agreement relates).<sup>45</sup>

However, the risk of conflicting decisions on the merits is contained by both the principles of *res iudicata* and the New York Convention safeguard clause, taking account of their respective scopes as suggested herein.

42 Given that the incompatibility arises between the enforcement of damages and the right of access to ‘Brussels I courts’, it does not matter whether the arbitral decision qualifies as a provisional measure and, if so, the Member State where the recognition is sought allows the arbitral tribunal to grant provisional measures.

43 Contrary to the assertion in the previous note, an obstacle to recognition may be connected with the arbitral award’s provisional nature. Thus, even though all the states involved permit damages to be granted in the instant case, an obstacle could ultimately result from the fact that the requested state does not allow for arbitral provisional measures.

44 Similarly, as regards the choice of court agreements, see P Mankowski, ‘Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?’ (2009) 29 IPRax 23, 29ff.

45 A coordination, in light of the ECJ case law, seems to be well founded when a party or the arbitral tribunal requests the court to grant a provisional measure in support of an arbitrated claim falling within the scope of the Brussels I Regulation. See *Van Uden* (n 13) on which see recently Hartley (n 5) 8ff.

The lack of coordination between arbitral tribunals and courts, evaluated in light of Recital 12, eventually makes circulation both of injunction measures (such as anti-suit injunctions) and damages judgments incompatible even with Brussels I *bis*. A different line of reasoning leads to the paradox that a party's behaviour which is rightful according to the Brussels I *bis* Regulation and to the 'safeguarded' New York Convention would be punished in states that are bound by them both.

It should just be remembered that the Brussels I *bis* Regulation (like its predecessor and, generally, EU law) does not affect the admissibility, legitimacy and enforcement of such measures within the state of origin because what is at stake here is the cross-border circulation of the measures, and especially their impact both on the right to bring an action before courts of Member States having jurisdiction under the Regulation and on courts' power to rule on jurisdiction in the instant case.

Recital 12 and the New York Convention safeguard clause encourage, hence, the idea that it is principally for the courts to protect the obligation to arbitrate and the arbitration itself as a means of justice equivalent to the one they oversee.

Thus, if, on the one hand, a party acting in breach of an arbitration agreement is allowed to seise a court competent under the Brussels I *bis* Regulation, the same party, on the other, must comply with what the court rules on the arbitration agreement.

As a result, the defences against derailing or delaying tactics are mainly embodied in the handling of the *exceptio compromissi*<sup>46</sup>: that is to say, those defences depend largely on the efficiency of the devices that national laws provide for in this regard.<sup>47</sup>

46 It is well known that in certain states the *exceptio compromissi* gives rise to the *Kompetenz-Kompetenz* negative effect, whereby the court must dismiss jurisdiction in favour of the arbitral tribunal already seised to rule on its own jurisdiction. See E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (2nd edn, Kluwer 1999) 395ff; Poudret and Besson (n 9) 392; Mayer (n 9) 414. As a matter of fact, the negative effect amounts for courts and arbitral tribunals to a sort of *lis pendens* rule: Wilhelmssen (n 5) 115.

47 In Italian law, an efficient mechanism seems to have become the '*regolamento preventivo di giurisdizione*' after the Italian Supreme Court declared its admissibility in relation to foreign arbitration (*Luxury Goods International SA v Swaili Diffusioni Srl in liquidazione* 25 October 2013 n 24153 (2014) 97 *Rivista di diritto internazionale* 927, with our comment '*Regolamento preventivo di giurisdizione e arbitrato estero: riflessioni sul nuovo orientamento della Cassazione italiana*', *ibid* 811). Such a device allows parties and courts to rely promptly on a Supreme Court assessment of the issue concerning the *exceptio compromissi*, without waiting for lower-instance judgments which rule on it along with the merits.