

STUDIES AND COMMENTS

International arbitration and its exclusion from the Brussels regime

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Abstract

*The Brussels regime, which regulates the matters of transnational litigation excludes arbitration from its scope. Upon formation of the Brussels regime the existing instruments concerning arbitration - the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration - were believed to be sufficient. The original Brussels Convention 1968 on recognition and enforcement of judgments delivered in the courts of the EU Member States expressly provided for the exclusion of arbitration. The following Brussels I Regulation³ followed the trend and reinforced the exclusion of arbitration from their material scopes. The rationale for doing so was primarily the prevention of parallel proceedings and irreconcilable judgments. The arbitration exclusion from the Brussels regime has caused a fair amount of confusion, especially regarding the extent and limits of the exclusion. That is, whether the arbitration agreement, the arbitral award and its consequences are covered by the exclusion or they may fall under the scope of the Brussels regulation if they constitute only an incidental question to the main cause of action?⁴ The confusion was illustrated in the ECJ judgment *West Tankers*⁵, which generated negative feedback from the arbitration community and indicated the need for reform. The recently adopted Recast Regulation⁶ took it upon itself to clarify the relationship between arbitration and the EU regime of transnational litigation. The exclusion is reinforced yet again and its boundaries are specified in the Preamble. However, whether or not the concerns about the extent and objectives of arbitration exclusion have been at present eliminated, remains to be seen.*

Keywords: international arbitration, litigation, the EU law, Brussels regulation, Brussels recast

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³ Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12 p.1.

⁴ Moses, M 2014, 'Arbitration/Litigation Interface: The European Debate', *Northwestern Journal of International Law & Business*, vol. 35, no. 1, pp. 1-47.

⁵ Case C-185/07, *Allianz Spa v. West Tankers, Inc.*, 2009 E.C.R. 1-00663.

⁶ Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351 p. 1.

1. Introduction

Arbitration is a method of dispute resolution, which relies on private parties rather than the system of state courts: the parties, thus, grant powers to a number of individuals to decide a dispute between them, effectively setting aside the power of the courts and the national procedures, in as much, however, as the extent of the law permits⁷. Arbitration is a popular form of dispute resolution particularly in the environment of business to resolve issues that arise of the dealings in trade. The popularity and wide reliance on arbitration flows from a number of advantages arbitration claims, such as it being less costly and much speedier than court litigation (which, in fact, might not be the case: depending on the subject of a dispute and the expertise arbitrators are required to possess to be qualified to tend to it, the costs escalate, especially in areas like computer technologies; besides, the necessity for court measures at different stages of arbitration process is likely to undermine its arguably swift nature)⁸, as well as conservatism of state justice and its degree of immobility⁹.

The paper explores the inevitable relationship between arbitration and litigation and arbitration's place within the European legislative framework. Particularly, it addresses the question of why the Brussels regime, which regulates matters of transnational litigation in the EU, has consistently excluded arbitration from under its scope. Besides the *prima facie* exclusion of arbitration and its rationale, the concerns raised by the extent of the exclusion are addressed as well. That is, whether the complementary to arbitration questions such as the validity of an arbitration agreement and formation of an arbitration tribunal, among others, are similarly excluded from the scope of the Brussels regime. The paper commences with introductory comment and continues by outlining the nature of arbitration and its distinctive features in Part II. Part III gives a detailed overview of the instances of court involvement in the arbitration process, which often dictates the choice of forum. Part IV discusses elaborates on the rationale for the exclusion of arbitration from the Brussels regime. Finally, Part V concludes with an inquiry of whether the confusion generated by the exclusion has been eliminated with the entry into force of the Recast Brussels Regulation and whether a separate instrument regulating arbitration in Europe is desired.

2 International arbitration: nature and key characteristics

2.1 Key features of international arbitration

The need to define the notion of international commercial arbitration was not urgently felt until the adoption of the UNCITRAL Model Law on International Commercial Arbitration¹⁰ in 1985, which, although not legally binding, was meant

⁷ Palacean, C 2009, 'Forms of arbitration in international trade', *Law Annals Titu Maiorescu University*, vol. 7, pp. 117 – 128.

⁸ Carr, I & Stone, P 2014, *International Trade Law*, 5th edn, Routledge, UK.

⁹ Palacean, C *op. cit.*, p. 117.

¹⁰ UNCITRAL Model Law on International Commercial Arbitration (1958) with amendments as adopted in 2006, available at the United Nations Commission on International Trade Law web-

to shape and co-exist with national laws of contracting parties, relating to domestic (non-commercial) arbitration. The *sine qua non* of international arbitration¹¹ - the New York Convention¹² of 1958 did not call for identifying the boundaries as it applies equally to commercial and other disputes. The main feature distinguishing and challenging the sound and harmonious administration of international arbitration, as opposed to national arbitration, is that it is governed by a multitude of laws¹³: national, comparative, law of international conventions, as well as *lex mercatoria* and even *ex aequo et bono*. Hence, the precise definition of what is considered commercial in different jurisdictions as well as understanding of seemingly uniform word 'international' differs considerably. The variety of laws involved in the arbitral process also has an impact on how the different constituent parts of it are construed, and on the degree to which courts find themselves obliged/able to intervene. The Model Law provides, albeit in a footnote, that 'the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not', followed by a non-exhaustive list of what is understood to be a relationship of commercial nature (e.g. any trade transaction for the supply or distribution of goods or services, licensing, factoring, agency, etc). The reasons parties choose to adhere to international arbitration should a dispute arise are those of comfort and neutrality: disputes arising out of a transnational agreement necessarily involve differing jurisdictions and thus different laws that would apply in case a dispute is brought before a court. Furthermore, litigating in a foreign country involves engaging local counsel and familiarising with domestic laws, which is costly and time-consuming. Therefore, to avoid bias to either of the parties involved, international arbitration is preferred, especially if one decides to submit a dispute to one of the institutions providing dispute resolution services, them being, inter alia, the International Chamber of Commerce, London Court of International Arbitration, Australian Commercial Disputes Centre, and others. Besides, international awards are much easier to enforce, especially with the view that the parties to the New York Convention were 149 states as of 2013. On the contrary, it is clear that enforcement jurisdiction of a state stops at its national borders, and a judgment given by a court in one state can be enforced in another either on the grounds of reciprocity under existing bi- or multilateral agreements or out of courtesy of the courts, as they are under no obligation to facilitate the enforcement of judgments passed in another state.

page: < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html >. [15 January 2015].

¹¹ Bassler, WG 2013, 'The Symbiotic Relationship Between International Arbitration and National Courts', *Dispute Resolution International*, vol. 7, no. 2, pp. 101 – 118.

¹² United Nations Convention on the recognition and enforcement of foreign arbitral awards (the New York Convention), United Nations Conference on International Commercial Arbitration, 1958. Text available at: < <http://www.newyorkconvention.org/texts> >. [15 January 2015].

¹³ Dr. Al-Baharna, HM 1994, 'International Commercial Arbitration in a Changing World', *Arab L. Q.*, vol. 9, pp. 144 – 157.

2.2 Why arbitrate?

Despite the distinguished features of national and international commercial arbitration, the process the parties engage in is conceptually one and the same, subject to the variations of the applicable laws. Besides, parties can choose which form of arbitration they prefer – institutional or *ad hoc*, each having certain appeal and drawbacks. Institutional arbitration provides for a default set of arbitration rules should the parties have not agreed on one in advance or have not catered for every aspect that might come up; administrative matters are also taken care of, such as setting the date, time and venue and informing the parties; the arbitral award is subject to scrutiny, such as the ICC arbitral award draft that is to be forwarded to the International Court of Arbitration for approval; administrative costs and arbitrators' fees may be fixed or a clear method provided to calculate them so as to give the parties an approximation of the total cost of arbitration. Ad hoc arbitration, on its merits, gives in to institutional in comfort as it is up to the parties to draft an arbitration agreement, or fall back onto a ready-made set of rules by reference or the national rules on arbitration at the place of *situs*¹⁴.

Arbitration is based on the consent of the parties. This is manifested in the arbitration agreement, which can take two forms: an arbitration clause in a contract (whereby parties agree to submit to arbitration any future disputes that might arise out of the contract) and a submission agreement (whereby parties decide to submit to arbitration a dispute that has already arisen)¹⁵. An arbitration clause is considered to fulfil a special function – confer jurisdiction on individuals who are to decide the potential dispute; this gives arbitrators a special power to decide on the matters related to the contract as well as on their own jurisdiction (known as the doctrine of '*Kompetenz-Kompetenz*'). With the view of its special function, another related to the arbitration agreement doctrine is '*separability*' of the arbitration clause, which essentially means that if arbitrators decide that the underlying contract is null and void, it does not lead to the loss of their jurisdiction¹⁶. Finally, the party who ceases to be enjoying the idea of submitting a dispute to arbitration might bring the dispute before a court, despite the existing arbitration clause. In this case, due to the waivable nature of arbitration jurisdiction, the lack of jurisdiction of the court is not automatic and is not decided by the court *ex officio*: the relevant objection must be filed by the defendant; otherwise this lack of challenge may be considered a tacit waiver of arbitration jurisdiction. This is important to keep in mind to better understand whether or not, and if yes then how, courts can enforce an arbitration agreement and compel parties to arbitrate.

Further, the features characteristic of arbitration are that the parties can choose arbitrators, depending on the field of expertise relevant to the issue at hand,

¹⁴ Carr, *I op. cit.*

¹⁵ UNCTAD Course on Dispute Settlement: International Commercial Arbitration, Module 5.2 '*The Arbitration Agreement*', United Nations, 2005, New York and Geneva. The course is available at: <www.unctad.org>.

¹⁶ *Ibid.*

which is not always available in court litigation, where the judges are burdened with a great number of concurrent cases covering a vast array of subjects. Arbitrators are appointed through cooperation between the parties and in the absence thereof – by an appointing authority or with court assistance¹⁷. Parties are also free to choose the venue/situs of the arbitral tribunal, as well as be ensured that their issue is kept confidential. Confidentiality is one of the reasons arbitration is preferred over litigation, as a duty of an arbitrator is not to disclose private information obtained in the course of and prior to arbitration proceedings to third parties, which stems from the agency nature of the arbitration agreement and the duty of diligence¹⁸. Among other features that bring particular appeal to arbitration is that arbitral award is final in the sense that it is not subject to appeal on its merits and to judicial review. Immunity from national judicial review at the enforcement of an arbitral award stage is the primary objective of the New York Convention. It is argued, however, that complete independence of arbitration and rigorous preservation of its private nature may backfire without at least some form of scrutiny. Unguided systems are more prone to abuse, and thus there is a need to seek balance between the strive of justice for judicial precision and fairness and the finality of arbitral awards, without undermining the fundamental principles of commercial arbitration¹⁹.

3 Relationship with litigation

3.1 Court involvement

‘The great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself’²⁰. Arbitration does not exist in isolation from national judicial systems. In as much as international commercial arbitration relies on the New York Convention for recognition and enforcement, on the UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules for a harmonized system of applicable principles and practices, on the ICC Arbitration Rules for institutional arbitration of a dispute, and other international instruments that aim at creating a common legal ground for an arbitration process, there is no way around accounting for national laws of the states involved in the process at its different stages. It has been observed that arbitration had become a business rather than a calling, which has inevitably led to the decline in the standards of those involved. With this in mind, in place of peer pressure and honour some other mechanism must be found

¹⁷ UNCTAD Course on Dispute Settlement: International Commercial Arbitration, Module 5.3 ‘*Arbitral Tribunal*’, United Nations, 2003, New York and Geneva. The course is available at: <www.unctad.org>.

¹⁸ *Ibid.*

¹⁹ Gelande, JL 1997, ‘Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations’, *Marquette Law Review*, vol. 80, no. 2, pp. 625 – 644.

²⁰ Prof. Williams, DAR 2012, ‘*Defining the role of the court in modern international commercial arbitration*’, SMU Asian Arbitration Lecture, Singapore, 2012.

so as to protect the voluntary process of arbitration from those who deviate from what has been agreed upon²¹.

It is clear that among the many factors to consider, the parties deciding to submit future disputes arising out of their contract to arbitration and looking for a place of arbitration suitable for both of them, shall not disregard the national laws of the place of situs. Regardless of what law the underlying contract is governed by as well as regardless of the rules applicable, even if specifically agreed upon by the parties beforehand, to the arbitration process, composition of the arbitral tribunal and appointment of arbitrators, any gaps in regulation will be effectively filled by the laws in place in the arbitral situs. By the same token, any supplementary actions that may prove necessary during, or even prior to, the process, such as interim measures of protection, may trigger court intervention and application of national laws. The survey conducted by Queens Mary University of London and White & Case in 2010 on the '*Choices in International Arbitration*' was illustrative of the fact that parties considering arbitration carefully assess the options regarding national court systems when choosing the seat of arbitration and the law applicable to the substance of the dispute²². Thus, 62% of respondents considered the 'formal legal infrastructure at the seat' to be a presiding factor when choosing the seat of arbitration; 66% considered 'neutrality and impartiality' to be of primary importance when choosing the law governing the dispute. Hence, one can assume that there are states that are favored with regard to conduct of arbitration proceedings over others. It is indeed the case: the popular arbitration venues are those, whose laws are significantly receptive to international arbitration, providing and improving the best possible conditions; according to the 2012 International Arbitration Survey by White & Case, London, Paris, New York and Geneva have been widely used by respondents over the last five years and proved very satisfactory (described as 'excellent'), whence Singapore has emerged as a regional leader in China. Regarding the seat of arbitration, the most unpleasant impression on the respondents was left by Moscow and mainland China²³.

The above-said illustrates that there is a tight relationship between litigation and arbitration and neither shall disregard the other's potential of interference and influence. The question that arises is what legal grounds there are for a court to assume jurisdiction. They are, essentially, the New York Convention, the domestic laws and practices of the intervening state and the arbitration agreement via which the submission to arbitration was made, and the arbitration rules contained therein. As it is evident from the above, no two venues are the same when it comes to appeal of domestic laws, which essentially leads to 'arbitral site shopping'. This, however, may prove not to be easy in places where domestic

²¹ *Ibid.*, p. 2. Citing Lord Mustill in his foreword to *The Law and Practice of Arbitration and Conciliation* by OP Malhotra SC, 2002.

²² Bassler, WG *op. cit.*, pp. 103 – 104.

²³ White & Case International Arbitration Survey 2012, Current and Preferred Practices in Arbitral Process. Available at: < <http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3787> >. [15 January 2015].

provisions relating to arbitration are not transparent, are scarce, or non-existent. This may be the case with countries that traditionally have been opposed to arbitration, like many developing countries used to be. In such an instance the practice of the courts must be carefully studied to learn how various issues are approached, such as whether foreign lawyers are accepted as arbitrators or counsels, which subject matters are considered capable of being arbitrated, whether the arbitral tribunal will not be deprived of jurisdiction to rule on its own jurisdiction, and alike²⁴. This is why there is increasing need to unify existing approaches and practices, of which UNCITRAL Model Law is one example.

The framework for the degree of court involvement is provided by the New York Convention and mirrored in essence in the UNCITRAL Model Law, the latter, however, being not binding but indicative. The framework provides the minimum and maximum degree of court involvement, leaving a spacious grey area in between that harbours many measures that can be undertaken by a court, both cooperative and obstructive²⁵. Thus, Article II(3) of the New York Convention provides: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.' The minimum degree of court intervention is an explicit obligation to refer the parties to arbitration, and as is found in Article III – recognize and enforce arbitral awards. These two obligations are the cornerstone of the Convention. In both cases, the arbitration agreement must be compliant with the requirements of Article II(1) and (2), where it is provided that the agreement must be in writing. The maximum degree of court intervention is incorporated in the implied provision of Article II(3), which is – to not take any measures incompatible with the obligation to refer the parties to arbitration. However, as it was mentioned above, the room left uncovered in between the two framework boundaries allows room for interpretation as to what measures are indeed incompatible with the said obligation.

Finally, alongside the New York Convention and national laws and practices, the power of the courts to intervene may be modified by the arbitration agreement of the parties. Thus, parties may agree in advance as to what actions they see as permissible to be undertaken by a court in the process of arbitration. This, however, can only be done within the confinement of what is allowed under the domestic laws. The implications that it brings is that when the parties decide to increase the power of the court (usually it is very unlikely to be possible to grant a court powers beyond what is laid down by statute) or exclude some of the powers of the court (depending, again, on the extent of domestic laws: thus, powers closely related to mandatory provisions and public policy are unlikely to be capable of limitation), it first of all, may be subject to special requirements, and secondly, it is highly dependable on domestic legislation. Hence, a surer way for the parties to

²⁴ Course on DS 5.8, p. 10.

²⁵ Course on DS 5.8, p. 7.

predict the degree of court intervention is to exercise their power of choice of arbitral situs, within which the modifications of the courts powers are then to be assessed.

3.2 Court involvement at different stages of arbitration process

It is a popular misconception that the only way a court gets involved in an arbitration process is at the stage of recognition and enforcement of arbitral awards, due to the fact that arbitration is devoid of the centralized system of enforcement in place within a nation state. It is indeed a fact that unless the parties willingly comply with the arbitration award, it is up to the state courts to compel compliance. The major international instrument for the regulation of recognition and enforcement of arbitral awards – The New York Convention 1958 – provides in Article 3 that contracting parties shall recognize as binding and enforce arbitral awards without imposing conditions or fees more onerous than those applicable to domestic arbitral awards. The New York Convention abolishes the principle of ‘double exequatur’, which was a rule under the Geneva Convention 1927 and according to which a party seeking enforcement had to prove conditions necessary for enforcement²⁶: thus, it had to obtain a declaration from the courts of the arbitral situs that arbitration was final and enforceable there, and only after that it could proceed to enforcing it in a different state. This complicated process was abolished, and the New York Convention provides for only a limited number of grounds, on which a state party can refuse enforcement and recognition of a foreign award. The exhaustive list of proper grounds is laid down in Article V of the Convention, which include incapacity of the parties to the arbitration agreement or invalidity of the agreement under the law; the party against whom the award is invoked was unable to present their case, due to improper notice or otherwise; the award is granted on an issue outside the scope of the arbitration agreement; the composition of the arbitral tribunal or arbitration process was not compliant with the agreement of the parties; the award has not become binding on the parties yet, or has been set aside or suspended. In addition to the grounds pertaining to a deficiency in the arbitration process per se, recognition and enforcement may be refused where the subject matter of the dispute is not capable of resolution through arbitration under the law of the state where recognition and enforcement is sought; or where recognition and enforcement are contrary to public policy of that state (Article V (2)).

This reversed focus on what seems to be the final step in the process of arbitration was intentionally made a forerunner to the subsequent discussion so as to disillusion the reader as to the solitary existence of arbitration, and address the popular understatement of the degree of court intervention straight away. As will be seen in the following, it is in no way confined to recognition and enforcement of arbitral awards, but may be present at virtually any stage of arbitration process, or

²⁶ Redfern, A, Hunter, M, Blackaby, N & Partisides C 2004, *Law and Practice of International Commercial Arbitration*, 4th edn., Sweet & Maxwell Ltd, London, UK.

even before the commencement of it (as regards the enforceability of the arbitration agreement). The UNCITRAL Model Law gives an outline of instances, which may trigger court involvement, those being interim measures of protection, appointment and challenge of arbitrators, jurisdiction of the arbitral tribunal and setting aside the award. Namely, it is expressly provided in Article 5 of the Model Law that 'In matters governed by this law, no court shall intervene except where so provided by this law'. This would make for one remarkably clear provision were the Model Law legally binding; instead, it can be incorporated into the domestic law of a state or a domestic law can be largely based on its pattern²⁷.

As was mentioned above, counterintuitive to the perception of arbitration as a form of dispute resolution separate from and alternative to court litigation, court intervention does not always mean that the expectations of the parties as to the efficiency they opted to is jeopardized. A healthy degree of court involvement is necessary due to the private nature of arbitration and lack of enforcement mechanisms. The other side of the force is indeed the darker side, where courts intervene when stringent national provisions dictate so, such as the case with anti-suit and even more so – anti-arbitration injunctions. Let us look at these in some detail.

Anti-suit injunctions have been referred to under the scope of Article II(3) of the New York Convention, where the courts shall refer parties to arbitration at the request of one of the parties, unless it finds that the underlying arbitration agreement is invalid, that is – not compliant with the requirements in Article II(1) and (2). It is important to see here, that the Convention places no obligation on a court to compel arbitration, rather – it shall *refer* the parties to arbitration, thus acknowledge the existence of the concluded to this end arbitration agreement. Interestingly, this interpretation differs depending on jurisdiction, and although not very common, enforcement of an arbitration agreement is possible. Thus, the US courts can boast the widest powers to compel arbitration should one party to a contract decide to violate the arbitration clause; even more so – the party that is thus ordered by a court to participate in arbitration and ignores it nonetheless, may be held in contempt of court²⁸. In Europe, the approach towards anti-suit injunctions has changed very recently – January 10th 2015 is the date when the new Regulation Brussels I Recast²⁹ came into force. The Recast Regulation restates the

²⁷ UNCITRAL Model Law on International Commercial Arbitration (1958) with amendments as adopted in 2006, available at the United Nations Commission on International Trade Law webpage: < http://www.uncitral.org/uncitral/en/uncitraltexts/arbitration/1985Model_arbitration_status.html >. [15 January 2015]. Its current status, together with the amendments of July 2006 providing for a more detailed regulation of interim measures, is that it has been adopted by 67 states in a total of 97 jurisdictions.

²⁸ Bassler, WG *op. cit.*, pp. 106 – 107.

²⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1 20/12/2012. Text of the Regulation available at: < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> >. [15 January 2015].

exclusion from the scope of Brussels I of arbitration. Recital 12 expressly provides that ‘nothing in this Regulation should prevent the courts of a Member State, when seized of a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law’. This essentially changes the status quo since the 2009 *West Tankers* case³⁰, in which the ECJ ruled that a court of a Member State *could not* order an anti-suit injunction or other measure restraining proceedings in another Member State, on the grounds that they would be contrary to a pending arbitration (thus, due to the exclusion of arbitration from the scope of the Brussels I Regulation, the doctrine of *lis pendens* did not apply and so, as a result, this would likely lead to parallel court and arbitration proceedings and a risk of contradictory judgments). Anti-suit injunctions, however, can be argued to be beneficial to the parties and facilitate rather than impede the arbitration process, and rightfully so.

The more controversial case is anti-arbitration injunctions. Fortunately, it is not a common phenomenon. Again, common and civil law countries have differing approaches in this regard: common law, even though being more liberal with court intervention when it comes to anti-suit injunctions, reserves the possibility of anti-arbitration injunctions to a restricted number of circumstances; civil law countries, such as France, Sweden and Switzerland lack legal grounds whatsoever to grant such injunctions and any of these granted in a foreign state shall not be enforced³¹. Anti-arbitration injunctions generally serve the purpose of protecting local companies by national courts, despite existing legitimate arbitration agreements. The effect of such an injunction is temporary only, designed as a delaying tactic to gain leverage to settle the case; such a move shall not empower a company that has agreed to submit any disputes arising out of an international agreement it is a party to arbitration, to employ its domestic courts to rewrite such an agreement³². In as much as this is a slippery slope, it is currently observed in a number of developing countries and only a handful of cases from other jurisdictions.

Anti-suit and anti-arbitration injunctions are one form of measures that the parties to an arbitration agreement may seek. And whence, as it has been shown above, the position of the courts differs depending on jurisdiction and on either of the two injunctions sought, courts are generally more lenient towards interim measures of protection (IMP) that aim to assist international arbitration proceedings and preserve the parties’ procedural and/or economic rights³³. The

³⁰ Case C-185/07 *Allianz Spa and Generali Assicurazioni Generali Spa v West Tankers Inc* [2009] ECR I-663.

³¹ Bassler, WG *op. cit.*, p. 107.

³² Bisho, D, ‘Combatting arbitral terrorism: anti-arbitration injunctions increasingly threaten to frustrate the international arbitral system’, King & Spalding, Houston. Retrieved from: <<http://www.kslaw.com/library/pdf/bishop7.pdf>>. [15 January 2015].

³³ Falconer, C & Bouchenaki, A 2010, ‘Protective Measures in International Arbitration’, *Business Law International*, vol. 11, no. 3, pp. 183 – 194.

issue of preserving the status quo is akin to litigation, when it is necessary to issue an injunction before the dispute is effectively resolved and its resolution is final and enforceable. IMP can thus include ‘any temporary measure ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided’, such being, inter alia, attachments, injunctions, and posting of security for costs³⁴. IMP in an arbitration process suffer from the same lack of an enforceability mechanism characteristic of the private nature of arbitration that compels the parties to either turn to court for the respective enforcement of such measures, or request the court to issue such measures. Therefore, it seems that the ultimate effect of IMP ordered by an arbitral tribunal holds on the same premise as the functioning of the very arbitration process – the need of the participating parties to live up to their covenants and respect the arbitration decisions pertaining thereto.

The inability of an arbitral tribunal to enforce IMP calls for inevitable court assistance. The ability of a national court to uphold an IMP depends on the provisions of domestic law as well as on whether such measures are within the ambit of the jurisdiction of the arbitral tribunal. Considering the domestic laws of the place where enforcement of IMP is sought and the court practice, it is safe to assume that the court will be more inclined to enforce measures that it is familiar with and those that it would likely order in a domestic process. A curious situation surfaces, when one looks into the scope of the New York Convention, which does not cover enforcement of interim measures per se. However, courts in some states are willing to interpret Article III of the Convention, which provides for recognition of arbitral awards as binding and enforcing them according to national provisions, as obliging courts to also enforce interim measures when they are issued in a form of an award instead of a procedural order. Dissenting jurisdictions rely on one of the provisions for refusal of recognition and enforcement in Article V, which is that an award cannot be enforced if it has not yet become binding. Besides willingness or reluctance of the courts to enforce IMP is the form of an award, arbitrators, too, are sometimes opposed to the idea because such form would allow a measure of stability inconsistent with the very nature of interim measures, or simply because of the doubtful availability of such an option altogether³⁵.

IMP are not always available for an arbitral tribunal, firstly, because such measures may prove necessary before a tribunal is even constituted. The necessity may flow from a situation where a party initiates proceedings to challenge the validity of an arbitration agreement or despite its existence with the view of avoiding arbitration³⁶. This has been previously addressed in the context of Article II (3) of the New York Convention, according to which a court shall refer parties to

³⁴ Ferguson, SM 2003, ‘Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results’, *Currents International Trade Law Journal*, vol. 12, pp. 55 – 67.

³⁵ Course on DS 5.8, p. 16.

³⁶ Lew, JDM 2009, ‘Does National Court Involvement Undermine the International Arbitration Process?’, *American University International Law Review*, vol. 24, no. 3, pp. 489 – 537.

arbitration, and the corollary issue of anti-suit and anti-arbitration injunctions. It must be noted here that the ICC has also introduced a mechanism for seeking protective measures prior to the constitution of the arbitral tribunal – the Pre-Arbitral Referee Procedure, in force since 1990. The Rules are designed to assist situations that require emergency measures at very short notice through an appointment of a referee; they are not to be understood as substitution to arbitration or state courts with respect to the substance of a dispute³⁷. The Rules are separate from the ICC Arbitration Rules, so the parties must have made sure to incorporate them by reference to their arbitration agreement beforehand³⁸.

Secondly, some provisional measures may need to bind third parties, which is beyond the powers of a tribunal, and rather, within the reach of state courts. The amendments to the UNCITRAL Model Law of 2006 sought a more detailed regulation of interim measures and increased the power of arbitrators in this regard. Currently, Article 17 of the Model Law provides that arbitrators may issue IMP even *ex parte*, which has been subject to extensive criticism as being incompatible with the very nature of an arbitrator's mission³⁹.

It has been discussed above that the framework outlining the minimum and maximum degree of court intervention leaves out room for interpretation as to what measures are meant in Article II(3) of the New York Convention as incompatible with it. Hence, some jurisdictions take a stand that IMP are contrary to the very nature of arbitration altogether (some jurisdictions choose to follow a non-interventionist approach and let arbitration be. Such are, for example, the Canadian courts – Quebec and Ontario – that decided they lacked general power to review procedural rulings by arbitrators; German courts previously have also held that setting aside proceedings against interim orders by arbitral tribunals is inadmissible⁴⁰); others allow for interim measures both prior and during arbitration proceedings. Therefore, the availability of IMP depends greatly on the domestic law of the court, from which such order or its enforcement is sought.

Another hallmark of arbitration process that is likely to attract court involvement is the stage of constitution of the arbitral tribunal and challenge of arbitrators. Here, the previously discussed distinction between institutional and ad hoc arbitration must be brought to light. Whence it is clear that in a trial it is not at the discretion of the parties to choose a judge to one's liking, appointment of arbitrators by choice via an arbitration agreement is what makes arbitration attractive. Thus, parties can either name the individuals empowered to decide the potential dispute in the arbitration agreement, or provide/refer to a mechanism that would effectively secure the appointment of arbitrators. In ad hoc arbitration court involvement is particularly likely: a court might be called upon to cooperate with

³⁷ Pre-Arbitral Referee procedure, International Chamber of Commerce web-page. Available at: < <http://www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee/>>. [15 January 2015].

³⁸ Falconer, C & Bouchenaki, A *op. cit.*, p. 188.

³⁹ *Ibid.*, p. 190.

⁴⁰ Bassler, WG *op. cit.*, p. 109.

the parties within the scope of their arbitration agreement and the mechanism chosen by them, or employ the default mechanism provided by the national law of the arbitral situs. In both cases a degree of familiarity by the parties with the respective law is crucial, as the court is not obliged to follow the arbitration agreement to the letter, and may refuse to appoint arbitrators in a way anticipated by it if it deviates from the statutory mechanism. Such rejection will render the agreement 'inoperative and incapable of being performed', unenforceable and for want of a better word, useless. This stems from the fact, as has been previously discussed with regard to the modification, increase or exclusion of court powers by agreement of the parties, that the source of court power is essentially the law, and unless the court does not find a proper legal ground in domestic law, the arbitration agreement granting the court powers of appointment of arbitrators would be, again, unenforceable⁴¹. Institutional arbitration is not immune from this either, and regardless of the mechanism the parties rely on in the arbitration agreement, they shall ensure that it is not foreign to the jurisdiction where they plan to arbitrate, or that the courts in the place of situs have a tradition of respect towards institutional appointing mechanisms.

The court involvement in the challenge of arbitrators follows a similar pattern to the constitution of the tribunal, differentiating between ad hoc and institutional arbitration as well. The parties opting for ad hoc arbitration, while catering for the appointment mechanism, often overlook the issue of challenge of arbitrators. Therefore, so long as the New York Convention does not cover the challenge and provided that that the arbitration is not governed by the UCITRAL Model Law, the issue will fall under the national law of the state where the arbitration process takes place. Institutional arbitration usually lays down provisions relating to the challenge of arbitrators, empowering the respective institution with the issue, hence eliminating the necessity of court involvement. However, depending on the jurisdiction, issues may arise when a court admits a challenge submitted to it directly or offers judicial review of the decision of the arbitral institution on the challenge (this may be the case in jurisdictions where international commercial arbitration is not common)⁴².

Finally, but no less important in the arbitration process is the setting aside of the arbitral award. This is not to be confused with the refusal of its enforcement, which has different legal grounds and effects. Here the primary interest pursued in arbitration is contrasted with that of a court: once the latter is concerned with both dispute settlement and effective administration and enforcement of the law of the state, the primary focus of the former is essentially resolving a conflict, hence meticulous application of the law and matters of public interest resort to the background. This is essentially why arbitral tribunals are not hierarchically structured and no appeal is usually authorized (except the rare instances of appeal to a second arbitral tribunal). Therefore, the only way the procedural legitimacy of an arbitral process may be scrutinized is at the time of enforcement of an arbitral

⁴¹ Course on DS 5.8, pp. 21 – 22.

⁴² *Ibid.*, p. 26.

award, which can be denied due to a short list of reasons provided in Article V of the New York Convention. It, however, would not be entirely accurate unless the setting aside of an arbitral award as a method of control was addressed. Unlike recognition and enforcement that is decided by the courts and according to the laws of the state where such recognition and enforcement are sought, setting aside of an award employs the laws and the courts of the place of the arbitral situs. The paramount difference between denial of enforcement and setting aside is the extent to which the legal status of the award is affected. Refusal to enforce an award does not affect its status in any manner, making the party seeking to enforce an award in the courts of one state and being rejected on the grounds of, for instance, public policy, able to try to enforce the award in another state, whose public policy provisions might prove less stringent or whose courts turn out to be more hospitable. On the contrary, when an award is set aside by the court of the place of arbitration, it is essentially rendered unenforceable, which creates a defence under Article V(1)(e) of the New York Convention (providing as one of the grounds for recognition and enforcement that the award has not yet become binding, has been set aside or suspended), which can be invoked any time and in any court the award it sought to be enforced. It has been interestingly noted, however, that the language of the New York Convention with this regard leaves much room for confusion: inter alia, it is unclear whether courts are obliged or only authorized to refuse an award previously set aside (such discretion/duty is interpreted differently depending on the translation of the original text of the Convention)⁴³. As with the majority of instances discussed above, it is up to the law of the arbitral situs to determine the grounds on which an award can be set aside, which may be modified by agreement of the parties subject to the applicable mandatory rules of the respective national law.

4 Exclusion of arbitration from the Brussels regime

It has been noted that historically international arbitration and EU law have existed in parallel without coming much in contact with one another. The co-habitation started in 1958 with the adoption of the Treaty Establishing the European Economic Community (today the TEU) and in the same year - New York Convention, both of which pursued their own policy objectives. Whereas arbitration within the EU offers a forum for application of EU's private law, arbitral tribunals are not authorised to make requests for preliminary rulings on the validity of the EU law provisions to the ECJ.⁴⁴ This in couple with the consistent exclusion of arbitration from the Brussels Regime has made EU law and international arbitration develop along different routes, absent any close interaction.

⁴³ *Ibid.*, p. 30.

⁴⁴ Bermann, GA, 'Navigating EU Law and the Law of International Arbitration', *Arbitration International*, vol. 28, no. 3, pp. 397-445 (p.400-401).

At the time Brussels Convention 1968 was negotiated, it has been decided that given the availability of international agreements on arbitration, arbitration shall not be included under its scope. The 1958 New York Convention, which at the time of signing of the Brussels Convention was a decade old, offered world-wide uniformity and legal certainty as regards recognition and enforcement of arbitral awards, whose efficiency could be undermined by regional instruments.⁴⁵ Thus, the Brussels Convention did not cover recognition and enforcement of arbitral awards, as well as determination of court jurisdiction relating to questions of arbitration, and recognition on judgments given in proceedings relating to questions of jurisdictions (such as setting aside of an arbitral award)⁴⁶. After the accession of the UK and Ireland to the Brussels Convention, the scope of the arbitration exclusion has become a matter of opposing views between the common and civil law. Common law advocates maintain that the exclusion should cover all disputes subjected to arbitration, including secondary ones. Civil law approach is to extend the exclusion only to the substantive subject matter of the dispute.⁴⁷

Its successor, the Brussels I Regulation has inherited the arbitration exclusion.⁴⁸ The subsequent ECJ case law (most prominently, *Marc Rich*, *Van Uden* and *West Tankers*) has also indicated that the exclusion shall be interpreted broadly, covering any action in Member States courts relating to arbitration be it supervisory, supportive or enforcement.⁴⁹ The ruling in *Marc Rich* provides that the Contracting Parties to the Brussels Convention intended to exclude arbitration in its entirety, that is - such measure as appointment of an arbitrator by a national court in the process of setting up of arbitration proceedings shall be also deemed excluded.⁵⁰ This stands regardless of whether the New York Convention has been signed by all the Member States and of the fact that it does not cover the procedure for the appointment of arbitrators.⁵¹ By contrast, provisional measures relating to arbitration could be ordered by a national court as such measures are not limited to arbitration but protect a wide array of rights.⁵² In *West Tankers* the ECJ ruled that anti-suit injunctions are incompatible with Brussels I Regulation because *in casu* both the subject matter and the preliminary question about the applicability of the arbitration agreement were covered by the scope of the Regulation.⁵³ The ruling

⁴⁵ Mr P. Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. OJ No C 59/1. Chapter III (IV)(D).

⁴⁶ Report on the Application of Regulation Brussels I in the Member States presented by Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, Study JLS/C4/2005/03, Rupert-Karls-Universität Heidelberg, 2007. § 116.

⁴⁷ Genberg JHE, 'Arbitration in the EU - Where are we heading?', LL.M. Thesis, University of Helsinki, 2014.

⁴⁸ Article 1(2)(d).

⁴⁹ Heidelberg Report supra note, § 106-107.

⁵⁰ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* (1991) ECR I-3855. §18-19.

⁵¹ *Marc Rich*, § 20.

⁵² Case C-391/95 *Van Uden v Deco-Line* (1998) ECR I-07091.

⁵³ Case 185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* (2009) ECR I-663. The facts of the case were the following: Front Comor, a vessel owned by West Tankers and chartered by Erg Petroli SpA collided and caused damage in Syracuse, Italy with a

means that the courts of one Member State cannot issue an anti-suit injunction to prevent proceedings in a court of another Member State regardless of the fact that such proceedings are in violation of an arbitration agreement between the parties. The decision in *West Tankers* triggered the revision of the arbitration exclusion from the Regulation Brussels I. The Commission Green Paper suggested that the deletion of the arbitration exclusion could improve legal certainty and be beneficial on several occasions.⁵⁴ Specifically, in as much as it is agreed that the New York Convention is a fine instrument, which should continue the proper international regulation of arbitration, the relationship of arbitration with the proceedings in the Member States courts could be improved by the deletion of the arbitration exclusion from the Brussels I Regulation. Firstly, complementary to arbitration court proceedings at the place of arbitration could be covered by the Regulation's rules on exclusive jurisdiction, which would contribute to legal certainty and procedural transparency. By the same token, the interim measures issued in support of arbitration would as well be covered by the Regulation's jurisdictional rules. Moreover, parallel proceedings between courts and arbitral tribunals in different Member States would be avoided by streamlining the recognition of judgments that set aside an arbitral award; judgments relating to the validity of an arbitration agreement by introducing a uniform conflict rule; and judgments merging an arbitral award. As is evident now, the Green Paper has been overall more ambitious than the resulting Recast Regulation, including in arbitration related matters, which stayed consistently excluded from the Brussels regime.

The Heidelberg Report, which crowned the consultation with the stakeholders during the revision of the Brussels I Regulation, indicated that the Member States did not perceive it as necessary to extend the scope of the Brussels I Regulation to arbitration and mediation because the New York Convention 1958 was working adequately. Among the arguments voiced against the extension were the following: the adequate functioning of the New York Convention would be compromised⁵⁵; and the enforcement of an arbitration clause is more effective under the national law than it would be under a common European framework⁵⁶.

Recital 12 of the Recast Regulation reinforces the exclusion of arbitration from its scope. It reads that when a court is seized of a matter in respect of which

jetty owned by Erg. The charter party was governed by English law and all disputes were to be resolved by recourse to arbitration in London. Erg commenced arbitration proceedings in London against West Tankers for the payment of the excess of the damaged covered by insurance. The insurer, Allianz and Generali brought proceedings against West Tankers in the Tribunale di Siracusa (Italy) to recover the paid out to Erg insurance money. West Tankers sought an injunction from the High Court of Justice of England and Wales, Queens Bench Division restraining Allianz and Generali from trying the dispute in the Italian court in violation of the arbitration agreement. The High Court granted the anti-suit injunction. Allianz and Generali appealed arguing that such an injunction is contrary to the Brussels I regulations arbitration exclusion.

⁵⁴ Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final.

⁵⁵ Heidelberg Report supra note, § 110.

⁵⁶ Ibid., § 111.

the parties have entered into an arbitration agreement, the court may refer the parties to arbitration, stay or dismiss the proceedings, or examine the validity of the arbitration agreement. Furthermore, when a court rules on the validity of an arbitration agreement, the decision is outside the scope of Recast Regulation's recognition and enforcement rules regardless of whether it is a principal issue or an incidental question. Paragraph 3 of the recital specifies, that when a court rules on the validity of an arbitration agreement and finds it null and void, it can still rule on the substance of the dispute. read in conjunction with Article 73 mean that arbitration awards that deal with the same subject matter and are inconsistent can be enforced under the New York Convention, which takes precedence. Finally, the Recital explains that the Recast Regulation does not apply to any action or ancillary proceedings, which relate to the establishment of an arbitral tribunal, powers of arbitrators, etc. Altogether, despite the fact that the clarification of the extent of arbitration exclusion is not in the body of the Recast Regulation but in the Preamble, it is a welcomed development that reduces the voiced ambiguity.⁵⁷

However, despite some clarification offered by the Recast Regulation, there is a concern that the consistent exclusion of arbitration from the harmonised European rules on jurisdiction jeopardises the concept of mutual trust between the Member States.⁵⁸ Mutual trust is a notion that lets the Brussels system of jurisdiction function in harmony, that is - when courts of each Member State respect the results reached in the other as well as the right of each court to rule on its own jurisdiction. With the *West Tankers* decision, the court can no longer issue anti-suit injunctions to prevent proceedings that conflict with an arbitration agreement. It is proposed that the *lis pendens* rule favouring the court of the seat of arbitration or arbitral tribunal could be fit to resolve the issue, while being non-intrusive with the provisions of the New York Convention. Moreover, as has been mentioned earlier in this paper, the exclusion of arbitration from the scope of the Brussels Regime leaves the possibility of parallel proceedings between arbitral tribunals and national courts. This compromises the predictability and straightforward application of jurisdictional rules as well as undermines legal certainty.⁵⁹

5 Conclusions: state of play and prospective developments

The characteristic features that ensure arbitration's rapid and consistent increase in popularity as an appealing alternative to litigation is what repeatedly makes the business community keep it on top of the list of dispute resolution mechanisms. What drives the corporate decisions to arbitrate is the possibility to choose the law governing the substance of the dispute, the mutually convenient

⁵⁷ Alavi, H & Khamichonak, T 2015, 'A Step Forward in the Harmonisation of European Jurisdiction: Regulation Brussels I Recast', *Baltic Journal of Law & Politics*, vol. 8, no. 2, pp. 159-181.

⁵⁸ Dowers, N and Tang, ZS 2015, 'Arbitration in the EU Jurisdiction Regulation: Brussels I Recast and a new Proposal', *Groningen Journal of International Law*, vol. 3, no. 1, pp. 125-146 (143).

⁵⁹ *Ibid.*, pp. 144-145.

place of arbitration, the arbitration institution or arbitration ad hoc, the mechanism of or direct appointment and challenge of arbitrators; as well as the ability to be ensured in the confidentiality of the arbitration proceedings, understand the estimated costs and duration as well as the flexibility of the process⁶⁰. Corporations are increasingly engaging in international business transactions, which makes them seek resolution of inevitable disputes without undermining expanding global business interests. This, in turn, has accelerated competition among states looking to enhance their arbitration laws as well as arbitration institutions aiming at modifying their arbitration rules to catch up with the increasing corporate sophistication and expectations of the parties⁶¹.

On the European plane the differing arbitration laws among the Member States has been a question of controversy ever since the creation of the Brussels regime, which harmonises the matters of jurisdiction and the recognition and enforcement of foreign judgments. Since the Brussels Convention 1968 entered into force, the subsequent consistent arbitration exclusion has let the Brussels regime and arbitration relying on the 1958 New York Convention coexist in parallel. However, with the expansion of the EU and the accession of not only continental but common law states, with the controversial ECJ case law and the lack of clarity on the issues in the Brussels regime instruments, the exclusion of arbitration has grown into a matter of heated debate. Despite the many advocates in favour of abandoning the exclusion and welcoming arbitration within the scope of the recast Regulation, it has been excluded once again, ever so firmly. In as much as the voiced concerns have been addressed to some extent in that the scope of the exclusion was somewhat clarified, many scholars and practitioners alike claim that clarification will not resolve the real possibility of parallel proceedings and the resulting lack of legal certainty, which the Brussels regime has sought to protect. Perhaps, it is time for arbitration to be included in the EU legal landscape, either as part of the Brussels Regulation or as a separate instrument, adopting some of the ambitious ideas proposed in the Commission Green Paper.

Bibliography

1. Carr, I & Stone, P 2014, *International Trade Law*, 5th edn, Routledge, UK.
2. Moses, M 2014, 'Arbitration/Litigation Interface: The European Debate', *Northwestern Journal of International Law & Business*, vol. 35, no. 1, pp. 1-47.
3. Bermann, GA, 'Navigating EU Law and the Law of International Arbitration', *Arbitration International*, vol. 28, no. 3, pp. 397-445.
4. Palacean, C 2009, 'Forms of arbitration in international trade', *Law Annals Titu Maiorescu University*, vol. 7, pp. 117 – 128.

⁶⁰ Nobles, KC 2012 - 2013, 'Emerging Issues and Trends in International Arbitration', *California Western International Law Journal*, vol. 43, pp. 77 – 108.

⁶¹ *Ibid.*, p. 78.

5. Alavi, H & Khamichonak, T 2015, 'A Step Forward in the Harmonisation of European Jurisdiction: Regulation Brussels I Recast', *Baltic Journal of Law & Politics*, vol. 8, no. 2, pp. 159-181.
6. Dr. Al-Baharna, HM 1994, 'International Commercial Arbitration in a Changing World', *Arab L. Q.*, vol. 9, pp. 144 – 157.
7. Bassler, WG 2013, 'The Symbiotic Relationship Between International Arbitration and National Courts', *Dispute Resolution International*, vol. 7, no. 2, pp. 101 – 118.
8. Bisho, D, 'Combating arbitral terrorism: anti-arbitration injunctions increasingly threaten to frustrate the international arbitral system', King & Spalding, Houston.
9. Dowers, N and Tang, ZS 2015, 'Arbitration in the EU Jurisdiction Regulation: Brussels I Recast and a new Proposal', *Groningen Journal of International Law*, vol. 3, no. 1, pp. 125-146
10. Falconer, C & Bouchenaki, A 2010, 'Protective Measures in International Arbitration', *Business Law International*, vol. 11, no. 3, pp. 183 – 194.
11. Ferguson, SM 2003, 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results', *Currents International Trade Law Journal*, vol. 12, pp. 55 – 67.
12. Genberg JHE, 'Arbitration in the EU - Where are we heading?', LL.M. Thesis, University of Helsinki, 2014.
13. Gelandner, JL 1997, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations', *Marquette Law Review*, vol. 80, no. 2, pp. 625 – 644.
14. Nobles, KC 2012 - 2013, 'Emerging Issues and Trends in International Arbitration', *California Western International Law Journal*, vol. 43, pp. 77 – 108.
15. Lew, JDM 2009, 'Does National Court Involvement Undermine the International Arbitration Process?', *American University International Law Review*, vol. 24, no. 3, pp. 489 – 537.
16. Redfern, A, Hunter, M, Blackaby, N & Partisides C 2004, *Law and Practice of International Commercial Arbitration*, 4th edn., Sweet & Maxwell Ltd, London, UK.
17. Prof. Williams, DAR 2012, 'Defining the role of the court in modern international commercial arbitration', SMU Asian Arbitration Lecture, Singapore, 2012.
18. Mr P. Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. OJ No C 59/1. Chapter III (IV)(D).
19. Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final.
20. Report on the Application of Regulation Brussels I in the Member States presented by Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, Study JLS/C4/2005/03, Rupert-Karls-Universität Heidelberg, 2007. § 116.
21. UNCTAD Course on Dispute Settlement: International Commercial Arbitration, United Nations, 2005, New York and Geneva.
22. UNCITRAL Model Law on International Commercial Arbitration (1958) with amendments as adopted in 2006.
23. United Nations Convention on the recognition and enforcement of foreign arbitral awards (the New York Convention), United Nations Conference on International Commercial Arbitration, 1958.
24. Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12 p. 1.

25. Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351 p.1.
26. Case C-185/07, Allianz Spa v. West Tankers, Inc., 2009 E.C.R. 1-00663.
27. Case C-190/89 Marc Rich and Co. AG v Società Italiana Impianti PA (1991) ECR I-3855. § 18-19.
28. Case C-391/95 Van Uden v Deco-Line (1998) ECR I-07091.