UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

School of Law

"UNCERTAINTY AD INFINITUM: THE INADEQUATE CLARIFICATION OF THE ARBITRATION EXCLUSION BY THE RECAST REGULATION"

by

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ABSTRACT

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UNCERTAINTY AD INFINITUM: THE INADEQUATE CLARIFICATION OF THE ARBITRATION EXCLUSION BY THE RECAST REGULATION

By Jennifer Lavelle

Arbitration offers a real alternative to court litigation. As a result of globalisation, disputing parties are typically domiciled in different jurisdictions that have differing arbitral practices. Accordingly, to encourage the cross-border recognition and enforcement of foreign arbitral awards, the New York Convention was adopted in 1958 and is one of the most successful international conventions to date.

Even so, the effective resolution of disputes by way of arbitration is being threatened as questions are increasingly being raised as to whether a party agreed to arbitrate and/or whether the dispute in question is arbitrable. Consequently, parties who do not consider themselves bound by arbitration agreements or, more likely, abusive litigants, often seise a court with a view to obtaining a favourable judgment first. The race to a judgment or an award ensues. With no supranational regime to govern if or when a court or tribunal should stay their proceedings in favour of the other, conflicting judgments and awards inevitably result. What's more, as arbitration and litigation regimes have always been intended to be separate and independent, there is no supranational regime that provides guidance as to what factors a court should consider when evaluating whether a conflicting judgment or award should be enforced. This conundrum is left to national law, which does not give commercial parties the certainty they desire. The race to enforcement subsequently takes over.

This thesis aims to draw attention to these issues by evaluating the harmonised rules provided by the Brussels Regime for court jurisdiction and judgments and the interface of arbitration with that Regime. It will be seen that the mandatory rules governing recognition and enforcement of judgments leave little room for arbitral awards to be recognised. Case law spanning over four decades is examined and the inadequacy of national and European laws to combat the above problems is highlighted. There is currently a real risk of arbitral awards being rendered worthless unless national law is amended immediately. With Brexit on the horizon, will the UK Government and Parliament take the steps necessary to level the playing field for arbitration?

LIST OF CONTENTS

TABLE OF CASES

European Court of Justice/Court of Justice of the European Union

A

A v B (C-112/13) EU:C:2014:2195

Alassini v Telecom Italia SpA (C-317/08) EU:C:2010:146; [2010] 3 CMLR 17

Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) (The Front Comor) [2008] 2 Lloyd's Rep 661; [2009] ECR I-663 (Opinion of AG Kokott)

Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) EU:C:2009:69; [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138 (ECJ)

Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributaria e Aduaneira (C-377/13) EU:C:2014:1754; [2014] BTC 30

ASML Netherlands BV v Semiconductor Industry Services GmbH (C-283/05) EU:C:2006:787; [2007] 1 All ER (Comm) 949

Assedic Pas-de-Calais AGS v Dumon (C-235/95) EU:C:1998:365; [1998] ECR I-4531

Assens Havn v Navigators Management (UK) Limited (C-386/16) EU:C:2017:546; [2018] Lloyd's Rep IR 10; [2018] QB 463

Apostolides v Orams (C-420/07) EU:C:2009:271; [2011] QB 519

B

Bamberski v Krombach (C-7/98) EU:C:2000:164; [2001] QB 709

Banque internationale pour l'Afrique occidentale SA (BIAO) v Finanzamt für Großunternehmen (C-306/99) EU:C:2003:3

Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost (C-130/95) EU:C:1997:372

Bogiatzi (or Ventouras) v Deutscher Luftpool (C-301/08) EU:C:2009:649; [2010] 1 All ER (Comm) 555

C

Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (C-352/13) EU:C:2015:335; [2015] QB 906

Cartesio Oktato es Szolgaltato bt (C-210/06) EU:C:2008:723; [2009] Ch 354

Česká Podnikatelská Pojišťovna as, Vienna Insurance Group v Bilas (C-111/09) EU:C:2010:290; [2010] Lloyd's Rep IR 734

CILFIT Srl v Ministero della Sanita (Case 283/81) EU:C:1982:335; [1982] ECR 3415

N

Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG (Case 102/81) EU:C:1982:107; [1982] ECR 1095

O

Oceano Grupo Editorial SA v Quintero (C-240/98) EU:C:2000:346; [2000] ECR I-4941

Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89) EU:C:1991:279; [1992] 1 Lloyd's Rep 204; [1992] QB 434

Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj (C-406/92) EU:C:1994:400; [1995] 1 Lloyd's Rep 302; [1999] QB 515

Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02) EU:C:2005:120; [2005] 1 Lloyd's Rep 452; [2005] QB 801

P

Preservatrice Fonciere TIARD SA v Staat der Nederlanden (Case C-266/01) EU:C:2003:282; [2003] ECR I-4867

PreussenElektra AG v Schleswag AG (C-379/98) EU:C:2001:160; [2001] ECR I-2099

Prism Investments BV v van der Meer (C-139/10) EU:C:2011:653; [2011] ECR I-9511

Proceedings against Melki (C-188/10) EU:C:2010:363; [2010] ECR I-5667

ProRail BV v Xpedys NV (C-332/11) EU:C:2013:87; [2013] CEC 879

Pruller-Frey v Brodnig (C-240/14) EU:C:2015:567; [2015] 2 Lloyd's Rep 645; [2015] 1 WLR 5031

R

Refcomp SpA v Axa Corporate Solutions Assurance SA (C-543/10) EU:C:2013:62; [2013] 1 Lloyd's Rep 449; [2013] 1 All ER (Comm) 1201

Régie Nationale des Usines Renault SA v Maxicar SpA (C-38/98) EU:C:2000:225; [2000] ECR I-2973

Reichert v Dresdner Bank AG (C-261/90) EU:C:1992:149; [1992] ECR I-2149

Revenue and Customs Commissioners v Sunico ApS (C-49/12) EU:C:2013:545; [2014] QB 391

S

Seagon v Deko Marty Belgium NV (C-339/07) EU:C:2009:83; [2009] 1 WLR 2168

Shearson Lehmann Hutton Inc v TVB Treithandgesellschaft fur Vermogensverwaltung und Beteiligungen mbH (C-89/91) EU:C:1993:15; [1993] ECR I-139

National Case Law

United Kingdom

A

AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301

Adams v Cape Industries Plc [1990] Ch 433

ADM Asia-Pacific Trading PTE Ltd v PT Budi Semesta Satria [2016] EWHC 1427 (Comm)

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2011] EWCA Civ 647; [2011] 2 Lloyd's Rep 233; [2012] 1 WLR 920

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889

African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG [2011] EWHC 2452 (Comm); [2011] 2 Lloyd's Rep 531

Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87

Airbus Industrie GIE v Patel [1998] 1 Lloyd's Rep 631; [1999] 1 AC 119

AI v MT [2013] EWHC 100 (Fam); [2013] 2 FLR 371

Al-Midani v Al-Midani [1999] 1 Lloyd's Rep 923

Alexander Scott v George Avery (1856) 10 ER 1121; (1856) 5 HL Cas 811

Alfred C Toepfer International GmbH v Molino Boschi Srl [1996] 1 Lloyd's Rep 510

Alfred C Toepfer International GmbH v Société Cargill France [1997] 2 Lloyd's Rep 98

Alfred C Toepfer International GmbH v Société Cargill France [1998] 1 Lloyd's Rep 379

Ali Shipping Corp v Shipyard Trogir [1998] 1 Lloyd's Rep 643; [1999] 1 WLR 314

Aline Tramp SA v Jordan International Insurance Co (The Flag Evi) [2016] EWHC 1317 (Comm); [2017] 1 Lloyd's Rep 467

American International Speciality Lines Insurance Co v Abbott Laboratories [2002] EWHC 2714 (Comm); [2003] 1 Lloyd's Rep 267

AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH [2017] UKSC 13; [2018] AC 439

Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA (The Filiatra Legacy) (No 2) [1994] 1 Lloyd's Rep 513

Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485

B

C

M

Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd [2014] EWHC 3978 (Comm); [2015] 1 Lloyd's Rep 315

Malhotra v Malhotra [2012] EWHC 3020 (Comm); [2013] 1 Lloyd's Rep 285; [2013] 2 All ER (Comm) 353

Malicorp Ltd v Egypt [2015] EWHC 361 (Comm); [2015] 1 Lloyd's Rep 423

Mantovani v Carapelli SpA [1980] 1 Lloyd's Rep 375

Marc Rich & Co AG v Società Italiana Impianti SpA (The Atlantic Emperor) (No 1) [1989] ECC 198

Marc Rich & Co AG v Società Italiana Impianti SpA (The Atlantic Emperor) (No 1) [1989] 1 Lloyd's Rep 548

Marc Rich & Co AG v Societa Italiana Impianti SpA (The Atlantic Emperor) (No 2) [1992] 1 Lloyd's Rep 624

Markel International Co Ltd v Craft (The Norseman) [2006] EWHC 3150 (Comm); [2007] Lloyd's Rep IR 403

Maronier v Larmer [2002] EWCA Civ 774; [2003] QB 620

Masri v Consolidated Contractors International Co SAL [2008] EWCA Civ 303; [2008] 2 Lloyd's Rep 128; [2009] QB 450

Masri v Consolidated Contractors International Co SAL [2008] EWCA Civ 876; [2009] 1 Lloyd's Rep 42; [2009] 2 WLR 699

Maximov v Open Joint Stock Co [2017] EWHC 1911 (Comm); [2017] 2 Lloyd's Rep 519

Microsoft Mobile Oy (Ltd) v Sony Europe Ltd [2017] EWHC 374 (Ch); [2017] 2 Lloyd's Rep 119; [2018] 1 All ER (Comm) 419

Midgulf International Ltd v Groupe Chimiche Tunisien [2010] EWCA Civ 66; [2010] 2 Lloyd's Rep 543

Midland Bank Plc v Laker Airways Ltd [1986] QB 689

Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 All ER (Comm) 315

Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch); [2008] 1 Lloyd's Rep 326; [2008] 1 All ER (Comm) 607

N

National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWHC 196 (Comm); [2009] 1 Lloyd's Rep 666

National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193; [2010] 2 All ER (Comm) 1243

Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski) [2002] 1 Lloyd's Rep 106

New Zealand Shipping Co Ltd v Société Des Ateliers et Chantiers de France [1919] AC 1

Q

Qingdao Ocean Shipping Co v Grace Shipping Establishment Transatlantic Schiffahrtskontor GmbH (The Xing Su Hai) [1995] 2 Lloyd's Rep 15

R

R (on the application of S) v Hampshire County Council [2009] EWHC 2537 (Admin)

R v V [2008] EWHC 1531 (Comm); [2009] 1 Lloyd's Rep 97

Rainstorm Pictures Inc v Lombard-Knight [2014] EWCA Civ 356; [2014] 2 Lloyd's Rep 74; [2014] Bus LR 1196

Research in Motion UK Ltd v Visto Corp [2007] EWHC 900 (Ch)

Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd [1991] 2 Lloyd's Rep 625

Royal Bank of Scotland Plc v Highland Financial Partners LP [2013] EWCA Civ 328; [2013] 1 CLC 596

S

Samengo-Turner v J&H Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723; [2007] 2 All ER (Comm) 813

Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) [1997] 2 Lloyd's Rep 279

Shashoua v Sharma [2009] EWHC 957 (Comm); [2009] 2 Lloyd's Rep 376; [2009] 2 All ER (Comm) 477

Shell International Petroleum Co Ltd v Coral Oil Co Ltd (No 1) [1999] 1 Lloyd's Rep 72

Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusef Cepnioglu) [2015] EWHC 258 (Comm); [2015] 1 Lloyd's Rep 567; [2015] 1 All ER (Comm) 966

Societe Commerciale de Reassurance v Eras International Ltd [1992] 1 Lloyd's Rep 570; [1992] 2 All ER 82

Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871

Soinco SACI v Novokuznetsk Aluminium Plant (No 2) [1998] 2 Lloyd's Rep 346

Sokana Industries Inc v Freyre & Co Inc [1994] 2 Lloyd's Rep 57

Soleimany v Soleimany [1999] QB 785

Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo) [2015] EWHC 1974 (Comm); [2015] 2 Lloyd's Rep 578

Spiliada Maritime Corp v Cansulex Ltd (The Spiliada) [1987] 1 Lloyd's Rep 1; [1987] AC 460

Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm); [2015] 2 Lloyd's Rep 123; [2016] 1 All ER (Comm) 1034

Starlight Shipping Co v Tai Ping Insurance Co Ltd [2007] EWHC 1893 (Comm); [2008] 1 Lloyd's Rep 230; [2008] 1 All ER (Comm) 593

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162; [2012] 2 All ER (Comm) 608 (HC)

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2012] EWCA Civ 1714; [2013] 1 Lloyd's Rep 217; [2013] 1 All ER (Comm) 1297 (CA)

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2013] UKSC 70; [2014] 1 Lloyd's Rep 223; [2014] 1 All ER 590 (SC)

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544 (CA)

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG(The Alexandros T) [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep 579; [2015] 2 All ER (Comm) 747 (HC)

Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc [2008] EWHC 914 (Comm); [2008] 2 Lloyd's Rep 269

South Carolina Insurance Co v Assurantie Maatschappij 'De Seven Provincien' NV [1986] 2 Lloyd's Rep 317; [1987] AC 24

Star Reefers Pool Inc v JFC Group Ltd [2012] EWCA Civ 14; [2012] 1 Lloyd's Rep 376; [2012] 2 All ER (Comm) 225

Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 1) [2005] EWHC 9 (Comm); [2005] 1 Lloyd's Rep 515; [2005] 1 All ER (Comm) 515

Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2006] EWCA Civ 1529; [2007] 1 Lloyd's Rep 193; [2007] QB 886

T

Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1) [2003] EWHC 3158 (Comm); [2004] 1 Lloyd's Rep 206

Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1) [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; [2005] 1 All ER (Comm) 715

Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 2) [2005] EWHC 455 (Comm); [2005] 2 Lloyd's Rep 378

Tongyuan (US) International Trading Group v Uni-Clan Ltd (2001), unreported (Moore-Bick J)

Torch Offshore LLC v Cable Shipping Inc [2004] EWHC 787 (Comm); [2004] 2 Lloyd's Rep 446; [2004] 2 All ER (Comm) 365

Toyota Tsusho Sugar Trading Ltd v Prolat Srl [2014] EWHC 3649 (Comm); [2015] 1 Lloyd's Rep 344

Other States

Austria

Erich Gasser GmbH and MISAT Srl (Case 4 r 41/02i) [2003] ILPr 11 (Oberlandesgericht, Innsbruck)

Bermuda

Sojuzneftexport (SNE) v JOC Oil (4 Mealey's Int'l Arb Rep B1) (1998) (Court of Appeal, Bermuda)

Canada

Dell Computer Corp v Union des consommateurs [2007] 2 SCR 801 (Supreme Court, Canada)

OT Africa Line Ltd v Magic Sportswear Corp [2006] FCA 284; [2007] 1 Lloyd's Rep 85 (Federal Court of Appeal, Canada)

France

In Zone Brands International Inc v In Beverage International (Arrêt n° 1017 du 14 octobre 2009 (08-16.369/08-16.549)); [2010] ILPr 30 (Cour De Cassation, First Civil Chamber)

Republique du Congo v Societe Groupe Antoine Tabet [2008] ILPr 39 (Cour De Cassation)

Germany

Phillip Alexander Securities & Futures Ltd v Bamberger (1997) 22 YBCA 872-873

Re the Enforcement of An English Anti-Suit Injunction (Case 3 VA 11/95) [1997] ILPr 320 (Oberlandesgericht, Dusseldorf)

Hong Kong

PCCW Global v Interactive Communications Service Ltd [2006] HKCA 434; [2007] 1 HKLRD 309 (Court of Appeal, Hong Kong)

Italy

Somali High Seas International Fishing Co (SHIFCO) v Davies, 29 May 2003 (Tribunale di Latina, Italy)

Pakistan

Hub Power Co (HUBCO) v Pakistan WAPDA (PLD 2000 SC 841) 14 June 2000 (Supreme Court, Pakistan)

Société Générale de Surveillance SA (SGS) v Pakistan (2002 SCMR 1694) (Supreme Court, Pakistan)

Singapore

Aloe Vera of America Inc v Asianci Food (S) Pte Ltd [2006] SGHC 78 (High Court, Singapore)

Tolmolugen Holdings v Silica Investors Ltd [2015] SGCA 57 (Court of Appeal, Singapore)

United States

Karaha Bodas Company LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 18 June 2003 (335 F3d 357 (5th Cir 203)) (United States Court of Appeals, Fifth Circuit)

Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, 473 US 614 (1985) (Supreme Court, United States)

TABLE OF LEGISLATION

International Law

Treaties & Conventions

Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62

Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L79/4

Agreement on the European Economic Area 1992 [1994] OJ L1/3

Convention on the settlement of investment disputes between States and nationals of other States, 575 UNTS 159

Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice of the European Communities (78/884/EEC) [1978] L304/1

Convention of 25 October 1982 on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the amendments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland [1982] OJ L388/1

Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic [1989] OJ L285/1

Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the

Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic [1997] OJ C15/1

Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters [1972] OJ L299/32 (consolidated)

Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 005

Denmark and the Treaty on European Union [1992] OJ C348/1

European Convention on International Commercial Arbitration 1961, 484 UNTS 349

European Convention providing a uniform law on arbitration 1966, ETS No 056

Hague Convention on Choice of Court Agreements 2005, 44 ILM 1294

Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters 1965, 658 UNTS 163

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (Brussels, 25 August 1924), 120 LNTS 155

International Convention relating to the Arrest of Sea-going Ships 1952, 439 UNTS 193

Joint Declaration of 27 September 1968 to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/45

Joint Declaration of 3 June 1971 [1975] OJ L204/32 (consolidated version)

Joint Declaration of 9 October 1978 [1990] OJ C189/30

Joint Declaration of 26 May 1989 concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention [1990] OJ C189/32

Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L319/9

Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L399/3

Protocol of 27 September 1968 to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/43

Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (75/464/EEC) [1975] OJ L204/28 (consolidated version)

Protocol (No 22) on the position of Denmark [2012] OJ C326/299

Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1

Treaty establishing the European Economic Community 1957, 298 UNTS 3

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1

Treaty on the European Union [2012] OJ C326/13 (consolidated version)

Treaty on the Functioning of the European Union [2012] OJ C326/47 (consolidated version)

United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, 330 UNTS 38

Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331

Bilateral Treaties

Agreement providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 23 August 1990, with an Exchange of Notes, 1 September 1994, Cm 2896

Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters & Protocol, 18 January 1934, Cm 5235

Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters & Protocol, 2 May 1934, Cm 5321

Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 14 July 1960, Cm 1525

Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 14 July 1961, Cm 1868 & Protocol, 6 March 1970, Cm 4902

Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 7 February 1964 & Protocol, 14 July 1970, Cm 5512

Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 17 November 1967, Cm 4148

Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 12 June 1961, Cm 1761 & Protocol, 13 October 1971, Cm 4990

Model Law

UNCITRAL Model Law on International Commercial Arbitration (1985) (United Nations document Al40117, annex I)

European Union Law

Regulations

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40

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) [2012] OJ L351/1

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19

Directives

Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L78/17

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3

Decisions, Opinions & Resolutions

Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ C117/6

Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ L120/22

Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters EU:C:2006:81

Council Decision (2009/430/EC) of 27 November 2008 concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Opinion of the Economic and Social Committee on the Commission's Green Paper (2010/C 255/08), Brussels, 16 December 2009 [2009] OJ L147/1

European Parliament Resolution on the implementation and review of the Jurisdiction Regulation (2009/2140(INI)), Strasbourg, 7 September 2010

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C338/1

Proposals, Green Papers, Reports

Commission Communication to the Council and the European Parliament "Towards greater efficiency in obtaining and enforcing judgments in the European Union" (COM(97) 609 final, 97/0339 (CNS)) [1998] OJ C33/3

Proposal for a Council Act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union (COM(97) 609 final, 97/0339 (CNS)) [1998] OJ C33/20

Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1999/C 376E/1)(COM(1999) 348 final – 1990/0154 (CNS))

Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001/C 62 E/17)(COM(2000) 689 final – 1990/0154 (CNS) [2001] OJ C62E/243

European Parliament Report on the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] (adopted at the Parliament's plenary session on 21 September 2000)

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (2009) 174 final), Brussels, 21 April 2009

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), Brussels, 21 April 2009

Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (COM (2010) 748 final), Brussels, 14 December 2010

Report of the Parliament's Committee on Legal Affairs of 15 October 2012 on the 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) (A7-0320/2012)

Explanatory Reports

Explanatory Report to the 1966 European Convention [1966] COETSER 2 (20 January 1966), available at http://www.worldlii.org/int/other/COETSER/1966/2.html (accessed 05/06/2017)

Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/1

Report on the Protocols on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/66

Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1979] OJ C59/71

Council Report on the accession on the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1986] OJ C298/1

Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 [1990] OJ C189/57

Report on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic [1990] OJ C189/35

Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 [2009] OJ C319/1

National Law

United Kingdom

Statues

Administration of Justice Act 1969

Arbitration Act 1950

Arbitration Act 1975

Arbitration Act 1996

Civil Jurisdiction and Judgments Act 1982

Civil Jurisdiction and Judgments Act 1991

Companies Act 2006

Contracts (Applicable Law) Act 1990

Contracts (Rights of Third Parties) Act 1999

European Communities Act 1972

European Union (Notification of Withdrawal) Act 2017

Foreign Judgments (Reciprocal Enforcement) Act 1933

Human Rights Act 1998

Interpretation Act 1978

Private International Law (Miscellaneous Provisions) Act 1995

Senior Courts Act 1981 (formerly, the Supreme Court Act 1981)

Statutory Instruments

Civil Jurisdiction and Judgments Order, SI 2001/3929

Civil Jurisdiction and Judgments Regulations 2009, SI 2009/3131

Civil Procedure Rules, SI 1998/312

Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635

Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations, SI 2009/3064

Law Applicable to Contractual Obligations (Scotland) Regulations, SSI 2009/410

Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations, SI 2008/2986

Law Applicable to Non-Contractual Obligations (Scotland) Regulations, SSI 2008/404

Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901

Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987, SI 1987/468

Bills

European Union (Notification of Withdrawal) Bill, HC Bill 132 (as introduced)

European Union (Notification of Withdrawal) Bill, HL Bill 111 (passed)

European Union (Withdrawal) Bill, HC Bill 5 (as introduced)

Procedural Rules, Practice Directions & Statements

Practice Direction (High Court: Civil Litigation: Case Management) [1995] 1 WLR 508

Practice Statement: Commercial Court; Alternative Dispute Resolution [1994] 1 WLR 14

Italy

Italian Civil Code

Tunisia

Tunisian Insurance Code

ACADEMIC THESIS: DECLARATION OF AUTHORSHIP

I, Jennifer Lavelle, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

UNCERTAINTY AD INFINITUM: THE INADEQUATE CLARIFICATION OF THE ARBITRATION EXCLUSION BY THE RECAST REGULATION

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

3. Where I have consulted the published work of others, this is always clearly attributed;

4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

5. I have acknowledged all main sources of help;

6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

Signed: *J Lavelle*

Date: 23.11.2018

DETAILED TABLE OF CONTENTS

INTRODUCTION

This thesis is concerned primarily with commercial arbitration in the United Kingdom (UK).

It focuses on arbitration between commercial parties and how the English courts recognise party autonomy in this respect. Emphasis is placed on the scrutiny of arbitration agreements by the tribunals nominated therein and by the English courts where it is alleged by one party that the agreement is invalid or not binding. The inevitable tug of war between these fora is examined, which results from the legitimate inability of parties to completely oust the courts' jurisdiction. An overview of the advantages and disadvantages of arbitration as compared to litigation is provided.

This thesis also examines how arbitral awards are enforced. A brief word is said in Chapter 1 regarding the enforcement of domestic arbitral awards in England by the English courts. As commercial parties today are rarely based in the same jurisdiction, more time is taken to discuss the international enforcement regime provided by the New York Convention on the recognition and enforcement of foreign arbitral awards, in other words, the cross-border enforcement of arbitral awards. It goes without saying that there would be no point in arbitrating disputes if any resulting award could not be enforced in the State where the losing party's assets are located. The New York Convention is one of the most successful international conventions to date with over 150 Contracting States. It has two key objectives: (1) that arbitration agreements in writing are upheld; and, (2) that foreign arbitral awards are enforced, save for in the limited discretionary exceptions that are set out in the New York Convention.

It is impossible to consider arbitration in a vacuum. As mentioned above, courts may become involved even where parties have seemingly agreed to settle their disputes by way of arbitration, as one party may be of the view that the arbitration agreement is invalid, not binding on them and/or that the dispute is outside the scope of the arbitration agreement. Nor is it enough to only consider the curial jurisdiction of courts to support arbitration. Arbitration differs between States and the range of disputes that may be arbitrated varies from State to State. As such, a court in one State may hold that an arbitration agreement is invalid and, if it has jurisdiction, proceed to examine the merits of a dispute.

In order to determine whether a court has jurisdiction over a dispute, most States have national private international law rules that assist the court in examining its jurisdiction. The European Union (EU) Member States instead look to the supranational harmonised provisions found in the Brussels

Regime. The Brussels Regime aims to ensure that courts in all EU Member States apply the same rules to establish whether they have jurisdiction so that there is less scope for the courts in the EU Member State of enforcement to decline recognition of an incoming judgment. The harmonised rules in the Brussels Regime are referred to in this thesis where appropriate, although they are not examined in any detail as the primary topic is arbitration. That being said, the mandatory exceptions to recognition and enforcement in the latest Brussels Regime instrument, the Recast Regulation, are discussed and parallels are drawn between the exceptions in the New York Convention.

The Brussels Regime excludes 'arbitration' from its scope, precisely because arbitration is already catered for by the New York Convention and two European Conventions on arbitration had been adopted prior to the original Brussels Convention. Even so, the development of the Brussels Regime over the past 50 years is discussed in Chapter 2 and in the following Chapters, as there has been an inconsistent interpretation of the exclusion of arbitration from the Brussels Regime. This is a very important issue, as parties who include arbitration agreements in their contracts typically to do so in order to avoid litigation before the courts for a multitude of reasons. Both the English courts and the European Court of Justice (ECJ/CJEU) have struggled with this exclusion and their judgments are assessed throughout the thesis.

The CJEU's powers to interpret most of the Brussels Regime instruments are also considered in Chapter 2. The harmonised regime would be doomed to failure if each EU Member State was allowed to adopt its own interpretation of the Brussels Regime provisions. Accordingly, the CJEU provides preliminary rulings to assist the EU Member State courts in their application of EU law and relevant provisions are given an autonomous meaning in deference to the varying legal systems in the EU. That being said, the CJEU has no power to interpret international conventions such as the New York Convention.

As regards arbitration and the Brussels Regime, there are three main areas of concern. The first is whether the assessment of the validity of an arbitration agreement, where the underlying dispute is a matter that would otherwise fall within the jurisdictional rules provided by the Brussels Regime, falls within the arbitration exclusion. The second involves anti-suit injunctions that are issued by courts in support of arbitration. Finally, and arguably most importantly, the third area relates to the recognition and enforcement of arbitral awards, domestic and foreign, where there is a competing court judgment on the same matter and between the same parties. Each area is examined in detail in Chapters 3, 4 and 5 of this thesis respectively.

Chapter 3 examines the jurisprudence on the arbitration exclusion and the differing approaches of the courts. When read together with Chapter 2, it appears that the arbitration exclusion became narrower over time, most noticeably, following the ECJ judgment in *West Tankers*. The Recast Regulation has arguably widened the scope of the exclusion once again and perhaps the arbitration exclusion is now the widest it has ever been. Conversely, it may simply be the case that the courts have misunderstood the arbitration exclusion from the outset and this notion is scrutinised in Chapters 3 to 5. In any event, it will be seen that the clarifications provided by the Recast Regulation are limited and there are questions that remain unanswered.

The hot topic of anti-suit injunctions and ECJ's prohibition of them is dealt with in Chapter 4. Following the adoption of the Recast Regulation and the CJEU judgment in *Gazprom*, many have questioned whether courts are now once again able to grant anti-suit injunctions to prevent a party commencing or continuing proceedings before the courts of other EU Member States in breach of an arbitration agreement. The most sensible reading of the Recast Regulation is that the prohibition remains in place until the CJEU confirms otherwise. Alternatively, it can be argued that the Recast Regulation does not prohibit anti-suit injunctions in support of arbitration although it does expressly provide that EU Member State courts are not bound to recognise and enforce judgments or orders that are concerned with arbitration. As such, EU Member State courts may simply ignore them. Arguments for and against the use of anti-suit injunctions are also assessed, along with the compatibility of anti-suit injunctions with the New York Convention.

Chapter 5 moves on to consider the disastrous situation where one party has obtained an arbitral award and their counter-party has obtained a conflicting court judgment. The various scenarios and the rules that govern whether the award or the judgment should prevail are considered. Happily, the Recast Regulation appears to give a lifeline to the party who has obtained an arbitral award that would fall for recognition under the New York Convention. This is because the Recast Regulation expressly provides that its rules on recognition and enforcement are without prejudice to the application of the New York Convention.

What may come as an unwelcome surprise to some is that judgments concerning arbitration are also not subject to the Recast Regulation's rules on recognition and enforcement. So, a court judgment on the validity of an arbitration agreement or on the recognition of an arbitral award is not required to be recognised and enforced in other EU Member States (at least, under the Recast Regulation),

with the result that an abusive litigant can continue to seise courts in other EU Member States until a judgment on the merits is given. Conversely, EU Member State court judgments on the merits of a dispute must be recognised and enforced unless any of the exceptions discussed in Chapter 2 are applicable.

Further, not all arbitral awards are New York Convention awards, especially, domestic awards to be enforced in the State of origin, and these awards would not have the benefit of the perceived primacy given to arbitration by the Recast Regulation. In this regard, national law needs to be updated immediately, as the principle of *res judicata* does not appear to be available to a party where a competing court judgment falls for recognition under certain Brussels Regime instruments.

Finally, the English courts have struggled with the question of whether judgments obtained in breach of an arbitration agreement that the English courts would have held to be valid must be enforced. As there is no exception to recognition and enforcement on this basis, presumably, the English courts are bound to recognise the judgment if it is given by an EU Member State court, unless the exception to recognition based on public policy is reviewed.

Taking a step back, the three areas of concern highlighted in Chapters 3, 4 and 5 all stem from the same problem. That is, there are no *lis alibi pendens* rules that preclude the same dispute being litigated before arbitral tribunals and before courts. The New York Convention does not deal with the issue and the *lis alibi pendens* rules in the Recast Regulation do not extend to arbitral tribunals. As set out in Chapter 2, such rules were suggested when the Recast Regulation was being drafted, although any extension of the Brussels Regime to arbitration was met with a resounding 'No!' Without the ability to grant anti-suit injunctions, courts are helpless to prevent multiple proceedings and therefore competing arbitral awards and court judgments are inevitable.

Following the ECJ judgment in *West Tankers*, certain 'devices' were developed in an attempt to avoid the non-recognition of arbitral agreements and awards, and, while not a device in itself, damages based on the contractual breach of an agreement to arbitrate have been awarded to the 'innocent' party in some disputes. Certain devices, such as declaratory relief given by the courts or conversion of an arbitral award into a judgment may no longer be practically effective, as these judgments are likely to fall within the arbitration exclusion in the Recast Regulation and therefore not fall for recognition and enforcement thereunder.

If commercial parties were not already in an uncertain position given the above-mentioned conundrums, a spanner was thrown into the works in the shape of Brexit. At the time of writing, Brexit appears to be a foregone conclusion. It is currently unclear if or how the harmonised private international law system provided by the Brussels Regime will continue to exist after the UK leaves the EU. Chapter 6 sets out some of the possibilities in respect of provisions on governing law, jurisdiction and the recognition and enforcement of judgments that are likely to be contemplated by the UK Government.

Following Brexit, EU law provisions on governing law could be transplanted into national law by adopting new statutes and/or by updating current English law rules. Gaps in the legislation would also need to be filled. Going forward, the UK would need to update its 'new' statutory provisions each and every time EU law is updated if it wanted to continue to have a harmonised governing law regime with the remaining EU Member States. Alternatively, if the UK so desired, there is scope to argue that the Rome Convention could once again apply to most contractual disputes, although the status of the Rome Convention under international and EU law is questionable. In any event, governing law rules do not require reciprocity from other States, so either option could work in practice.

Adopting the harmonised rules on court jurisdiction and the recognition and enforcement of judgments is much more complicated. The UK could unilaterally implement the current EU law provisions by way of statute. However, it will be seen that this option is not desirable, as there would be no obligation on the remaining EU Member States to recognise court proceedings in the UK and to enforce judgments of an English court in the same way that they are currently required.

Alternatively, the UK could accede to the 2007 Lugano Convention so that some level of certainty will be provided. For the reasons set out in Chapter 6, if this option is taken, the UK will take a step backwards not least because the innovations of the Recast Regulation are not included within that Convention. The 2007 Lugano Convention needs to be updated without delay, although there is little indication that this is likely to happen any time soon, as the administrative burden of obtaining the agreement of all Contracting States each time the Convention needs to be amended is a significant hurdle to overcome.

The EU and the UK could instead forge a new agreement that would extend the Brussels Regime to the UK post-Brexit. The EU-Denmark Agreement has been suggested as a blueprint. The difficulties

with this option are discussed in Chapter 6, the most obvious being the unlikelihood of an EU-UK Agreement being finalised prior to the withdrawal date and the major sticking point of whether the jurisprudence of the CJEU will be applicable to the UK post-Brexit. Further options for jurisdiction and judgments are discussed in Chapter 6 but these options are not attractive.

The effect of Brexit on arbitration, while unclear, seems to be far less significant, as the New York Convention will continue to govern the cross-border recognition and enforcement of foreign arbitral awards. What's more, as discussed in Chapter 6, there are many practical reasons why parties choose to arbitrate in London and these advantages should be unaffected by Brexit. Even so, London cannot be complacent as competing arbitral centres are already proclaiming London's demise in a bid to win more business for themselves.

That being said, if the UK is willing to adopt a different approach to the Brussels Regime, which would also result in CJEU jurisprudence no longer binding the English courts, the effect of Brexit on arbitration in the UK could be overwhelmingly positive.

For instance, if the UK adopted a new private international law statute that dealt with governing law, jurisdiction and the recognition and enforcement of judgments and arbitration, it will not be necessary to wait for further clarification on the arbitration exclusion, particularly for the areas that remain unexplained since the adoption of the Recast Regulation, as set out in Chapter 3. The arbitration exclusion would simply no longer be relevant. Anti-suit injunctions in support of arbitration can also come to the fore, even if the Recast Regulation did not overturn the *West Tankers* judgment. Even if anti-suit injunctions are not upheld in the remaining EU Member States, they will continue to be enforced domestically by holding the abusive litigant in contempt. Importantly, primacy can be given to all arbitral awards, domestic or foreign, even if there is a competing EU Member State court judgment on the same matter between the same parties. Moreover, the question of whether the English courts are bound to recognise an EU Member State court judgment that has been obtained in breach of an arbitration agreement that the English courts would have held to be valid can once and for all be answered in the negative. Whether there is any appetite to implement such radical change remains to be seen.

It will be concluded that, for governing law, Brexit should be a singular hurdle, as the choice of law rules in the Brussels Regime are unilateral in nature and reciprocity of the remaining EU Member States is not required for the rules to operate. For jurisdiction and the recognition and enforcement

of court judgments, Brexit is more akin to a marathon and there are countless unknowns to be resolved. For arbitration, however, Brexit may provide an opportunity and the UK Government and Parliament should take this opportunity to give arbitration the primacy it deserves.

CHAPTER 1 - ARBITRATION IN THE UK AND THE NEW YORK CONVENTION

This Chapter provides an overview of commercial arbitration in the UK and of how foreign arbitral awards are recognised and enforced in accordance with the New York Convention.[1] The UK gives effect to its international obligations under the New York Convention by way of the Arbitration Act 1996.[2]

Part I examines arbitration agreements, arbitral proceedings and the powers of arbitrators under English law.[3] It sets out the numerous advantages of arbitrating disputes and the assistance that can be sought from courts pursuant to their supervisory jurisdiction, if needed. The drawbacks of arbitration are also considered. It will be seen that arbitration is strongly supported in England and Wales as an alternative dispute resolution (ADR) mechanism.

Part II deals with the obligation on courts in Contracting States to the New York Convention to recognise a valid arbitration agreement by referring the parties to arbitration and also considers what amounts to a valid arbitration agreement. Subsequently, the mandatory recognition and enforcement of foreign arbitral awards under the New York Convention, as enacted in English law, is discussed. This Part also reviews the short, exhaustive list of exceptions to recognition and enforcement of awards that is set out in the New York Convention. It is clear that the success of the New York Convention is owed to this two-fold requirement on courts (i) to recognise valid arbitration agreements in writing by referring parties to arbitration; and, (ii) to recognise and enforce foreign arbitral awards, subject to a handful of exceptions.

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[1] *United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards*, 330 UNTS 38 ('New York Convention' or 'NYC' in the footnotes).

[2] The Arbitration Act 1996 will be referred to as 'AA 1996' in the footnotes. AA 1996 entered into force on 31 January 1997. It largely follows the UNCITRAL Model Law on International Commercial Arbitration (1985) (United Nations document Al40117, annex I), adopted by the United Nations Commission on International Trade Law on 21 June 1985. Discussion of the Model Law is outside the scope of this thesis.

[3] 'English law' is used as shorthand for the law of England and Wales. While England and Wales as a jurisdiction is the focus of this thesis, many of the points made are likely to pertain to Northern Ireland and Scotland.

I. ARBITRATION IN THE UK

Arbitration is particularly important in the commercial, insurance and maritime industries,[4] as many standard form contracts in these areas provide for a choice of English law and arbitration in London.[5] Arguably, "arbitration has always been the procedural expression of *lex mercatoria*" such that arbitration and shipping are natural allies.[6] The energy and construction industries also prefer arbitration.[7] In 2015 alone, London was the seat[8] or centre of 4,738 international commercial arbitrations, mediations and adjudications.[9]

Arbitration is a voluntary[10] dispute resolution mechanism that can be very effective if both parties work to reach a solution. It is also an impartial process with parties either mutually agreeing on one

[4] See Queen Mary, University of London and PwC, *2013 International Arbitration Survey – Corporate choices in International Arbitration: Industry perspectives* ('2013 IAS'). The research took place between 1 March and 31 December 2012. An online questionnaire of 82 questions was completed by 101 respondents (all corporate counsel) and over 30 interviews followed. The survey can be accessed at http://www.arbitration.qmul.ac.uk/research/2013/index.html (accessed 06/02/2017).

[5] See e.g. standard form GAFTA and FOSFA contracts, the Institute Cargo Clauses 1982 and 2009, and standard form BIMCO Contracts, such as, NYPE 1946 & 1993, GENCON 1994, CONGENBILL 1978, 1994 & 2007. See also p 8 of Queen Mary, University of London and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration* ('2010 IAS'). The research was conducted from January to August 2010. The first phase included an online questionnaire comprising 78 questions completed by 136 respondents. The survey can be accessed at http://www.arbitration.qmul.ac.uk/research/2010/index.html (accessed 06/02/2017).

[6] Goldby, M., & Mistelis, L., 'Introduction', p 2, in Goldby, M., & Mistelis, L., (eds), *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016).

[7] 2013 IAS, pp 7-9.

[8] For a discussion of the concept of the 'seat', see Merkin, R., & Flannery, L., *Arbitration Act 1996* (Informa Law from Routledge, 5th edn, 2014) ('Merkin & Flannery'), pp 18-21.

[9] Cannon, A., Naish, V., & Ambrose, H., 'When Life Gives You Lemons, Make Lemonade: Anti-suit Injunctions and Arbitration in London Post-Brexit', 27 July 2016, available at http://kluwerarbitrationblog.com/2016/07/27/when-life-gives-you-lemons-make-lemonade-anti-suit-injunctions-and-arbitration-in-london-post-brexit/ (accessed 30/01/2017).

[10] Arbitration tribunals do not enjoy any inherent jurisdiction, as compared to national courts. Their jurisdiction is founded on the relevant arbitration agreement between the parties, as amended or supplemented by any applicable national law provisions. Outside the scope of the agreement, arbitrators have no jurisdiction. See further Gaunt, I., 'London Maritime Arbitration: Jurisdiction and Preliminary Issues' available at http://www.lmaa.london/uploads/documents/Ian%20Gaunt%20paper.pdf (accessed 27/01/2018).

arbitrator or each nominating their own arbitrator with a third arbitrator acting as chairman.[11] In addition, arbitration can take place in any jurisdiction irrespective of the nationality, domicile or habitual residence of the parties, or the place where the dispute arose. This adds to the neutrality of the process, which may be of significant importance to the parties. For instance, arbitration can give a sense of fairness that litigation before the English courts may not be able to provide, especially if one of the parties is domiciled in England and the other is not.

A. Arbitration and party autonomy

So, what is arbitration? Perhaps surprisingly, there is no statutory definition of arbitration in English law, as it can take various forms. At its most basic level, arbitration involves a decision by an independent and impartial third party of the matters that are in dispute, which is binding on all parties to the arbitration thereby ending their disagreement.[12] The primary characteristics of arbitration are:

> "(a) a tribunal:
>
> (i) selected directly by the parties (or by some delegated institutional, court or statutory process);
>
> (ii) required to act impartially (therefore excluding unilateral communications with one party, or at least disclosing such communications to the other party);
>
> (iii) obliged to resolve the dispute according to any chosen law or other agreed principles;
>
> (b) a procedure:
>
> (i) whereby the substantive legal rights and obligations of the parties are determined;
>
> (ii) that includes a proper mechanism for the receipt of evidence;
>
> (iii) in which each party is given a proper opportunity to state its case and deal with that of its opponent; and
>
> (c) a decision:
>
> (i) that is final and binding on the parties in the sense of being enforceable at law;
>
> (ii) that deals fairly, fully and finally with all of the issues that are required to be determined and;

[11] 2013 IAS, p 7. See further pp 24-25 below.

[12] For the history of how the arbitration process developed in London, see Harris, B., 'London Maritime Arbitration' (2011) 77 *Arbitration* 116-124.

(iii) that is clear and comprehensible".[13]

In addition, arbitrations that are formally regulated by the Arbitration Act 1996 are subject to three general principles that are set out in section 1 of the 1996 Act:

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and,

(c) the court should not intervene except as provided by the 1996 Act.[14]

In the case of any ambiguity in the 1996 Act, the three stated principles above are to have overriding effect.[15]

The recognition in section 1(b) above that party autonomy is paramount is extremely important, given that the very nature of arbitration is a consensual process. As expressed by Goldby & Mistelis, "Arbitration exists because it is an expression of party autonomy: disputing parties wish to settle their disputes outside national courts in a neutral and specialist adjudicatory forum where trusted members of the industry or lawyers with a commercial mind can decide the matter and render a widely enforceable award".[16]

For this reason, English law allows parties to select the seat[17] of the arbitration, to choose the law governing the validity of the arbitration agreement[18]; and, to dictate the law governing the

[13] Merkin & Flannery, pp 29-30, citing *O'Callaghan v Coral Racing Ltd* (1998) Times, 26 November 1998; *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237; *England and Wales Cricket Board Ltd v Kaneria* [2013] EWHC 1074 (Comm).

[14] AA 1996, s 1. These principles had no previous precedent in statutory arbitration law, Merkin & Flannery, p 8.

[15] Merkin & Flannery, pp 8-9.

[16] Goldby, M., & Mistelis, L., 'Introduction', p 2, in, Goldby, M., & Mistelis, L., (eds) (op cit).

[17] AA 1996, s 3(a).

[18] On determining the law governing the arbitration agreement, see Briggs, A., *Private International Law in English Courts* (Oxford: OUP, 2014) ('Briggs, *Private International Law in English Courts*'), [14.33]-[14.42].

substance of their dispute.[19] The location of the seat is fundamental to defining the legal framework for international arbitral proceedings and can have profound legal and practical consequences.[20]

Further, where provisions of the Arbitration Act 1996 contain the phrase "unless otherwise agreed by the parties" (or similar wording), parties are able to adopt procedures different to those set out in the 1996 Act. There are, however, a number of provisions in the 1996 Act that will apply on a mandatory basis to arbitrations with their seat in England or Wales.[21] The mandatory rules must be applied whatever law governs the arbitration agreement. In addition, unless the parties have excluded them, the non-mandatory provisions of the 1996 Act will apply also, so long as the law governing the arbitration agreement is English.[22]

B. Arbitration agreements

Parties can agree to arbitrate at the outset of their commercial relationship, typically by way of an agreement in the contract between them, or after a dispute has arisen, the latter is known as a 'submission agreement'.[23] For the Arbitration Act 1996 to apply, the agreement must be in writing or

[19] AA 1996, s 46. See Merkin & Flannery, pp 202-211.

[20] Born, G.B., *International Arbitration: Law and Practice* (Kluwer Law International, 2012), p 105. Where parties have not clearly selected the seat in their arbitration agreement, a number of hurdles need to be overcome, see Hill, J., 'Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements' (2014) 63(3) *ICLQ* 517-534. See further, Briggs, A., *Civil Jurisdiction and Judgments* (Informa law from Routledge, 6th edn, 2015) ('Briggs, *Civil Jurisdiction and Judgments*'), pp 774-776. For an overview of the reasons why parties select certain seats in maritime disputes, see Mistelis, L., 'Competition of arbitral seats in attracting international maritime arbitration disputes' in Goldby, M., & Mistelis, L., (eds) (op cit).

[21] The mandatory provisions of AA 1996, Part 1 are listed in AA 1996, Sch 1. See also, AA 1996, s 4(1).

[22] AA 1996, s 4(5); Briggs, *Civil Jurisdiction and Judgments*, p 778.

[23] Arbitration agreements are defined in AA 1996, s 6(1) as "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)". This wording encompasses both pre- and post-dispute agreements; *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83. See further, Merkin & Flannery, pp 26-34.

evidenced in writing.[24] This does not mean that oral agreements to arbitrate are invalid under English law but simply that they are not governed by the 1996 Act.[25]

Well drafted arbitration agreements allow a party to set the tone for any arbitration that may be necessary. The agreement can provide for, *inter alia*, the choice of seat, governing law, composition of the tribunal and language of the arbitration, as well as provisions on confidentiality. An arbitration agreement should also define the types of dispute that will be referred to arbitration should they arise.[26] While the agreement may typically refer to contractual disputes given that it forms part of the contractual relationship between the parties, a tortious claim may 'arise out of'[27] a contract containing an arbitration agreement and therefore fall within the agreement's scope if there is a sufficiently close connection between the tortious claim and a claim under the contract.[28]

Importantly, an arbitration agreement is a separate agreement between the parties that is severable from the underlying contract.[29] This means that the agreement may remain binding and enforceable

[24] AA 1996, s 5. See further, Merkin & Flannery, pp 22-25; Briggs, *Civil Jurisdiction and Judgments*, pp 779-781.

[25] AA 1996, s 81(b) confirms that oral agreements remain valid at common law but courts cannot exercise their powers under AA 1996 to assist the parties. See Merkin & Flannery, pp 374-375.

[26] See Briggs, *Private International Law in English Courts*, [14.43]-[14.47] on the scope of arbitration agreements.

[27] Phrases such as 'disputes arising out of' and 'disputes arising under' in such agreements draw no distinction and do not vary the scope of the agreement in themselves; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254; [2007] 4 All ER 951 ('*Fiona Trust*').

[28] *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep 171. See also *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701; [1993] 1 Lloyd's Rep 455; [1993] QB 701, "the presumption in favour of one-stop adjudication", p 470 per Hoffman LJ; *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 Lloyd's Rep 73; [1989] QB 488, where Bingham LJ held "I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings", p 90. See further *Fiona Trust*; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70; [2014] 1 Lloyd's Rep 223; [2014] 1 All ER 590. *Cf*. *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2017] UKSC 13; [2018] AC 439, where an action in tort of inducing a breach of contract where the relevant contractual term was an exclusive jurisdiction clause was not held to fall within the scope of the jurisdiction agreement.

[29] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*; *Fiona Trust*. AA 1996, s 7 provides "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to

even if the underlying contract was entered into fraudulently. It is only where the arbitration agreement itself is entered into by way of fraud that the parties can avoid it.[30]

Arbitration agreements can remove any anxiety that a person may have about litigation before a foreign court by ousting the jurisdiction of the courts (to a certain extent) at the very outset of the contractual relationship. This does not guarantee that the opposing party will not try to seise a foreign court, although their success in doing so should be much lower. Courts will not, however, uphold arbitration agreements that are unclear or ambiguous. Such agreements must be sufficiently certain to be capable of enforcement.[31] Even so, there is strong public policy in England and Wales in favour of upholding arbitration agreements, as the objective of an arbitration agreement is to allow the parties to resolve their disputes without the need for litigation before the courts.[32]

Notwithstanding the above, it is becoming increasingly common to have a preliminary hearing on the existence, validity or scope of the arbitration agreement and the party disputing it often chooses, in breach of the agreement, to air their concerns before a court instead of the designated tribunal. This regularly leads to a dispute on the most appropriate forum to determine the preliminary issue of the arbitration agreement's validity. There are, of course, circumstances where one party truly believes that they did not enter into an arbitration agreement.[33] In such matters, it may seem unfair to that party that the arbitral tribunal pronounces on its jurisdiction under the arbitration agreement. The inverse is also true; where one party is of the view that there is a binding arbitration agreement, that party is unlikely to want the court to determine the validity of the agreement.

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form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement". See Merkin & Flannery, pp 34-38; Briggs, *Civil Jurisdiction and Judgments*, pp 781-784.

[30] *Fiona Trust*; *El Nasharty v J Sainsbury Plc* [2007] EWHC 2618 (Comm); [2008] 1 Lloyd's Rep 360.

[31] *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540; *Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch); [2013] 1 Lloyd's Rep 11; [2013] 1 All ER (Comm) 1226.

[32] See section I(F) below on the encouragement of arbitration in England and Wales.

[33] See, e.g., *Dardana Ltd v Yukos Oil Co Ltd* [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep 326; [2002] 1 All ER (Comm) 819 ('*Dardana*'); *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763 ('*Dallah*'); *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193; [2010] 2 All ER (Comm) 1243.

Of greater concern are disputes where a party seises the court in breach of an arbitration agreement in bad faith in order to delay the proceedings or in the hope that the court will accept jurisdiction in spite of the agreement. Such parties often select courts in a jurisdiction known to be slow or anti-arbitration.[34]

In view of this conundrum, the Arbitration Act 1996 provides that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction,[35] i.e. as to whether there is a valid arbitration agreement; whether the tribunal is properly constituted; and, what matters have been submitted to arbitration in accordance with the arbitration agreement.[36] The ability of the tribunal to do so is known as the 'doctrine of competence-competence'.[37]

Also, where proceedings are commenced in court in breach of a valid arbitration agreement (domestic or foreign), a party to the agreement can apply to that court to stay the proceedings.[38] The ability for a party to request a stay under the 1996 Act is one of the ways in which the UK gives effect to its international obligations under the New York Convention.[39] The court *must* grant a stay

[34] Italy e.g. is renowned for being a slow jurisdiction. It took the Italian courts some ten years to determine the preliminary issue of jurisdiction in *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA (C-159/97)* EU:C:1999:142; [1999] ECR I-1597.

[35] *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192; [2005] 1 All ER (Comm) 303.

[36] AA 1996, s 30. See Merkin & Flannery, pp 101-113; Briggs, *Civil Jurisdiction and Judgments*, p 795. Any determination on jurisdiction made by the arbitral tribunal is subject to the overriding and non-excludable right of any party to have such a determination reviewed by the court, AA 1996, s 67. AA 1996, s 31 specifies when an objection to the substantive jurisdiction of the tribunal must be made. The right to object can be lost, AA 1996, s 73. See pp 28-29 below on the limited ability to appeal awards.

[37] For a detailed explanation of the doctrine and its interface with the Brussels Regime, see Roodt, C., 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' (2011) 19(2) *AJICL* 236-282. See also Graves, J., 'Court Litigation over Arbitration Agreements: Is it time for a New Default Rule?' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005).

[38] AA 1996, s 9(1); *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 Lloyd's Rep 465; [1998] 1 WLR 726; *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep 739; [2000] 1 All ER (Comm) 30.

[39] NYC, Art II(1) requires Contracting States to recognise arbitration agreements in wirting and NYC, Art II(3) requires courts in a Contracting State, when seised of a dispute that falls for resolution by way of arbitration, upon the request of one of the parties, to refer the parties to arbitration unless it finds that the arbitration

unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.[40] This is in accordance with the common law rule that an arbitration agreement cannot completely oust the jurisdiction of the courts.[41] The court may also grant a stay under its inherent jurisdiction.[42]

By way of overview, the court may:

(1) decide on the basis of written evidence that there is a valid arbitration agreement and that the dispute(s) falls within its scope – in such circumstances a stay must be granted;
(2) grant a stay under the court's inherent jurisdiction, with the result that the tribunal assesses the validity of the agreement;
(3) order the issue of validity to be tried under CPR[43] rule 62.8(3);
(4) decide that there is no arbitration agreement or that the dispute(s) falls outside the agreement's scope, and dismiss the application for a stay.[44]

There is a wealth of authority and stated preference for this initial issue to be determined by a court,[45] as there is for the issue to be determined by the nominated tribunal,[46] with the result that English law is in an overall state of mild disarray.[47]

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agreement is null and void, inoperative or incapable of being performed. There is a distinction between staying the court proceedings and referring the parties to arbitration, as explained by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291; [1993] AC 334, where it was held that AA 1975 "requires and empowers the court to do no more than stay the action, thereby cutting off the plaintiff's agreed method of enforcing his claim. It is then up to the plaintiff whether he sets an arbitration in motion, but if he chooses not to do so he loses his claim", p 354.

[40] AA 1996, s 9(4). This list is exhaustive, *Societe Commerciale de Reassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570; [1992] 2 All ER 82, and repeats almost verbatim NYC, Art II(3), which is discussed further at pp 34-36 of this Chapter. See also Merkin & Flannery, pp 39-55; Briggs, *Civil Jurisdiction and Judgments*, pp 784-788; Briggs, *Private International Law in English Courts*, [14.53]-[14.60].

[41] *Alexander Scott v George Avery* (1856) 10 ER 1121; (1856) 5 HL Cas 811; *Doleman & Sons v Ossett Corp* [1912] 3 KB 257.

[42] Senior Courts Act 1981 (formerly, the Supreme Court Act 1981), s 49(3); *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291; [1993] AC 334. See Merkin & Flannery, p 41.

[43] Civil Procedure Rules, SI 1998/312, as amended.

[44] These options are summarised in Merkin & Flannery, p 41.

[45] See Briggs, *Civil Jurisdiction and Judgments*, p 787, footnotes 99-102 and the cases cited therein.

[46] *Ibid*.

[47] *Ibid*. p 787.

In the academic literature, for example, Graves submits that this "often obstructive skirmish" arguably presents the single greatest threat to the effectiveness of commercial arbitration,[48] not to mention duplicated costs and wasted time for both parties. Graves believes that such clashes arise from the fact that national courts remain the default forum for the resolution of disputes[49] and that such disputes over the appropriate forum would be reduced by simply recognising the normatively preferred arbitration forum as the legal default rule.[50] Conversely, Briggs refers to the "welcome reassertion" that the binding force of arbitration is the consent of the parties only and that the final question as to whether a party consented to arbitration is one for a court to answer.[51]

The standard of proving the validity of the agreement is a 'good arguable case' and a merely arguable case as to validity will not be sufficient. As mentioned above, the court must decide if it considers it appropriate to resolve the issue of validity itself.[52] The party applying for a stay must also show that the agreement binds the parties before the court; covers the matter in issue in the proceedings; and, is not otherwise invalidated.[53] Once the applicant discharges this burden, a stay is automatic and mandatory unless the opposing party can satisfy the court that the agreement is null and void, inoperative, or incapable of being performed. The standard of proof is no higher than 'on the balance of probabilities'.[54] Where it is unclear whether either party has discharged their burden of proof, arguably, a stay should be granted.[55]

[48] Graves, J., 'Court Litigation over Arbitration Agreements: Is it time for a New Default Rule?' (op cit), p 203.

[49] *Ibid*. p 205.

[50] *Ibid*. pp 203-205.

[51] Briggs, *Civil Jurisdiction and Judgments*, p 770, referring to *Dallah*.

[52] *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm); [2013] 2 Lloyd's Rep 421; [2013] 2 All ER (Comm) 1025, [54], endorsed by the Court of Appeal in *JSC Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242. See further, Merkin & Flannery, p 45.

[53] Merkin & Flannery, p 52.

[54] *JSC Aeroflot Russian Airlines v Berezovsky*, [77].

[55] Merkin & Flannery, p 52. For the approach of other common law systems see *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801 (Supreme Court, Canada); *PCCW Global v Interactive Communications Service Ltd* [2006] HKCA 434; [2007] 1 HKLRD 309 (Court of Appeal, Hong Kong); and, *Tolmolugen Holdings v Silica Investors Ltd* [2015] SGCA 57 (Court of Appeal, Singapore).

The respondent also has the opportunity to challenge the award on the basis of the tribunal's lack of jurisdiction at the appeal stage.[56] This may result in a full re-hearing before the court, such that the losing party effectively has two bites at the cherry insofar as the tribunal's jurisdiction is concerned.

Alternatively, a court may, on the application of a party to the arbitral proceedings, determine any question as to the substantive jurisdiction of the tribunal.[57] Such an application can only be made with the written consent of all the parties to the arbitral proceedings or with the permission of the tribunal, and the court must be satisfied that (i) the determination of the question is likely to produce substantial savings in costs; (ii) the application was made without delay; and, (iii) there is a good reason why the matter should be decided by the court.[58] Applications under this section are to be the exception, not the norm, for dealing with jurisdictional objections.[59] In the meantime, the arbitral tribunal may continue with the arbitral proceedings and make an award.[60]

All told, there is no overwhelming majority in favour of a court or in favour of the nominated arbitral tribunal undertaking the initial assessment as to the validity of an arbitration agreement. In any event, the final say is given to the courts.

A device aimed at holding parties to their contractual agreement to arbitrate and avoiding duplicate proceedings on the validity of the agreement is the anti-suit injunction. Chapter 4 explores the role of anti-suit injunctions as a method of preventing the party in breach of an arbitration agreement from continuing or commencing proceedings before a court. It will be seen that the efficacy of anti-suit injunctions depends on whether they are permitted in the first place and even if they are,

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[56] AA 1996, s 67. This section is a mandatory provision of AA 1996.

[57] AA 1996, s 32(1). This section is a mandatory provision of AA 1996. See Chapter 5, pp 213-216 on applications to the court for declaratory relief.

[58] AA 1996, s 32(2).

[59] *Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 Lloyd's Rep 1; [2000] 2 All ER (Comm) 70. See also Merkin & Flannery, p 119 *et ff*. This position should be contrasted with applications to the court under AA 1996, s 72 where a party does not participate in the proceedings. In *Hashwani v OMV Maurice Energy Ltd* [2015] EWCA Civ 1171; [2015] 2 CLC 800, the Court of Appeal held that it would only be in exceptional cases that a court which was required to determine the jurisdiction of arbitrators would be justified in exercising its inherent power to stay those proceedings to enable the arbitrators to decide the question for themselves, [33]-[34].

[60] AA 1996, s 32(4).

whether the court in the relevant jurisdiction will uphold the injunction. There have been numerous cases of parallel proceedings where anti-suit injunctions have fallen on deaf ears.[61]

C. Arbitral proceedings

Arbitral proceedings[62] are private,[63] unlike a trial in an open court. They are also typically confidential,[64] with most express arbitration agreements containing provisions on confidentiality.[65] There are exceptions allowing for disclosure, for example, where the parties consent; where a court grants permission; where disclosure is reasonably necessary for protecting legitimate interests of an arbitrating party[66]; or, where the interests of justice require it.[67]

The arbitral process can be agreed upon in advance by the parties or determined by the arbitrator, and it can be tailored to the specific dispute. It can be formal and structured; informal and flexible; or have a formal procedure, while maintaining flexibility, depending upon the needs of the parties. Arbitration can also be combined with other forms of ADR such as early neutral evaluation[68] or mediation.[69] According to the 2015 International Arbitration Survey,[70] 90% of respondents indicated

[61] See Chapter 4, pp 143-146.

[62] For a description of how arbitration works by an experienced arbitrator, see Harris, B., 'London Maritime Arbitration' (op cit), pp 122-123.

[63] *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The Eastern Saga) (No 2)* [1984] 2 Lloyd's Rep 373; [1984] 3 All ER 835.

[64] *Ali Shipping Corp v Shipyard Trogir* [1998] 1 Lloyd's Rep 643; [1999] 1 WLR 314. According to the 2010 IAS, 62% of respondents stated that confidentiality was "very important" to them and 35% went as far to say that if arbitration did not offer confidentiality, they would not use it, p 29.

[65] Where there is no rule on confidentiality in the arbitration agreement or institutional rules adopted by the parties, the arbitration may not be confidential. It is likely that for this reason, 33% of respondents to the 2010 IAS stated that they include confidentiality in their arbitration clauses as a mandatory requirement, p 5.

[66] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 WLR 1041.

[67] *Owners, Masters and Crew of the tug "Hamtun" v Owners of the ship "St John"* [1999] 1 Lloyd's Rep 883; [1999] 1 All ER (Comm) 587. See also Blake, S., Browne, J., & Sime, S., *The Jackson ADR Handbook* (Oxford: OUP, 2nd edn, 2016), p 60 and Merkin & Flannery, pp 13-14 and the cases cited therein.

[68] Where an independent third party provides a written assessment of some or all of the issues in dispute.

[69] 'Med-arb' is usually where parties agree to mediate but allow the mediator to reach a final decision if the parties fail to do so themselves. Conversely, 'arb-med' is where parties commence arbitration but the arbitrator attempts to mediate the dispute before rendering a final decision. See *IDA Ltd v Southampton*

that international arbitration was their preferred dispute resolution mechanism, either alone (56%) or together with other forms of ADR (34%).[71] Arbitration can also be used to narrow the issues in dispute and to determine the facts and issues that the parties agree upon. Consequently, even if the matter ultimately goes to trial, fewer issues will require full investigation.

Arbitration can include 'hearings' similar to those in litigation, although parties do not have an automatic right to an oral hearing.[72] Alternatively, arbitration can be conducted on the basis of written submissions only. Arbitrators decide the matter solely on the submissions of the parties, so each party can select what they want to disclose. If the written submission procedure is used, it can be extremely cost effective and much quicker than litigation. Arbitration can also be a speedier option, as parties effectively control the length of the process themselves by setting deadlines for the constitution of the tribunal, disclosure of documents, written submissions, hearings and so on. A court and/or the CPR would set such deadlines in litigation proceedings. Parties can equally delay the arbitral process by stalling at each of the aforementioned stages for tactical reasons.

Parties can agree on one or more arbitrators[73] or arbitrators can be appointed by an independent body such as the London Court of International Arbitration (LCIA) or the London Maritime

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University [2006] EWCA Civ 145; [2006] RPC 21 for an example of a med-arb. According to the 2015 IAS (cited at footnote 70), when arbitration and mediation are used in conjunction, a minimal overlap between the two processes is preferred, p 31.

[70] Queen Mary, University of London and White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* ('2015 IAS'). The research was carried out between February and July 2015. An online questionnaire of 80 questions was completed by 763 respondents and 105 face-to-face or telephone interviews were conducted. The survey can be accessed at http://www.arbitration.qmul.ac.uk/research/2015/index.html (accessed 06/02/2017).

[71] *Ibid*. p 5. See similar results in the 2013 IAS, p 6. As well as p 5 of Queen Mary, University of London and PricewaterhouseCoopers LLP, *2006 International Arbitration Study: Corporate Attitudes and Practices* ('2006 IAS'). The study was conducted during a six-month period between 3 May and 31 October 2005, comprising of two phases. The first was an online questionnaire completed by 103 respondents; the second, 40 face-to-face or telephone interviews. The study can be accessed at http://www.arbitration.qmul.ac.uk/research/2006/123975.html (accessed 06/02/2017).

[72] Harris, B., 'London Maritime Arbitration' (op cit), p 122.

[73] AA 1996, ss 15-16. See Merkin & Flannery, pp 68-72.

Arbitrators Association (LMAA).[74] Where three arbitrators are used, typically each party nominates an arbitrator and the third is appointed by the service provider or the arbitrators themselves, with the third arbitrator acting as chairman or umpire.[75] Importantly, parties can select arbitrators with appropriate expertise and experience to deal with the dispute in question. The Chartered Institute of Arbitrators also provides training and accreditation for arbitrators.[76]

Parties can agree on the powers exercisable by the tribunal or the powers can be dictated by the governing body, e.g. LCIA, or by statute.[77] Generally, arbitrators can grant procedural orders,[78] interim awards,[79] final awards and costs awards.[80] The final award[81] sets out the substantive decision of the arbitrators and disposes of the matter.[82] Dissenting opinions can be given although, according to the 2012 International Arbitration Survey,[83] such opinions are only given in 8% of arbitrations.[84]

[74] The LMAA was formed by the brokers/arbitrators named on a list maintained at the Baltic Exchange. See further, Harris, B., 'London Maritime Arbitration' (op cit), pp 117-118.

[75] AA 1996, ss 16, 20-22. See also Merkin & Flannery, pp 78-81; Harris, B., 'London Maritime Arbitration' (op cit), pp 117, 122-123.

[76] See further http://www.ciarb.org/training-and-development (accessed 28/06/2017).

[77] AA 1996, s 38-39. See Merkin & Flannery, pp 146-157.

[78] Procedural orders include directions and measures designed to preserve evidence. In spite of arbitrators' ability to grant interim measures, requests are relatively uncommon. 77% of respondents to the 2012 IAS (cited at footnote 83) stated that they have experienced such requests in only one quarter or less of their arbitrations, p 16. Only 35% of all interim measures applications addressed to the tribunal are granted, with the majority (62%) being complied with voluntarily; parties sought enforcement by a court in only 10% of cases, p 17. Just over half of the respondents to the 2012 IAS believed that arbitrators should have the power to order interim measures *ex parte* in certain circumstances, p 18.

[79] AA 1996, s 47. Interim awards may dispose finally of one or more substantive issues, leaving others to be decided later. Partial or interim awards are issued in one-third of arbitrations, 2012 IAS, p 38. It should be noted that only 'final' awards are required to be recognised and enforced under the New York Convention, Merkin & Flannery, p 155.

[80] AA 1996, ss 46-58 deal with the award, including its form and effect. AA 1996, ss 59-65 set out provisions on the costs of the arbitration. See further, Merkin & Flannery, pp 202-260; Briggs, *Civil Jurisdiction and Judgments*, pp 797-798.

[81] Parties are free to agree on the form of an award, AA 1996, s 52. Awards will typically be in writing in any event.

[82] AA 1996, ss 47(2), 58. See also Merkin & Flannery, pp 243-244.

[83] Queen Mary, University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* ('2012 IAS'). The research was conducted from January to August

Arbitrators typically deliver their award within weeks of written submissions being received or oral hearings being concluded.[85] Arbitration can also provide remedies[86] that are not available in the court litigation process, such as requiring a party to apologise to the aggrieved party. Further, laws other than national laws can be applied by arbitrators, such as Sharia Law, if requested.[87] A tribunal has additional powers in case of default by any party.[88]

As mentioned, institutional arbitration service providers can provide detailed rules which establish the procedure to be followed by the parties along with the powers of arbitrators, often instead of or in addition to national laws like the Arbitration Act 1996. While arguably removing some of the parties' control over the proceedings, these rules do away with the need for parties to agree similar provisions at the time that they are negotiating the substantive contract or after a dispute has arisen. Further, parties often choose institutional arbitration because of the institution's well established reputation, their familiarity with the institution's rules and a prior understanding of the likely costs and fees that will be involved. Ad-hoc arbitrations that do not follow any pre-prepared rules can be much simpler and cheaper but there is a lot less certainty as to how the proceedings will develop and ultimately be resolved.

The courts at the seat of arbitration retain supporting jurisdiction over the arbitral proceedings and can, for example, make orders relevant to the taking of evidence[89] and they can grant injunctions

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2012. An online questionnaire of 100 questions was completed by 710 respondents in phase 1 and 104 telephone interviews took place in phase 2. The survey can be accessed at http://www.arbitration.qmul.ac.uk/research/2012/index.html (accessed 06/02/2017).

[84] 2012 IAS, p 38. This can be contrasted with other arbitration centres, where dissents are very common, see Harris, B., 'London Maritime Arbitration' (op cit), p 121.

[85] For sole arbitrators, two-thirds of respondents (67%) believe that the award should be rendered within 3 months after the close of proceedings; for 3 member tribunals, respondents believe that the award should be rendered within 3 months (37%) or 3-6 months (41%), 2012 IAS, p 39.

[86] See AA 1996, s 48.

[87] AA 1996, s 46(1)(b) entitles parties to require that the arbitrator applies to the substantive dispute a choice of law that is not recognised by ordinary private international law rules, such as Sharia law, *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch); [2008] 1 Lloyd's Rep 326; [2008] 1 All ER (Comm) 607. For further examples, see Merkin & Flannery, pp 206-207.

[88] AA 1996, s 41. See Merkin & Flannery, pp 160-165.

[89] See, e.g., AA 1996, s 43 on securing the attendance of witnesses; Merkin & Flannery, pp 167-170.

and appoint receivers.[90] The court can only act if or to the extent that the arbitral tribunal has no power or is unable to act effectively.[91] The courts can also determine a preliminary point of law following an application by a party to the arbitral proceedings.[92] In addition, courts can extend time limits for the commencement of arbitral proceedings,[93] remove arbitrators[94] and enforce peremptory orders of the tribunal.[95]

Compared to arbitration, litigation may be disproportionate to the matter(s)[96] or the sum in dispute,[97] or could incur disproportionate costs.[98] It is worth noting that court fees in England and Wales have significantly increased in recent years. For example, from 6 April 2015, a claim with a value between £10,000-£200,000 has an issue fee of 5 per cent of the value of the claim or a fee of £10,000 for claims above £200,000.[99] Legal aid funding is now very limited in England and Wales, particularly for civil and commercial matters. Even in high value cases, ADR may be a better option to litigation[100] and complex disputes may also be more readily addressed by way of ADR.[101] Moreover, litigation may simply not be appropriate for the matters in dispute,[102] such as employment law disputes where reference to the Employment Tribunal may be preferable.

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[90] AA 1996, s 44. See Merkin & Flannery, pp 171-199; Briggs, *Private International Law in English Courts*, [14.77]-[14.80]. Requests for interim measures in aid of arbitration to courts are rare, with 89% of respondents to the 2012 IAS stating that they had experienced such requests in only one quarter or less of their arbitrations, p 16.

[91] AA 1996, s 44(5). Parties can also exclude these powers as s 44 is a non-mandatory provision, AA 1996, s 44(1).

[92] AA 1996, s 45. See Merkin & Flannery, pp 199-201; Briggs, *Civil Jurisdiction and Judgments*, p 797.

[93] AA 1996, s 12. See Merkin & Flannery, pp 56-61.

[94] AA 1996, s 24. See Merkin & Flannery, pp 83-93.

[95] AA 1996, s 42. See Merkin & Flannery, pp 165-167; Briggs, *Civil Jurisdiction and Judgments*, pp 796-797.

[96] *R (on the application of S) v Hampshire County Council* [2009] EWHC 2537 (Admin).

[97] *Dibble v Pfluger* [2010] EWCA Civ 1005; [2011] 1 FLR 659.

[98] *Oliver v Symons* [2012] EWCA Civ 267; [2012] 2 P&CR 2; *Faidi v Elliot Corporation* [2012] EWCA Civ 287; [2012] HLR 27; *Gilks v Hodgson* [2015] EWCA Civ 5; [2015] 2 P&CR 4.

[99] For the Civil and Family Court fees from 6 April 2015, see https://www.gov.uk/government/publications/fees-for-civil-and-family-courts/court-fees-for-the-high-court-county-court-and-family-court#civil-court-fees (accessed 11/02/2017).

[100] *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; (2011) 108(7) LSG 16.

[101] *Dyson v Leeds City Council* [2000] CP Rep 42.

[102] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123; [2011] CP Rep 26.

D. Enforcement and appeal of awards

In England, a domestic award[103] given by a tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.[104] Alternatively, where leave is given, judgment may be entered in the terms of the award.[105] These options are available regardless of the seat of the arbitration.[106]

Another advantage of arbitration is the limited ability to appeal arbitral awards.[107] The Arbitration Act 1996 has, as one of its key underlying objectives, the speed and finality of arbitration proceedings, and the desire to avoid satellite litigation in the form of applications to the courts and appeals from court decisions.[108] The tribunal itself has powers to correct an award or to make an additional award.[109] Otherwise, a domestic award may be challenged before the court only on the basis that the tribunal lacked substantive jurisdiction[110]; on the grounds of serious irregularity[111]; or,

[103] The term 'domestic award' is used in this thesis to refer to an award made in England and Wales, and to distinguish a 'New York Convention award', which is an award granted by a tribunal in a Contracting State to the NYC (other than the UK), see also footnotes 142 and 159 below. The term 'foreign award' is used interchangeably with 'New York Convention award'.

[104] AA 1996, s 66(1).

[105] AA 1996, s 66(2). See Merkin & Flannery, pp 261-291.

[106] AA 1996, s 2(2). See further, Briggs, *Civil Jurisdiction and Judgments*, pp 798-800.

[107] Most of the respondents to the 2015 International Arbitration Survey did not favour an appeal mechanism on the merits in either commercial or investment treaty arbitrations, p 8.

[108] Merkin & Flannery, p 2.

[109] AA 1996, s 57. See *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm); [2004] 2 Lloyd's Rep 446; [2004] 2 All ER (Comm) 365; *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm); [2013] 1 Lloyd's Rep 630.

[110] AA 1996, s 67. This section is a mandatory provision of AA 1996 and is available only where the seat of the arbitration is in England and Wales; the governing law is irrelevant. See further, Merkin & Flannery, pp 291-303. See e.g. *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm); [2016] 1 Lloyd's Rep 295; [2017] 1 All ER (Comm) 207.

[111] AA 1996, s 68. This section is a mandatory provision of AA 1996 and is available only where the seat of the arbitration is in England and Wales; the governing law is irrelevant. The grounds which constitute serious irregularity are set out in AA 1996, s 68(2). See e.g. *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm); *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep 255; [2014] 1 All ER (Comm) 813. See *Union Marine Classification Services LLC v The Government of the Union of Comoros* [2017] EWHC 2364 (Comm); [2017] 2 Lloyd's Rep 608; [2018] 2 All ER

if not excluded by agreement between the parties, on a point of law.[112] The ambit of the appeal provisions has recently been restated by the House of Lords in narrow terms.[113]

Thereafter, in accordance with the Arbitration Act 1996, an appeal may be made to the Court of Appeal only with permission of the judge at first instance and not with the permission of the Court of Appeal.[114] There is no possibility of an application to the Court of Appeal for permission to appeal where this is refused by the judge at first instance.[115]

Foreign awards are enforced in accordance with sections 101-104 of the Arbitration Act 1996, as the recognition and enforcement of foreign arbitral awards is governed by the New York Convention.[116] Ease of enforcement under the New York Convention is one of the foremost arguments in favour of using arbitration. The New York Convention is discussed in Part II of this Chapter.

According to the 2015 International Arbitration Survey, enforceability of awards is seen as arbitration's most valuable characteristic followed by avoiding specific legal systems, flexibility and the selection of arbitrators.[117]

(Comm) 174, where a recent application to set aside an award under this section failed. See further, Merkin & Flannery, pp 303-321.

[112] AA 1996, s 69. This section is applicable only where the seat of the arbitration is in England and Wales and where English law governs the arbitration agreement. See further Merkin & Flannery, pp 321-337. See e.g. *Demco Investments & Commercial SA v SE Banken Forsakring Holding AB* [2005] EWHC 1398 (Comm); [2005] 2 Lloyd's Rep 650.

[113] *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2005] 2 Lloyd's Rep 310; [2006] 1 AC 221.

[114] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2000] 2 Lloyd's Rep 625; [2001] QB 388; *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep 305; [2002] 1 All ER (Comm) 70.

[115] Merkin & Flannery, p 2, footnote 6. In exceptional cases, there is a residual power to hear an appeal under the Senior Courts Act 1981, s 16, where the judge has not made a valid decision at all, see Merkin & Flannery, p 2, footnote 7.

[116] See pp 36-50 below. Also, AA 1996, s 66(4) confirms that nothing in s 66 affects the provisions of AA 1996 that relate to enforcement of awards under the NYC. In particular, AA 1996, s 66 cannot be used to evade the limited exceptions to recognition and enforcement in the NYC. See Merkin & Flannery, p 262, footnote 1.

[117] 2015 IAS, p 6.

E. Drawbacks of arbitration

There are, of course, drawbacks to arbitration. The main drawbacks can include cost, lack of effective sanctions during the arbitral process, lack of insight into arbitrators' efficiency and/or lack of speed.[118] While arbitration may typically be cheaper than litigation, if the arbitral process used is similar to a court trial, arbitration can be just as, if not more, expensive than going to court.[119] For example, parties will typically need to pay a filing fee to commence the arbitration, along with fees and expenses of any administrative body such as LCIA, fees of the arbitrator(s), and fees paid to solicitors, counsel, translators and/or experts. Parties are also jointly and severally liable to arbitrators for fees and expenses.[120] If one party refuses to pay, the other party will be liable to pay both parties' shares in order for the arbitration to proceed (although these fees and expenses can usually be claimed in the arbitration).[121]

In a similar manner to litigation, the parties are bound by a third party's decision and have no control over the outcome of the dispute. If parties do not want to relinquish such control, settlement negotiations may be more appropriate than a formal ADR mechanism.

Arbitrators have fewer powers than judges and cannot compel a party to arbitrate or cooperate. Also, as the parties effectively control the arbitral process, there is always a risk that they may become entrenched if the goodwill to resolve the dispute breaks down.[122] Where one party refuses to take part in the proceedings, there can be a significant delay. Arbitrators also have limited power to give interim orders, as compared to a court. While arbitrators can issue awards in default, the 'winning' party may then face difficulty in enforcing the award, depending on the jurisdiction in which the losing party's assets are located. The New York Convention seeks to avoid arbitral awards

[118] 2015 IAS, p 7.

[119] That being said, high costs typically result from the use of lawyers and experts, as opposed to the costs of the arbitrators themselves. See further Harris, B., 'London Maritime Arbitration' (op cit), p 123.

[120] AA 1996, s 28. See Merkin & Flannery, pp 96-100.

[121] See AA 1996, s 63. See Merkin & Flannery, pp 253-258.

[122] Parties do however have a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings, AA 1996, s 40. This includes taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law, AA 1996, s 40(2)(b). See Merkin & Flannery, pp 157-159.

being ignored by parties and the courts of enforcement. However, while the New York Convention is extensively ratified, it has not been acceded to in every jurisdiction worldwide.[123]

According to the 2015 International Arbitration Survey, a growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully.[124] Further, where arbitrations are determined on the basis of written submissions only, arguments cannot be tested in the same way as they can during an oral hearing.[125] It is also necessary to ensure that the arbitration agreement, Notice of Arbitration, arbitral proceedings and any award comply with the procedural rules of the State of enforcement.

It is crucial that arbitrators are chosen with care and parties must avoid selecting the same arbitrators over and over, as this may suggest bias and remove an arbitrator's impartiality.[126] For technical arbitrations, there may only be a small pool of experienced arbitrators, which may result in opponents rejecting the nominated arbitrator for reasons of bias more frequently.

Regrettably, certain disputes cannot be resolved by arbitration. For example, arbitration is typically prohibited under national law to resolve disputes involving public law rights and legal status.[127] Also, arbitration may not be appropriate where one party has substantially more power, influence and/or resources than the other. Further, arbitration is not suitable for multiparty disputes, especially where only some of the parties are bound by the arbitration agreement. It is often quite difficult to join a third party not bound by the agreement to the proceedings unless all parties agree or the

[123] See p 34 and footnote 143 below, which refer to the Contracting States to the NYC.

[124] 2015 IAS, p 10.

[125] *Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd* [2014] EWHC 3978 (Comm); [2015] 1 Lloyd's Rep 315. See also *HBC Hamburg Bulk Carriers GmbH & Co KG v Huyton Inc* [2014] EWHC 4176 (Comm); [2015] 1 Lloyd's Rep 310; [2016] 1 All ER (Comm) 595; *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep 109; [1999] 2 All ER (Comm) 778.

[126] The tribunal must act fairly and with impartiality, AA 1996, s 33(1). A court may remove an arbitrator where there are justifiable doubts as to his impartiality, AA 1996, s 24(1)(a). See further, Merkin & Flannery, pp 83-89, 124-133.

[127] See e.g. *Gazprom OAO (C-536/13)* EU:C:2015:316; [2015] 1 Lloyd's Rep 610; [2015] 1 WLR 4937 ('*Gazprom*'). Arbitral awards may be refused recognition and enforcement if the matters dealt with are not capable of being resolved by way of arbitration in the State of enforcement. See pp 48-49 below.

tribunal allows it. While less common in commercial disputes, some parties simply want their 'day in court' and if so, are unlikely to agree to or to engage in the arbitral proceedings.

The intention behind agreeing to arbitrate is usually to avoid involvement of the courts. Even so, there is always a risk of court intervention. There are also concerns over the "judicialization" of arbitration i.e. the increased formality of proceedings, similarity with litigation, associated costs and delays. This trend is potentially damaging to the attractiveness of arbitration. Control over the process also appears to be moving towards law firms and away from the actual users of arbitration.[128]

Finally, arbitral awards do not create legal precedent, as only a court judgment can do so. This may be of no consequence to the parties in dispute, although the lack of precedent may be both an advantage and disadvantage to the parties. The financial services sector, for example, prefers litigation, as a precedent is typically needed on the construction of terms in financial documents in order to avoid repeated disputes on the same wording.[129]

On the whole, the advantages of arbitrating disputes continue to outweigh the disadvantages, which is why arbitration is encouraged and supported in England and Wales, as discussed in the next section.

F. Encouragement of arbitration in England and Wales

Following the introduction of the Jackson Reforms from 1 April 2013, resolution by way of ADR must be given serious consideration as a way of resolving civil disputes and it now regularly forms part of case and costs management analysis.[130] Parties should be made aware that a costs sanction may be given where unreasonable refusal or failure to use ADR is shown.

Since 1994, the Commercial Court has issued procedural guidance requiring lawyers to consider with their clients the possibility of using ADR and to ensure that parties are informed of the cost-effective ADR options available.[131] The High Court has also issued guidance on using ADR since 1995, and

[128] 2013 IAS, pp 21-22. See further Harris, B., 'London Maritime Arbitration' (op cit), p 120.

[129] 2013 IAS, pp 7-9.

[130] Blake, S., Browne, J., & Sime, S., *The Jackson ADR Handbook* (op cit), p 1.

[131] *Ibid.* p 2; Practice Statement: Commercial Court; Alternative Dispute Resolution [1994] 1 WLR 14.

courts may, for example, question lawyers as to whether ADR has been discussed with their clients.[132] Encouragement of the use of ADR is also prominent throughout the CPR and the Pre-action Protocols.[133]

In England and Wales, courts cannot compel parties to use ADR if they do not wish to do so, as this may equate to an unacceptable restriction on the right of access to a court and a potential violation of Article 6 of the European Convention on Human Rights (ECHR)[134], as per the judgment in *Halsey*.[135] That being said, *Halsey* has been criticised for failing to differentiate ADR processes that result in a permanent stay of court proceedings, such as arbitration, and those that do not, such as negotiation or mediation.[136] The Court of Justice of the European Union (CJEU)[137] has held that a requirement under domestic law that parties attempt to settle their dispute by way of mediation as a condition precedent to legal proceedings would not infringe Article 6 of the ECHR.[138] Nor is Article 6 infringed where a party waives its right to a trial by way of a contractual agreement to arbitrate, for example.[139]

All things considered, the use of arbitration should be encouraged as this would ensure that only those cases that truly require access to a formal adjudication process can utilise the limited resources available in the justice system.[140]

[132] *Ibid*. Practice Direction (High Court: Civil Litigation: Case Management) [1995] 1 WLR 508.

[133] The procedural rules governing applications to courts in their supervisory capacity over arbitration are set out in CPR Part 62 and its Practice Direction. Part 62, Section I governs applications to the court under AA 1996 and Section III deals with applications for the enforcement of arbitral awards. Section II is now redundant.

[134] *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No 005.

[135] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002. The ECHR is incorporated into English law by the Human Rights Act 1998.

[136] Mr Justice Lightman, 'Mediation: Approximation to Justice', 28 June 2007.

[137] Formerly the European Court of Justice (ECJ).

[138] *Alassini v Telecom Italia SpA (C-317/08)* EU:C:2010:146; [2010] 3 CMLR 17.

[139] *Deweer v Belgium (A/35)* [1980] ECC 169. See further, Merkin & Flannery, p 9.

[140] Lord Neuberger, The Fourth Keating Lecture 2010, 'Equity, ADR, Arbitration and the law: Different Dimensions of Justice'.

II. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Once jurisdiction of the arbitral tribunal has been established, the tribunal will deal with the merits of the dispute and ultimately grant an award.[141] Yet, even in circumstances where the designated tribunal is the sole forum that determines the merits, only half of the battle is won, as the 'winning' party then needs to enforce the award against their opponent in a jurisdiction where the opponent's assets are located. This is more often than not in a jurisdiction other than the jurisdiction in which the award was granted. It goes without saying that arbitrating disputes would be futile if the winning party was unable to enforce the award. The same considerations hold true when commencing proceedings. No matter how favourable the jurisdiction in which litigation or arbitration takes place, it will all have been for nothing if a foreign court refuses to recognise or enforce the judgment or award. Accordingly, the New York Convention aims to facilitate the cross-border recognition and enforcement of foreign arbitral awards. The New York Convention will be the focus of this Part of the Chapter.

A. The New York Convention

The New York Convention lays down common standards for the recognition and enforcement of arbitration agreements and foreign[142] arbitral awards. There are currently 159 Contracting States to the New York Convention,[143] which represents over 77% of the 206 States recognised by the United Nations, making it one of the most successful international agreements to date.

The success of the New York Convention can be attributed to its two central obligations. The first obliges courts seised of a matter in breach of a valid arbitration agreement to refer the parties to arbitration[144] and the second requires mandatory recognition and enforcement of arbitral awards, save in the limited circumstances set out in the New York Convention.[145] The New York Convention also seeks to ensure that foreign arbitral awards will not be discriminated against and that they are

[141] Unless the parties settle their substantive dispute in the interim.

[142] Arbitral awards made in the territory of a Contracting State to the NYC, other than the State where recognition and enforcement is sought, are considered 'foreign' arbitral awards, NYC, Art I(1).

[143] Contracting States to the NYC and the date of their signature, ratification or accession are listed at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 31/03/2018). The NYC entered into force on 7 June 1959.

[144] NYC, Art II(3).

[145] NYC, Art III.

recognised and enforced in the same manner as a domestic award. This is achieved by requiring any conditions for recognition and enforcement in national laws that are stricter than those in the New York Convention to be removed, while preserving more favourable rights of any party that is seeking to enforce an award.[146]

Contracting States to the New York Convention must interpret their obligations in good faith in accordance with the ordinary meaning to be given to the terms of the Convention in their context and in the light of the Convention's object and purpose, pursuant to Article 31 of the Vienna Convention on the Law of Treaties 1969 ('Vienna Convention').[147]

B. The obligation on courts to refer parties to arbitration

Basic provisions on the form of arbitration agreements were included in the New York Convention in an attempt to avoid awards being refused recognition and enforcement on the basis that the arbitration agreement would not be recognised in the State of enforcement. The New York Convention requires that the arbitral agreement is in writing or evidenced in writing.[148] As discussed in Part I, oral arbitration agreements are also enforceable under English law, although the courts cannot exercise their powers under the Arbitration Act 1996 to assist the parties.[149]

Where there is an arbitration agreement in writing or evidenced in writing, Article II(3) of the New York Convention requires courts that have been seised in breach of that agreement, upon the request of one of the parties, to refer the dispute to arbitration *unless* the arbitration agreement in question is null and void, inoperable or incapable of being performed.[150] Regrettably, the New York Convention does not provide guidance on which forum should review the validity of the arbitration agreement, nor does it set out the extent to which a court should consider the agreement to determine if it is null and void etc.[151]

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[146] NYC, Arts III and VII.

[147] 1155 UNTS 331. The Vienna Convention will be referred to as 'VCLT' in the footnotes.

[148] NYC, Art II(1)-(2).

[149] AA 1996, s 81. See pp 16-17, footnote 25 above. This includes AA 1996, ss 100-104, which enact NYC into domestic law.

[150] As mentioned above, the UK has implemented its international obligations under the NYC by allowing a party to apply for a stay of the court proceedings in accordance with AA 1996, s 9(4). Discussed at pp 19-22 above. The distinction between a stay and a reference to arbitration is set out in footnote 39 above.

[151] See further the discussion of these issues in a domestic context at pp 18-22 above.

Further, there may be matters that are permitted to be resolved by arbitration in one jurisdiction but not in another jurisdiction.[152] Accordingly, a party and a foreign court may legitimately regard an arbitration agreement as invalid[153] or the incorporation[154] of the agreement to be invalid.[155] In addition, different conclusions are often reached on whether an arbitration agreement binds a third party.[156] This may result in arbitration proceedings in one jurisdiction and court proceedings in another. Parties are then faced with a race to an award or judgment, in the hope that their position will be stronger than their opponent's. The race to an award or judgment is dealt with in Chapter 5.[157]

C. Recognition and enforcement of awards under the New York Convention

Article III of the New York Convention deals with the recognition and enforcement of arbitral awards and provides that:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

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[152] See further pp 48-49 below.

[153] *Dardana*; *Dallah*. See further pp 18-22 above and pp 42-43 below.

[154] See e.g. *Kallang Shipping SA Panama v AXA Assurances Senegal (The Kallang)* [2008] EWHC 2761 (Comm); [2009] 1 Lloyd's Rep 124. For a detailed review on incorporating arbitration agreements into bills of lading from charterparties, see Ozdel, M., *Bills of Lading Incorporating Charterparties* (Oxford: Hart Publishing, 2015). See also, Baatz, Y., 'Incorporation of a charterparty arbitration clause into a bill of lading and its effect on third parties' in Goldby, M., & Mistelis, L., (eds) (op cit); Todd, P., 'Incorporation of charterparty terms by general words' (2014) 5 *JBL* 407-424; Gaunt, I., 'Incorporation of arbitration clauses in bills of lading: the saga continues' (Paper presented at International Congress of Maritime Arbitrators XIX, Hong Kong, 11 May 2015) available at http://www.lmaa.london/uploads/documents/ICMA%20Paper%20-%20Incorporation%20of%20arbitration%20clauses%20in%20bills%20of%20lading.pdf (accessed 27/01/2018).

[155] See the discussion of *The Wadi Sudr* at Chapter 5, pp 183-185.

[156] See Baatz, Y., 'Incorporation of a charterparty arbitration clause into a bill of lading and its effect on third parties' (op cit), [7.03] and the sources cited at footnote 9 therein.

[157] See Chapter 5, pp 186 *et ff*.

This duty can be expressed as requiring Contracting States to recognise and enforce all foreign arbitral awards unless one (or more) of the exceptions to enforcement in Article V of the New York Convention is applicable.[158] The exceptions are discussed in section II(D) of this Chapter below.

In the UK, recognition and enforcement of 'New York Convention awards'[159] are dealt with in sections 100-104 of the Arbitration Act 1996.[160] A New York Convention award is an award made, in pursuance of an arbitration agreement, in the territory of a Contracting State to the New York Convention (other than the UK).[161] This definition includes awards that are handed down in spite of one of the parties alleging that the arbitration agreement is invalid.[162] It does not include awards made in non-Contracting States to the New York Convention, as permitted by Article I(3) of the New York Convention.[163] Awards are treated as made at the seat of arbitration, regardless of where the award was signed, despatched or delivered to any of the parties.[164]

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[158] *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625.

[159] Pursuant to AA 1996, s 99, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards that are not 'New York Convention awards'. Part II of the 1950 Act sets out the enforcement regime applicable to 'Geneva Convention awards', which remains in force only as regards those countries that have not acceded to the NYC. See further Merkin & Flannery, p 386. The Geneva Convention is outside the scope of this thesis.

[160] AA 1996, ss 100-104 re-enact the Arbitration Act 1975, which enacted the NYC into English law. See further, Merkin & Flannery, pp 386-410; Briggs, *Civil Jurisdiction and Judgments*, pp 801-804; Briggs, *Private International Law in English Courts*, [14.84]-[14.100].

[161] AA 1996, s 100(1). Awards made in the UK are not included as they are not 'foreign' awards.

[162] See *Dardana*, where Mance LJ (as he then was) construed the phrase "in pursuance of an arbitration agreement" as including "purporting to be made under", [10].

[163] NYC, Art I(3) provides "when signing, ratifying or acceding to this Convention […] any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State […]". Approximately half of the Contracting States, including the UK, have adopted this 'reciprocity reservation', Merkin & Flannery, p 387.

[164] AA 1996, s 100(2)(b). This is because an arbitrator may sign and send an award from a jurisdiction that differs from the seat of arbitration, e.g. because the arbitrator lives in another jurisdiction or because the award is signed and/or sent while the arbitrator is travelling. See also AA 1996, s 53; *Hiscox v Outhwaite (No 1)* [1991] 2 Lloyd's Rep 435; [1992] 1 AC 562.

Contracting States may also choose to apply the New York Convention only to legal relationships that are considered "commercial" under its national law.[165] This reservation was inserted as the draftsmen of the New York Convention were of the opinion that, without this reservation, it would be impossible for certain civil law countries, which distinguish between commercial and non-commercial transactions, to adhere to the New York Convention.[166] The commercial reservation has generally not caused many problems, as courts tend to interpret the term "commercial" broadly.[167]

In accordance with section 101 of the Arbitration Act 1996, New York Convention awards must be recognised as binding on the parties as between whom the award was made and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings in England, Wales or Northern Ireland.

A New York Convention award, by leave of the court, may be enforced in the same manner as a judgment or order of the court to the same effect.[168] This allows the party seeking enforcement to rely on the various enforcement mechanisms contained in the CPR, including third-party debt orders, charging orders, orders compelling evidence as to a company's assets, orders for the seizure of goods and post-judgment freezing orders under section 37 of the Senior Courts Act 1981.[169] Alternatively, where leave is given, judgment may be entered in the terms of the award.[170] It is often the case that the court will make an order under both sections 101(2) and 101(3) of the Arbitration Act 1996. The court may also correct errors in the order where it does not reflect the terms of the award.[171]

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[165] NYC, Art I(3) continues "[…] It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". A total of 48 (out of 159) Contracting States have made this declaration. The UK has not made a declaration to this effect.

[166] van den Berg, A. J., 'The New York Convention of 1958: An Overview', (available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (accessed 02/10/2017)), p 5.

[167] *Ibid*.

[168] AA 1996, s 101(2). *Cf.* the similar options available for domestic awards pursuant to AA 1996, s 66(1), discussed at p 28 above.

[169] See e.g. *ConocoPhillips China Inc v Greka Energy (International) BV* [2013] EWHC 2733 (Comm).

[170] AA 1996, s 101(3). *Cf*. AA 1996, s 66(2), discussed at p 28 above.

[171] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2008] EWHC 797 (Comm); [2008] 2 Lloyd's Rep 59, where the award was an order for the payment of the sterling equivalent of the dollar and Nigerian naira sums

It is not only awards that deal with the merits of the dispute that must be recognised and enforced under the New York Convention. An award that deals only with jurisdiction must be recognised.[172] An award on jurisdiction makes the matter *res judicata*.[173] How this works in practice where there are conflicting court judgments and awards on the same matter between the same parties will be discussed in Chapter 5.[174] The New York Convention also permits partial enforcement of awards.[175]

A party seeking recognition or enforcement of an award must submit an arbitration claim form in accordance with CPR Part 62.[176] The application may be made without notice, as long as all material facts are submitted to the court, including whether there is any application to challenge the award before the courts of the seat.[177] The court may order that the form is served on the other parties and those parties must acknowledge service.[178] Permission to serve the form out of the jurisdiction may be granted by the court irrespective of where the award is or is treated as made.[179] The party must also produce the duly authenticated original award and the original arbitration agreement, or a duly certified copy of either/both.[180] Awards are not to be set aside solely because copies of the arbitration agreement in question have not been certified.[181]

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were awarded, *cf. Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm); [2009] Bus LR 558 where the order was made against the Republic of Ukraine and the State Property Fund as separate legal entities instead of against the 'Republic of Ukraine through the State Property Fund'. Gross J refused to allow the applicant to treat the order as though the reference to the SPF was struck out and set aside the order.

[172] *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 1)* [2005] EWHC 9 (Comm); [2005] 1 Lloyd's Rep 515; [2005] 1 All ER (Comm) 515.

[173] *People's Insurance Co of China v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617, [54]; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529; [2007] 1 Lloyd's Rep 193; [2007] QB 886, [104].

[174] See Chapter 5, pp 194 *et ff*.

[175] NYC, Art V(1)(c) discussed at pp 44-45 below.

[176] CPR, r 62.18(1).

[177] See Merkin & Flannery, p 392.

[178] CPR, r 62.18(2)-(3).

[179] CPR, r 62.18(4).

[180] AA 1996, s 102(1). If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent, AA 1996, s 102(2). There is no mechanism in English procedural law for a copy of the award or arbitration agreement to be 'duly certified' and it is enough that the applicant has deposed that it is authentic; *Dardana*.

An order giving permission to serve must contain a statement of the respondent's right to reply within 14 days of service to set the order aside. It must also set out the restrictions on enforcing the award before the end of any application to set the award aside being disposed of.[182] The order must be drafted by the party seeking to enforce the award and served on the respondent.[183]

Once the party seeking to enforce the award has satisfied the relevant requirements outlined above, the burden shifts to the respondent to make out one or more of the limited exceptions to enforcement in Article V of the New York Convention. These exceptions are discussed next.

D. Exceptions to recognition and enforcement

Article V provides the limited exceptions where recognition and enforcement may be refused under the New York Convention. The refusal is discretionary and the foreign award can still be recognised and enforced if the court in the State of enforcement elects to do so.[184] The exceptions are reproduced almost verbatim in section 103 of the Arbitration Act 1996.[185]

The list of exceptions is exhaustive and Contracting States are not permitted to add additional grounds to refuse recognition and enforcement of foreign arbitral awards.[186] The test for

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[181] *Rainstorm Pictures Inc v Lombard-Knight* [2014] EWCA Civ 356; [2014] 2 Lloyd's Rep 74; [2014] Bus LR 1196. Any challenge to the validity of an arbitration agreement must be made under AA 1996, s 103(2), discussed below at pp 42-43.

[182] CPR, r 62.18(9)-(10).

[183] CPR, r 62.18(7).

[184] NYC, Art V begins "Recognition and enforcement of the award *may* be refused […]" (emphasis added), *cf.* Recast Regulation (cited at footnote 343), Art 45 where exceptions to recognition and enforcement are mandatory. See Chapter 2, pp 72 *et ff*.

[185] AA 1996, s 103(1) states "Recognition or enforcement of a New York Convention award shall not be refused except in the following cases" and s 103(2) follows "Recognition and enforcement of the award may be refused if the person against whom it is invoked proves […]" The former provision makes it clear that recognition and enforcement is mandatory save for the cases set out in AA 1996. While worded slightly differently to NYC, Art V, the relevant provisions of AA 1996 have the same effect.

[186] *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC); [2014] 2 Lloyd's Rep 133 ('*Honeywell*').

determining whether any of the exceptions have been met is whether there is a real prospect of successfully establishing the exception alleged.[187]

The exceptions under Article V(1) are grounds to be invoked *only* by the party opposing recognition and enforcement of the award ('the respondent') and that party must furnish the court with the requisite proof to make out the exception.[188] The further exceptions in Article V(2) empower the court to refuse recognition and enforcement if, on its own initiative, it finds that one of the exceptions is applicable. The court in the State of enforcement must not review any of the grounds in Article V(1) unless the respondent demands it. Further, if the respondent does not raise the relevant facts that would allow them to rely on any of the exceptions in Article V(1), those facts cannot be relied upon by the court to invoke the public policy exception in Article V(2).

As exceptions to the general pro-enforcement objectives of the New York Convention, it is arguable that each of the grounds outlined below should be interpreted restrictively.[189] Alternatively, as provisions in an international convention, the exceptions should be interpreted in accordance with the object and purpose of the New York Convention.[190] It is doubted whether either approach to interpretation would result in a different outcome. In any event, the merits of the award should not be reviewed. However, where the respondent discharges their burden of proof in respect of any of the four jurisdictional exceptions,[191] the English court will treat this exception as giving the respondent a right to a full rehearing of the issues put before the tribunal.[192]

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[187] *Ibid*. citing *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301.

[188] Maurer, A. G., *The Public Policy Exception under the New York Convention: History, Interpretation, and Application* (New York: JurisNet LLC, 2013), Chapter 4: 'Interpretation of Article V(2)(b)', pp 67-68.

[189] *Canada Steamship Lines Ltd v King, The* [1952] 1 Lloyd's Rep 1; [1952] AC 192, although the extent of this rule has recently been brought into question by the Court of Appeal judgment in *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373; [2017] 2 CLC 28.

[190] VCLT, Art 31.

[191] Jurisdictional exceptions include the incapacity of a party to the agreement; the invalidity of the agreement; the award dealing with matters outside the scope of the submission to arbitration; and, the improper constitution of the arbitral tribunal. See Merkin & Flannery, p 395.

[192] *Dallah*. See further Merkin & Flannery, p 395 *et ff*.

1. Incapacity

Recognition or enforcement of a foreign award may be refused where a party to the arbitration agreement was, under the law applicable to them, under some incapacity.[193] It is unclear whether the incapacity must be physical or legal. The preferable view is that the defence refers to some legal incapacity as any physical incapacity would be dealt with by Article V(1)(b)/section 103(2)(c) of the Arbitration Act 1996; namely, a party's inability to present their case.[194]

Further, it is unclear whether the incapacity must be present at the time of making the arbitration agreement or at the commencement of proceedings. It is debatably the former,[195] given that an arguably valid agreement is required for the foreign arbitral award to be recognised and enforced at all.

There are no reported English cases on this exception, although an attempt to resist enforcement in Bermuda pursuant to Article V(1)(a) was made on the basis that there was a failure to comply with the "two signature rule" required in a number of countries.[196] The Bermudan Court of Appeal declined to refuse enforcement and drew a distinction between the separable arbitration agreement and the underlying contract; it was only the latter that required two signatures to be enforceable.

2. Invalidity

The respondent may submit that the arbitration agreement was not valid under the law governing the agreement or, in the absence of a choice of law, under the law of the State where the foreign arbitral award was made.[197] It should be noted that the law governing the arbitration agreement

[193] NYC, Art V(1)(a); AA 1996, s 103(2)(a).

[194] Merkin & Flannery, p 397.

[195] *Ibid*.

[196] *Sojuzneftexport (SNE) v JOC Oil* (4 Mealey's Int'l Arb Rep B1) (1998) (Court of Appeal, Bermuda) cited in (1990) XV *YBCA*, p 384. See further Joseph, D., *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd edn, 2015) ('Joseph').

[197] NYC, Art V(1)(a); AA 1996, s 103(2)(b). See also AA 1996, s 30(1)(a).

may differ from the law governing the underlying contract. Reference to a choice of law excludes that State's private international law rules, as does a reference to the law of the seat.[198]

Parties have also utilised this defence to argue that they were not a party to the arbitration agreement. In *Dardana*,[199] Mance LJ allowed the respondent to rely on section 103(2)(b) to argue that they had never become a party to the contract.[200] Also, in *Dallah*,[201] Aikens J held that the reference to the 'arbitration agreement' was to the original arbitration agreement in the contract and that, if a party was arguing that it was not a party to the arbitration agreement, that would still be a matter falling under section 103(2)(b).[202] In *Honeywell*, it was alleged that a foreign award was invalid under UAE law, to which it was subject, as it had resulted from a contract procured by bribing public servants in Dubai. However, the court held that there were no real prospects of the respondent successfully establishing the alleged bribery and therefore no basis for refusing enforcement under section 103(2)(b).

3. Inability of the respondent to present his case

The third defence available is that of due process i.e. where the respondent was not given proper notice of the appointment of the arbitrator; of the arbitration proceedings; or, was otherwise unable to present their case.[203] This exception reflects, in general, the right to a fair trial or hearing. Due process is to be assessed by the court seised.[204]

In a case where a tribunal had based its award on material obtained by its own investigations, it was held that the respondent could not rely on this exception, as the respondent had declined the

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[198] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm); [2008] 2 Lloyd's Rep 535; [2009] 1 All ER (Comm) 505, [78] per Aikens J, endorsed by Lord Collins in the Supreme Court [2010] UKSC 46; [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, [123]-[125].

[199] *Dardana*.

[200] *Ibid.* [8]. Merkin & Flannery appear to disagree with the Court's interpretation of this section in *Dardana*, see Merkin & Flannery, p 398.

[201] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm); [2008] 2 Lloyd's Rep 535; [2009] 1 All ER (Comm) 505.

[202] *Ibid.* [74], [77]. In the Supreme Court, Lord Collins adopted an identical view [2010] UKSC 46; [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, [77].

[203] NYC, Art V(1)(b); AA 1996, s 103(2)(c).

[204] *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15; [2015] 2 All ER 1061.

opportunity to seek disclosure of and to comment upon the material during the arbitration.[205] Conversely, if the respondent had not been given such an opportunity, they would have been able to invoke this defence.[206] In *Kanoria v Guinness*,[207] allegations of fraud were not brought to the attention of the respondent, who was allegedly too ill to attend the hearing. In such circumstances, enforcement of a foreign award may be refused. A similar outcome was reached in *Malicorp Ltd v Egypt*.[208]

This exception cannot be relied upon where a breach of due process is deemed to be *de minimis*[209] or where a reasoned award has not been given.[210]

4. Decisions outside the scope of the arbitration agreement

The respondent may also argue that the foreign arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or that the award contains decisions on matters beyond the scope of the submission to arbitration.[211] In *Minmetals Germany GmbH v Ferco Steel Ltd*,[212] it was held that this exception is concerned with substantive jurisdictional matters, as opposed to procedural matters.

If the decisions on matters submitted to arbitration can be separated from those not submitted, the part of the foreign arbitral award which contains decisions on matters correctly submitted to arbitration may be recognised and enforced.[213]

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[205] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

[206] *Irvani v Irvani* [2000] 1 Lloyd's Rep 412.

[207] [2006] EWCA Civ 222; [2006] 1 Lloyd's Rep 701; [2006] 2 All ER (Comm) 413.

[208] [2015] EWHC 361 (Comm); [2015] 1 Lloyd's Rep 423. In this case, the High Court refused to recognise the award as it had been set aside by a previous decision of the Cairo Court of Appeal and the award granted remedies on a basis that had not been pleaded nor argued by the parties.

[209] *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222; [1999] 2 All ER (Comm) 146.

[210] Joseph, pp 590-591 citing *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15; [2015] 2 All ER 1061.

[211] NYC, Art V(1)(c); AA 1996, s 103(2)(d). See also AA 1996, s 30(1)(c).

[212] [1999] 1 All ER (Comm) 315 ('*Minmetals*').

[213] NYC, Art V(1)(c); AA 1996, s 103(4).

In *Honeywell*, it was argued that the foreign arbitral award was contrary to section 103(2)(d) of the Arbitration Act 1996, as it dealt with termination claims, which were issues not contemplated by or not falling within the terms of the submission to arbitration. The court held that, as the statement of claim had contained the termination claims, the tribunal had been entitled to allow those claims to be dealt with in the arbitration. The respondent had declined to take part in the arbitration and was therefore unable to later complain that the award had dealt with a matter beyond the scope of the submission.

5. Improper composition of the arbitral authority

Where the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement (where specified) or was not in accordance with the law of the State where the arbitration took place,[214] the foreign award may not be enforced against the respondent. That being said, the breach may be disregarded if it is trivial.[215] For example, a challenge to a foreign award on the basis that the hearing was in Beijing as opposed to Shenzhen or Shanghai failed.[216]

The respondent may also lose their right to rely on this exception if they are taken to have waived the breach by failing to object to the composition of the tribunal within the relevant time frame.[217] For instance, in *Honeywell*, the court found that the respondent had been given notice of the arbitration but had chosen not to participate, and could therefore not argue that he had been deprived of the opportunity to nominate an arbitrator.

6. Award not yet binding, set aside or suspended

The respondent may challenge enforcement where the foreign arbitral award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, that award was made.[218]

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[214] NYC, Art V(1)(d); AA 1996, s 103(2)(e). See also AA 1996, s 30(1)(b).

[215] *China Agribusiness Development Corporation v Balli Trading* [1998] 2 Lloyd's Rep 76.

[216] *Tongyuan (US) International Trading Group v Uni-Clan Ltd* (2001), unreported (Moore-Bick J). See (2001) XXVI *YBCA* p 886.

[217] *Minmetals*.

[218] NYC, Art V(1)(e); AA 1996, s 103(2)(f). See further, Harisankar, K. S., 'Annulment versus enforcement of international arbitral awards: does the New York Convention permit issue estoppel?' (2015) 18(3) *Int ALR* 47-53.

The first limb of this defence refers to the status of the foreign arbitral award at the seat. An award becomes binding on the parties immediately upon its publication. The award continues to be binding unless it is set aside or suspended by a court of competent jurisdiction i.e. the courts of the seat. The New York Convention removed any pre-condition to register the award with the courts of the seat before it becomes enforceable abroad. It should be noted that parties cannot agree to additional pre-conditions that must be complied with before the award becomes binding and enforceable. If parties could do so, this would be contrary to the objectives of the New York Convention and would likely result in endless litigation concerning the alleged pre-conditions that the parties had agreed and whether they had been discharged.

A foreign arbitral award may be final and binding despite proceedings at the seat to set the award aside. This issue is to be determined by the courts in the State where enforcement of the award is sought.[219]

The second and third limbs of this exception are only triggered where an order has been made setting aside or suspending the foreign arbitral award. It does not apply where the application is pending before the supervisory court.[220] Where an application for the setting aside or suspension of the award has been made to a court before which the award is sought to be relied upon, the court may, if it considers proper, adjourn the decision on the recognition and enforcement of the award. The court may also, on the application of the party requesting recognition or enforcement of the award, order the respondent to give suitable security.[221] Further, where an application is pending before the courts of the seat, enforcement may be granted as regards those parts of the award that are either unchallenged or where there is no prospect of challenge.[222]

[219] *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm); [2011] 2 Lloyd's Rep 475; [2012] 1 All ER (Comm) 820; *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm); [2014] 2 Lloyd's Rep 435, *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm); [2014] 2 Lloyd's Rep 283.

[220] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm); [2005] 2 Lloyd's Rep 326.

[221] NYC, Art VI; AA 1996, s 103(5).

[222] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2008] EWCA Civ 1157; [2009] 1 Lloyd's Rep 89; [2009] 1 All ER (Comm) 611.

In *Yukos Capital Sarl v OJSC Rosneft Oil Company*,[223] four awards made by a tribunal with its seat in Moscow were set aside by the Russian courts. The same awards were later enforced in the Netherlands. The Dutch Court of Appeal held that the Russian court judgments were the result of a judicial process that was neither impartial nor independent. Thereafter, the English Court of Appeal had to determine (i) whether the Dutch judgment created an issue estoppel preventing the English court reviewing the standing of the Russian judgments; and, (ii) whether the English courts were in any event allowed to consider the integrity of the Russian judgments. The English Court of Appeal held that the Dutch judgment did not create an issue estoppel[224] and that the English courts were not precluded by the Act of State doctrine from examining the validity of the Russian judgments.[225]

Subsequently, the English High Court has held[226] that the awards were *prima facie* enforceable at common law. The correct approach to enforcement was whether the English courts could treat an award as having legal effect notwithstanding a later order of a foreign court annulling the award. In applying this test, it would be both unsatisfactory and contrary to principle if the English courts were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy. The High Court held that there is no *ex nihilo nil fit* principle that precludes the enforcement of awards.[227] Courts in other States have also enforced foreign arbitral awards that have been set aside by courts at the seat,[228] including, for example, the French courts that have enforced an award previously set aside by the English courts.[229]

[223] [2012] EWCA Civ 855; [2012] 2 Lloyd's Rep 208; [2014] QB 458. See Merkin & Flannery, p 401. One of the awards was for USD50 billion in damages. It was one of the largest, if not the largest, awards ever made at the time. See Gaunt, I., 'London Maritime Arbitration: Jurisdiction and Preliminary Issues' (op cit), p 2.

[224] *Ibid*. [138]-[157].

[225] *Ibid*. [86]-[91].

[226] *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm); [2014] 2 Lloyd's Rep 435. *Cf. Maximov v Open Joint Stock Co* [2017] EWHC 1911 (Comm); [2017] 2 Lloyd's Rep 519, where the English High Court declined to enforce an arbitration award made in Russia which was subsequently set aside by the Russian Commercial Court. The High Court was unpersuaded that the awards were so extreme and perverse that they could only be ascribed to bias against the claimant.

[227] *Ibid*. [19]-[22]. The Latin wording roughly translates to "nothing comes from nothing".

[228] See the cases cited at Joseph, pp 598-599.

[229] *Ibid*. citing *PT Putrabali Adyamulia v Societe est Epices* [2003] 2 Lloyd's Rep 700; (2007) Rev Arb 507.

7. Dispute not capable of settlement by way of arbitration

Recognition and enforcement may be challenged where the subject matter of the dispute is not capable of settlement by way of arbitration under the law of the State in which recognition and enforcement of the foreign arbitral award is sought.[230] Prior to entering into an arbitration agreement, parties should therefore consider seeking legal advice as to whether there is a possibility that the type of dispute that may arise between them would be deemed incapable of settlement by way of arbitration in the likely State of enforcement (i.e. where the other party's assets are located).

In *Gazprom*, the Vilnius District Court held that a dispute concerning the investigation of the activities of a legal person under Chapter X of the Lithuanian Civil Code, specifically, whether a legal person "acted in a proper way", could not be the subject of arbitration under Lithuanian law.[231]

There are no known English authorities on the concept of 'arbitrability' under section 103(3) of the Arbitration Act 1996,[232] although the Court of Appeal has confirmed that party autonomy, as expressed in section 1(b) of the 1996 Act, is not concerned with arbitrability.[233]

Certain disputes may not be capable of private resolution,[234] for example, where the dispute concerns the rights of children, criminal law or inalienable statutory rights.[235] It used to be the case that antitrust issues were not capable of private resolution, although that position has now changed

[230] NYC, Art V(2)(a); AA 1996, s 103(3).

[231] See the Opinion of Advocate General Wathelet in *Gazprom*, [AG38]-[AG45]. The District Court and the Court of Appeal in Lithuania also refused to recognise the award on the basis of the public policy exception in NYC, Art V(2)(b), see *Gazprom*, [AG41]-[AG46].

[232] Merkin & Flannery, p 403. The notion is discussed in the Singapore case *Aloe Vera of America Inc v Asianci Food (S) Pte Ltd* [2006] SGHC 78 (High Court, Singapore).

[233] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] Ch 333. The Court of Appeal held that there was nothing to prevent a dispute on unfair prejudice under the Companies Act 2006, s 994 being referred to arbitration where the dispute fell within the scope of the agreement. See further, p 15 above on AA 1996, s 1.

[234] Merkin & Flannery, p 31.

[235] See *Exeter City AFC Ltd v Football Conference Ltd* [2004] EWHC 831 (Ch); [2004] 1 WLR 2910, although this case has been overruled by *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] Ch 333. See also *AI v MT* [2013] EWHC 100 (Fam); [2013] 2 FLR 371 regarding an arbitration in a matrimonial and religious context.

following decisions by the US Supreme Court[236] and, subsequently, the CJEU.[237] A recent case before the English High Court also confirms that such matters are arbitrable,[238] although the issue before the High Court was the application of an arbitration agreement to a tortious claim, rather than the arbitrability of the dispute *per se*. Further, if the subject matter of the arbitration agreement is as a matter of law not justiciable, such as an unenforceable wager,[239] the agreement does not qualify as an arbitration agreement and is null and void.[240]

8. Public policy

The public policy exception precludes recognition or enforcement of a foreign arbitral award where to do so would be contrary to the public policy of the State of enforcement.[241] It is clear from the language used that only the public policy of the State of enforcement should be considered. This is true even if a foreign law governs the dispute and/or the arbitration agreement; public policy under any foreign governing law cannot be considered by the court in the State of enforcement. Further, there is no autonomous concept of 'public policy' for the purposes of the New York Convention nor is there reference to public policy under public international law as an exception to recognition and enforcement.

Merkin & Flannery summarise[242] the most important aspects of 'public policy' from an English law perspective as follows:

(a) the award has been obtained by perjury or fraud[243];

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[236] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985) (Supreme Court, United States).

[237] *Eco Swiss China Time Ltd v Benetton International NV (C-126/97)* EU:C:1999:269; [1999] 2 All ER (Comm) 44. For a detailed comment on the arbitrability of EU competition law and the limits thereto, see Blanke, G., 'The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part I)' (2017) 10(2) *GCLR* 85-101.

[238] *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch); [2017] 2 Lloyd's Rep 119; [2018] 1 All ER (Comm) 419. See also *Et Plus SA v Welter* [2005] EWHC 2115 (Comm); [2006] 1 Lloyd's Rep 251.

[239] *O'Callaghan v Coral Racing Ltd* (1998) Times, 26 November 1998. This case was decided under the Arbitration Act 1950, so it is unclear whether the same result would be reached given the principle of separability enshrined in AA 1996, s 7 and the decision of the House of Lords in *Fiona Trust*.

[240] Merkin & Flannery, p 31.

[241] NYC, Art V(2)(b); AA 1996, s 103(3). See generally Maurer, A. G., *The Public Policy Exception under the New York Convention: History, Interpretation, and Application* (op cit), Chapter 4: 'Interpretation of Article V(2)(b)'.

[242] Merkin & Flannery, p 403 *et ff*.

(b) the losing party is at risk of having to make payment in some other jurisdiction as well as in England[244];

(c) the award is tainted by illegality[245];

(d) the award was obtained in breach of the rules of natural justice[246]; and,

(e) the award is so unclear on the obligation imposed on the losing side as to be incapable of enforcement.[247]

In *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Shell Petroleum Ltd*,[248] the House of Lords held that the concept of public policy covers cases where "the enforcement of the award would be clearly injurious to the public good or, possibly, enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[249]

When determining the concept of public policy in accordance with the New York Convention, the ECJ/CJEU has stated that EU Member State courts must take into account certain provisions of EU law that are so fundamental that they form part of European public policy.[250]

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[243] *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111; [1999] QB 740, aff'd [1999] 2 Lloyd's Rep 65; *HJ Heinz Co Ltd v EFL Inc* [2010] EWHC 1203 (Comm); [2010] 2 Lloyd's Rep 727.

[244] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Shell Petroleum Ltd* [1988] 2 Lloyd's Rep 293; [1990] 1 AC 295; *Soinco SACI v Novokuznetsk Aluminium Plant (No 2)* [1998] 2 Lloyd's Rep 346.

[245] *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111; [1999] QB 740; *Soleimany v Soleimany* [1999] QB 785; *R v V* [2008] EWHC 1531 (Comm); [2009] 1 Lloyd's Rep 97 (regarding a domestic award).

[246] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; *Adams v Cape Industries Plc* [1990] Ch 433; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223.

[247] *Tongyuan (US) International Trading Group v Uni-Clan Ltd* (2001), unreported (Moore-Bick J). See (2001) XXVI *YBCA*, p 886.

[248] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Shell Petroleum Ltd* [1988] 2 Lloyd's Rep 293; [1990] 1 AC 295.

[249] *Ibid*. [1990] 1 AC 295, p 316.

[250] See e.g. *Eco Swiss China Time Ltd v Benetton International NV*; *Mostaza Claro v Centro Movil Milenium SL (C-168/05)* EU:C:2006:675; [2007] Bus LR 60. See also the Opinion of Advocate General Wathelet in *Gazprom*, [AG173]-[AG177]. This issue is discussed further in Chapter 3, pp 130 *et ff*.

III. CONCLUDING REMARKS

This Chapter has introduced arbitration as a neutral dispute mechanism available in most civil and commercial matters. It is clear from Part I of this Chapter that there are numerous advantages to choosing arbitration over litigation in order to settle disputes. Specifically, it has been highlighted that one of the main advantages of arbitrating matters in the UK is the recognition given to party autonomy. The importance of drafting a clear, detailed arbitration agreement has been emphasised, although it has been noted that it is becoming increasingly common to have a preliminary hearing on the validity of such agreements.

As set out in Part II, the New York Convention is one of the most widely-ratified international conventions. It requires courts in Contracting States to uphold arbitration agreements and to recognise and enforce foreign arbitral awards, subject to a handful of discretionary exceptions. It has been seen that the New York Convention also recognises party autonomy. Article II of the New York Convention requires courts to uphold arbitration agreements, although Article V(1) allows respondents to raise arguments as to why a foreign arbitral award should not be recognised if it falls within one of the exceptions listed in that Article. However, it has been seen that, if the respondent does not raise any of the exceptions available to them under Article V(1), the court in the State of enforcement is not entitled to raise such arguments of its own volition and therefore refuse recognition and enforcement. Further, facts falling within the exceptions listed in Article V(1) cannot be relied upon to invoke the public policy exception.

The next Chapter moves away from arbitration and looks at the harmonised European law rules that aim to ensure the cross-border recognition and enforcement of court judgments.

CHAPTER 2 - THE BRUSSELS REGIME

This Chapter introduces the 'Brussels Regime'. The Brussels Regime provides harmonised rules for the courts of EU Member States[251] to determine whether or not they may exercise jurisdiction in disputes concerned with civil and commercial matters. It also provides uniform rules governing the mandatory recognition and enforcement of judgments handed down by EU Member State courts in the other EU Member States.

Part I of this Chapter sets out how the Brussels Regime has developed to date. As will be seen, 'arbitration' is excluded from the Brussels Regime, although the scope of this exclusion has always been uncertain. Even so, the wording of the exclusion has not been amended since the inception of the Brussels Regime in spite of numerous proposals in this regard. This Chapter sets the scene for a discussion of the parameters of the arbitration exclusion in Chapter 3.

Part II discusses the rules on recognition and enforcement of EU Member State court judgments. It will be seen that there are limited mandatory exceptions to these rules, as the aim of the Brussels Regime is to facilitate the cross-border recognition and enforcement of court judgments within the EU.

Finally, Part III of this Chapter introduces the powers of the CJEU and its role in interpreting the instruments that make up the Brussels Regime. The reason why such interpretative powers were bestowed on the CJEU is examined, along with the relevance of those powers to Denmark and the members of the European Free Trade Association (EFTA). Further, the inability of the CJEU to interpret international conventions like the New York Convention is confirmed and the policy reasons for why this is correct are given.

I. THE DEVELOPMENT OF THE BRUSSELS REGIME

The key instruments of the Brussels Regime include the Brussels Convention (as amended), the 1988 Lugano Convention, the Jurisdiction Regulation, the 2007 Lugano Convention and, most recently, the

[251] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and, for the time being, the UK.

Recast Regulation.[252] While this thesis focuses on the jurisdiction of courts and arbitral tribunals and the recognition and enforcement of judgments and arbitral awards, there are also harmonised rules that determine the law governing the substantive matters in dispute, which are provided by Rome I[253] and Rome II.[254]

A. Brussels Regime conventions

Starting at the very beginning, the then six Member States[255] agreed, so far as was necessary, to enter into negotiations with each other, with a view to securing for the benefit of their nationals, "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".[256] Consequently, a committee of experts was set up

[252] For the full titles and citations of these instruments, see footnotes 257-261, 268, 272, 322, 343 below.

[253] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. Rome I supersedes the *Convention on the law applicable to contractual obligations* [1980] OJ L266/1 ('Rome Convention'), see Rome I, Art 24. The Rome Convention was amended by a number of accession conventions, namely, *Convention on the accession of the Hellenic Republic to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980* [1984] OJ L146/1; *Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980* [1992] OJ L333/1; *Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations , opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice* [1997] OJ C15/10; and, *Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice of the European Communities* [2005] OJ C169/1. The UK has not ratified the latter accession convention. The Republic of Bulgaria and of Romania acceded to the Rome Convention by Council Decision of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (2007/856/EC).

[254] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[255] Belgium, Federal Republic of Germany, France, Italy, Luxembourg and Netherlands.

[256] *Treaty establishing the European Economic Community 1957*, 298 UNTS 3 ('Treaty of Rome'), Art 220 (emphasis added). See now, TFEU, Art 81.

in 1960 by a decision of the Committee of Permanent Representatives of the six Member States to draft what later became the *Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters.*[257]

The 1968 Convention has been modified by numerous accession conventions as the EU (formerly the European Economic Community (EEC) and then the European Community (EC)) expanded and new States acceded to the 1968 Convention. The first States to accede were the Kingdom of Denmark, Ireland and the UK[258]; then Greece[259]; then Spain and Portugal[260]; and lastly, Austria, Finland and

[257] [1972] OJ L299/32 (consolidated) ('1968 Convention'). The 1968 Convention, along with the *Protocol of 27 September 1968 to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* [1972] OJ L299/43 ('1968 Protocol') and the *Joint Declaration of 27 September 1968 to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* [1972] OJ L299/45 ('1968 Joint Declaration') were signed in Brussels on 27 September 1968 and entered into force on 1 February 1973. Discussion of the 1968 Protocol is outside the scope of this thesis.

[258] *Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice of the European Communities (78/884/EEC)* [1978] L304/1 ('1978 Accession Convention'). The 1978 Accession Convention was accompanied by the *Joint Declaration of 9 October 1978* [1990] OJ C189/30 ('1978 Joint Declaration'). The 1978 Joint Declaration urged Contracting States to the 1968 Convention to accede as soon as possible to the *International Convention relating to the Arrest of Sea-going Ships 1952*, 439 UNTS 193 in order to ensure uniformity of jurisdiction in maritime matters. The 1978 Accession Convention and the 1978 Joint Declaration were signed at Luxembourg on 9 October 1978. The 1978 Accession Convention entered into force on 1 November 1986 between the six original EEC Member States and Denmark; on 1 January 1987 as regards the UK; and on 1 June 1988 as regards Ireland.

[259] *Convention of 25 October 1982 on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the amendments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland* [1982] OJ L388/1 ('1982 Accession Convention'). The 1982 Accession Convention was signed in Luxembourg on 25 October 1982 and entered into force on 1 April 1989 between Greece and the other Contracting States, save for the UK, for which it entered into force on 1 October 1989.

[260] *Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern*

Sweden.[261] The consolidated, modified version of the 1968 Convention will be referred to as the 'Brussels Convention' in this thesis.[262]

As regards Denmark, following a referendum in June 1992, Denmark did not initially ratify the *Treaty on the European Union* (TEU),[263] as it had concerns with four areas of the Treaty, including justice and home affairs, under which the Brussels Convention fell.[264] On the condition that Denmark would opt-out of the four areas of concern, a second referendum in May 1993 was held. Thereafter, Denmark was able to sign the TEU.[265] Denmark's relationship with the EU is now governed by a separate Protocol[266] that is annexed to the *Treaty on the Functioning of the European Union* (TFEU).[267]

Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic [1989] OJ L285/1 ('1989 Accession Convention'). The 1989 Accession Convention was accompanied by the *Joint Declaration of 26 May 1989 concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention* [1990] OJ C189/32 ('1989 Joint Declaration'), wherein the Contracting States declared themselves ready to take every appropriate measure with a view to ensuring that national procedures for the ratification of the 1989 Accession Convention were completed by 31 December 1992 at the latest.

[261] *Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic* [1997] OJ C15/1 ('1996 Accession Convention').

[262] The Brussels Convention was given force of law in the UK by the Civil Jurisdiction and Judgments Act 1982 ('CJJA 1982'), s 2(1), which provides that "The Brussels Conventions shall have the force of law in the United Kingdom and judicial notice should be taken of them". For completeness, reference should also be made to CJJA 1982, Sch 4, which regulates jurisdiction of the courts in respect of the different legal systems within the UK. Further discussion of this regime is outside the scope of this thesis.

[263] *Treaty on the European Union* [2012] OJ C326/13 (consolidated version), otherwise known as the 'Maastricht Treaty'.

[264] See further Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (2016) 33(7) *J Intl Arbit* 483-500, p 485.

[265] See *Denmark and the Treaty on European Union* [1992] OJ C348/1 ('Edinburgh Agreement').

[266] Protocol (No 22) on the position of Denmark [2012] OJ C326/299.

[267] [2012] OJ C326/47 (consolidated version).

Non-EEC Member States also subscribed to the Brussels Regime by way of the 1988 Lugano Convention.[268] The purpose of the 1988 Lugano Convention was to strengthen economic co-operation between the EEC Member States and EFTA Member States.[269] The 1988 Lugano Convention was substantially the same as the Brussels Convention as amended by the 1978 and 1989 Accession Conventions, save that the ECJ had no jurisdiction to give preliminary rulings on the 1988 Lugano Convention. Instead, the Second Protocol to the 1988 Lugano Convention and two accompanying Declarations contained provisions aimed at achieving uniformity of interpretation of the Conventions.[270]

The 1988 Lugano Convention was revised in 2007.[271] The 2007 Lugano Convention[272] today provides a parallel system of harmonised rules between the EU Member States,[273] Denmark, Iceland, Norway

[268] *Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters* [1988] OJ L319/9 ('1988 Lugano Convention'). See Lord Collins *et al* (eds), Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 15th edn, 2017) ('Dicey, Morris & Collins'), [11-010] on the original parties to the 1988 Lugano Convention.

[269] 1988 Lugano Convention, Preamble; Dicey, Morris & Collins, [11-011]. The 1988 Lugano Convention was given force of law in the UK by the Civil Jurisdiction and Judgments Act 1991 ('CJJA 1991'), amending the CJJA 1982. CJJA 1982, as amended by CJJA 1991, s 3A(1) provides that "The Lugano Convention shall have the force of law in the United Kingdom and judicial notice shall be taken of it". The 1988 Lugano Convention entered into force in the UK in 1992.

[270] *Ibid*. Interpretation by the ECJ/CJEU of the Brussels Regime instruments is discussed in Part III below.

[271] On 7 February 2006, the ECJ ruled that conclusion of what became the 2007 Lugano Convention fell entirely within the Community's exclusive competence, see Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* EU:C:2006:81. Council Decision (2009/430/EC) of 27 November 2008 concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2009] OJ L147/1) swiftly followed. As a result, the 2007 Lugano Convention was negotiated by the EFTA Member States and the EU (acting through the Commission), rather than all of the EU Member States.

[272] *Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2007] OJ L399/3 ('2007 Lugano Convention'). The 2007 Lugano Convention brought with it three Protocols: Protocol No 1 on certain questions of jurisdiction, procedure and enforcement; Protocol No 2 on the uniform interpretation of the Convention and on the Standing Committee; and, Protocol No 3 on the application of Art 67 of the Convention.

and Switzerland.[274] It is applicable where the respondent is domiciled in an EFTA Member State; where the claim has as its object rights in rem in immovable property that is situated in an EFTA Member State; where a contract confers exclusive jurisdiction on the courts of an EFTA State; or, where a related action is pending in the courts of an EFTA Member State.[275]

The 1968 Convention and each accession convention were accompanied by explanatory reports, which may be used by courts as an aid to interpretation.[276] In chronological order, the explanatory reports include the Jenard Report,[277] the Schlosser Report,[278] the Evrigenis & Kerameus Report[279] and the Cruz, Real & Jenard Report.[280] The 1996 Accession Convention was not accompanied by an

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[273] The 2007 Lugano Convention was ratified by the EU on behalf of the EU Member States, as opposed to the individual EU Member States themselves. The UK implemented the 2007 Lugano Convention into national law by the Civil Jurisdiction and Judgments Regulations 2009, SI 2009/3131, and all prior references to the 1988 Lugano Convention in national law were amended. Even so, the 2007 Lugano Convention has direct effect in the UK pursuant to TFEU, Art 216.

[274] Liechtenstein, also an EFTA Member State, has not ratified either of the Lugano Conventions, although it is a party to treaties with Austria and Switzerland, which govern the recognition and enforcement of judgments between those States. For a comparison between the two Lugano Conventions, see Pocar, F., ' The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2008) X *Yrbk Priv Intl L* 1-18.

[275] 2007 Lugano Convention, Art 64.

[276] CJJA 1982, s 3 provides that the explanatory reports may be considered by the English courts in ascertaining the meaning or effect of any provision of the Brussels Convention and the courts may give such weight to the text of each report as is appropriate in the circumstances.

[277] Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/1.

[278] Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1979] OJ C59/71.

[279] Council Report on the accession on the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1986] OJ C298/1.

[280] Report on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic [1990] OJ C189/35.

explanatory report. The 1988 Lugano Convention and the 2007 Lugano Convention were also accompanied by explanatory reports, namely, the Jenard & Möller Report[281] and the Pocar Report.[282]

B. European conventions on arbitration

Arbitration has always been excluded from the Brussels Regime.[283] One of the main reasons for the arbitration exclusion is the New York Convention, to which all EU Member States are Contracting States.[284] The EU has not signed or ratified the New York Convention, nor can it do so.

In addition, when the 1968 Convention was adopted, the Council of Europe had already prepared the *European Convention on International Commercial Arbitration 1961*[285] and the *European Convention providing a uniform law on arbitration 1966*.[286] These conventions are of particular relevance to this thesis, as they provide further understanding as to why arbitration was excluded from the Brussels Regime from the outset. In addition, the problems of *lis alibi pendens* and conflicting judgments and awards that are highlighted in this thesis could, in theory, be avoided to some extent if the *lis alibi pendens* rule in Article VI(3) of the 1961 European Convention had been adopted in the Brussels Regime instruments. The conventions are briefly discussed below.[287]

[281] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 [1990] OJ C189/57.

[282] Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 [2009] OJ C319/1.

[283] Brussels Convention, Art 1(4); 1988 Lugano Convention, Art 1(4); Jurisdiction Regulation, Art 1(2)(d); 2007 Lugano Convention, Art 1(2)(d); Recast Regulation, Art 1(2)(d).

[284] See Chapter 1, footnote 143. Unlike the rules in the Brussels Regime *vis-à-vis courts*, the NYC does contain rules that allocate jurisdiction to an arbitral tribunal.

[285] 484 UNTS 349 ('1961 European Convention'). The full text is available at https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf (accessed 06/06/2017).

[286] ETS No 056 ('1966 European Convention'). The full text is available at http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056 (accessed 05/06/2017).

[287] For a tabular comparison of the New York Convention and the European Conventions, see Gaffney, J., 'Should the European Union regulate commercial arbitration' (2017) 33(1) *Arbitration Int* 81-98, pp 87-88.

1. 1961 European Convention

The 1961 European Convention entered into force[288] after the New York Convention.[289] The aim of the 1961 European Convention was to promote the development of European trade by removing difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries.[290] Unlike the New York Convention, the scope of the 1961 European Convention was not intended to be universal.[291]

The 1961 European Convention applies to "arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States", as well as arbitral procedures and awards based on such agreements.[292] Article II of the 1961 European Convention gives legal persons of public law the right to conclude valid arbitration agreements. This Article met strong opposition from civil law countries where public entities are prohibited from resorting to arbitration.[293] The 1961 European Convention also allows foreign nationals to be designated as arbitrators.

Article IV of the 1961 European Convention permits parties to elect institutional or ad hoc arbitration and sets out time frames and procedures for commencing arbitration. Parties are able to select their own arbitrators, the seat of arbitration and the procedural rules of the arbitration. There

[288] The 1961 European Convention was opened for signature at Geneva on 21 April 1961 and entered into force on 7 January 1964 in accordance with Art X(8), with the exception of paras 3 to 7 of Art IV which entered into force on 18 October 1965, in accordance with Annex, para 4. The Convention has 31 Contracting States, listed at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en (accessed 06/06/2017). Of the EU Member States, the following are *not* Contracting States: Cyprus, Estonia, Finland (although a signatory), Greece, Ireland, Lithuania, Malta, Netherlands, Portugal, Sweden and the UK.

[289] The NYC entered into force on 7 June 1959. See Chapter 1, footnote 143.

[290] 1961 European Convention, introductory paragraphs.

[291] Hascher, D. T., *Commentary on the European Convention on International Commercial Arbitration of 1961* (2011) XXXVI *YBCA* 504-562, p 504 ('Hascher'). The Commentary also provides a list of court decisions and arbitral awards on the 1961 European Convention, pp 549-562.

[292] 1961 European Convention, Art I(1).

[293] Hascher, p 517.

is also a procedural mechanism for setting in motion arbitral proceedings notwithstanding an inoperative arbitration clause or the disagreement of the parties on the conduct of the arbitration.[294]

If a party wishes to allege that an arbitration agreement is non-existent, null and void, or lapsed, they must comply with the procedure set out in Article V of the 1961 European Convention. The arbitrator whose jurisdiction is called into question is entitled to proceed with the arbitration, to rule on their own jurisdiction and to decide upon the existence or validity of the arbitration agreement or of the contract of which the agreement forms part.[295] The 1961 European Convention does not contain a specific provision on the recognition of arbitration agreements because the draftsmen were of the view that this issue had already been resolved by Article II(3) of the New York Convention.[296]

Pursuant to the 1961 European Convention, parties may, prior to commencing arbitration, cancel the arbitration agreement and refer the matter to a court.[297] Article VI(2) sets out uniform measures of private international law to determine the law governing the question of the existence or validity of an arbitration agreement when a court is seized of a dispute over which the parties have allegedly made an arbitration agreement.[298] The primary conflict rule is that of party autonomy. The 1961 European Convention also deals with *lis alibi pendens* between tribunals and courts, requiring the court to wait until an award is given before dealing with the matter, unless there are good and substantial reasons to the contrary.[299] Requests for interim measures from the court are not deemed incompatible with an arbitration agreement or regarded as a submission to court proceedings.[300]

Parties are free to choose the law applicable to the substance of their dispute or, in the absence of choice, the arbitrators are able to apply the proper law in accordance with the private international law rules that the arbitrators deem applicable.[301]

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[294] 1961 European Convention, Art IV(2)-(7). See further Hascher, pp 520-521.

[295] 1961 European Convention, Art V(3).

[296] Hascher, p 527. NYC, Art II(3) is discussed at Chapter 1, pp 34-36 above.

[297] 1961 European Convention, Art VI(1).

[298] Hascher, p 528.

[299] 1961 European Convention, Art VI(3) (emphasis added). This rule will be discussed further in Chapters 4 and 5.

[300] 1961 European Convention, Art VI(4).

[301] 1961 European Convention, Art VII.

Reasons for the award must be given unless the parties expressly declare that reasons should not be given.[302] As mentioned above, the 1961 European Convention does not govern the recognition and enforcement of arbitral awards. It does however limit the effect of setting aside the award in one Contracting State *vis-à-vis* the recognition and enforcement in another Contracting State.[303] It favours the enforcement of awards notwithstanding annulment in the State of origin, unless one of the grounds provided for in Article IX(1) is an obstacle to enforcement of the award.[304] These grounds are incapacity of the parties to the arbitration agreement[305]; violation of due process[306]; excess of authority by the arbitrator[307]; and, irregularity in the composition of the arbitral authority or the arbitral procedure.[308]

The 1961 European Convention expressly sets out its relationship with Article V(1)(e) of the New York Convention.[309] Specifically, the exception to recognition and enforcement in Article V(1)(e) (award not yet binding) is limited to the grounds for setting aside awards set out in Article IX(1)(a)-(d) of the 1961 European Convention that are listed in the above paragraph.

2. 1966 European Convention

The aim of the 1966 European Convention was the unification of national laws in order to enable a more effective settlement of private law disputes by arbitration and to facilitate commercial relations between the Member States of the Council of Europe.[310] The 1966 European Convention

[302] 1961 European Convention, Art VIII.

[303] 1961 European Convention, Art IX. For a recent case where awards set aside in the State of origin were later enforced in another State, see *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2012] EWCA Civ 855; [2012] 2 Lloyd's Rep 208, discussed at Chapter 1, p 47 above.

[304] Hascher, p 535.

[305] 1961 European Convention, Art IX(1)(a).

[306] 1961 European Convention, Art IX(1)(b).

[307] 1961 European Convention, Art IX(1)(c).

[308] 1961 European Convention, Art IX(1)(d).

[309] NYC, Art V(1)(e) provides an exception to recognition and enforcement of an award where "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." See Chapter 1, pp 45-47 above.

[310] 1966 European Convention, introductory paragraphs. See also the Explanatory Report to the 1966 European Convention [1966] COETSER 2 (20 January 1966), available at http://www.worldlii.org/int/other/COETSER/1966/2.html (accessed 05/06/2017).

has not entered into force, nor will it ever enter into force, as the minimum number of three ratifications has not been reached in the 50 years since it was adopted.[311] One of the main reasons for the 1966 European Convention failing is the alleged reluctance of States to give up the peculiarities of their own arbitration laws.[312]

The uniform law set out in Annex I to the 1966 European Convention deals with the validity of arbitration agreements[313]; appointment of arbitrators[314]; the right for an arbitrator to rule on their own jurisdiction[315]; arbitral proceedings[316]; awards and appeals of awards[317]; enforcement of awards[318]; and, compromises entered into before arbitrators.[319] Matters *not* dealt with include, *inter alia*, the capacity to conclude an arbitration agreement, qualifications of an arbitrator, counter-claims, powers of investigation, provisional execution of awards, costs, fees and the jurisdiction of courts to intervene.[320]

The Council of Europe was clearly in favour of the cross-border recognition and enforcement of arbitral awards and, by implication, arbitration itself, if it felt the need to produce the 1966 European Convention. According to the Jenard Report, the 1966 European Convention would probably be accompanied by a protocol which would "facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention" and, again, this is why it seemed preferable to exclude arbitration from the Brussels Regime.[321]

[311] The 1966 European Convention was opened for signature at Strasbourg on 20 January 1966. To date, it has been signed by Austria and ratified by Belgium.

[312] Sanders, P., 'Cross-border arbitration – a view on the future' (1996) 62(3) *Arbitration* 168-174, p 170.

[313] 1966 European Convention, Annex I, Arts 2-4, 18.

[314] 1966 European Convention, Arts 5-10, 14.

[315] 1966 European Convention, Art 18.

[316] 1966 European Convention, Arts 15-17.

[317] 1966 European Convention, Arts 19-28.

[318] 1966 European Convention, Arts 29-30.

[319] 1966 European Convention, Art 31.

[320] Explanatory Report to the 1966 European Convention, [6]-[7].

[321] Jenard Report, p 59/13 (emphasis added).

C. The Jurisdiction Regulation

The Jurisdiction Regulation[322] has superseded the Brussels Convention in respect of the territories of the EU Member States covered by the TFEU.[323] It entered into force on 1 March 2002. By way of a parallel agreement, the Jurisdiction Regulation has been applicable to Denmark since 1 July 2007.[324]

Prior to the Jurisdiction Regulation being adopted, the European Commission proposed that a new version of the Brussels Convention be agreed with modifications that would consolidate amendments that had been adopted with each accession convention, along with certain additions and clarifications deemed necessary in the light of case law emanating from the ECJ.[325] The new convention would also further align the Brussels Convention and the 1988 Lugano Convention. The arbitration exclusion remained unchanged in the Commission's proposal.

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[322] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[323] Jurisdiction Regulation, Art 68(1). It should be noted that the Brussels Convention continues to apply with respect to those territories of EU Member States that fall within its territorial scope and that are excluded from the Jurisdiction Regulation by virtue of TFEU, Art 355, namely, certain dependencies of France (French Overseas Collectivities) and Netherlands (Aruba), see Dicey, Morris & Collins [11-013], footnote 19. See also, Briggs, *Civil Jurisdiction and Judgments*, p 24, footnotes 12-15.

[324] See *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2005] OJ L299/62 ('EU-Denmark Agreement') and Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ L120/22.

[325] At its meeting on 4 and 5 December 1997, the Council instructed an ad hoc working party composed of representatives of all EU Member States and the Contracting States to the 1988 Lugano Convention, with observers from various sources, to undertake work on the parallel revision of the Brussels Convention and 1988 Lugano Convention. The Commission presented a proposal for a convention to replace the Brussels Convention on the basis of TEU, Art K.3(2), namely, Commission Communication to the Council and the European Parliament "Towards greater efficiency in obtaining and enforcing judgments in the European Union" (COM(97) 609 final, 97/0339 (CNS)) [1998] OJ C33/3 and Proposal for a Council Act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union (COM(97) 609 final, 97/0339 (CNS)) [1998] OJ C33/20.

The Commission's proposal was then amended so that a regulation would replace the Brussels Convention.[326] It was felt that a regulation would have advantages over a convention in that, *inter alia*, it would enter into effect in all of the EU Member States bound by it on a common known date.[327] Further, regulations are directly applicable and binding[328] in most of the EU Member States, which removes the need for implementing legislation to be adopted in each EU Member State and goes one step further in ensuring consistency in the application of a regulation's provisions. As regards the arbitration exclusion, the text again remained unchanged in the amended proposal.[329]

Unlike the preceding conventions, the Jurisdiction Regulation was not accompanied by an explanatory report. Rather, an express explanation of some of its provisions and its objectives can be found in its 29 introductory recitals. It is important to note that recitals are not operative provisions of the Jurisdiction Regulation and they cannot be interpreted in a way that impedes the scheme and objectives pursued by the Jurisdiction Regulation.[330] Conversely, the Brussels Convention did not

[326] See Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001/C 62 E/17)(COM(2000) 689 final – 1990/0154 (CNS) [2001] OJ C62E/243, amending Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1999/C 376E/1)(COM(1999) 348 final – 1990/0154 (CNS)).

[327] The Amended proposal adopted some of the amendments suggested in the European Parliament Report on the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] (adopted at the Parliament's plenary session on 21 September 2000) and the Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ C117/6.

[328] TFEU, Art 288; European Communities Act 1972 ('ECA 1972'), s 2(1). Where an EU instrument is directly applicable or of 'direct effect', individuals can enforce any rights under that instrument before national courts even in the absence of national legislation.

[329] Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, p 62E/247.

[330] *Kainz v Pantherwerke AG (C-45/13)* EU:C:2014:7; [2015] QB 34. Contrary to Recital 7 in Rome II, which requires the substantive scope and the provisions of the Jurisdiction Regulation, Rome I and Rome II to be interpreted in a consistent manner, the CJEU in *Pantherwerke* held that Recital 7 did not mean that the provisions of the Jurisdiction Regulation had to be interpreted in the light of Rome II. The Court stated "The objective of consistency cannot, in any event, lead to the provisions of [the Jurisdiction Regulation] being interpreted in a manner which is unconnected to the scheme and objectives pursued by that Regulation", [20]. See further, Briggs, *Private International Law in English Courts*, pp 62-67.

contain any introductory recitals and simply set out its objectives in brief at the beginning of the Convention.[331] This suggests that the objectives of the Jurisdiction Regulation are more robust than those of its predecessor,[332] which may provide an explanation for some of the ECJ's more controversial decisions on its provisions.[333] Nonetheless, save where obvious and deliberate changes have been made to the text, the Jurisdiction Regulation is intended to reproduce the Brussels Convention and there must be a continuity of interpretation between the two.[334]

Even though the Jurisdiction Regulation has recently been revised, it remains in force in the 28 EU Member States, including the UK (if and until it leaves the EU).[335] Further, the Jurisdiction Regulation will be applicable in the remaining EU Member States for many years to come, as it governs legal proceedings instituted on or after 1 March 2002[336] and before 10 January 2015.[337]

It is worth noting that Denmark is precluded from taking part in the adoption of amendments to the Jurisdiction Regulation (and presumably the Recast Regulation).[338] Denmark is described as being "held hostage" to any reforms, as the consequence of any decision by Denmark not to agree to amendments of the Recast Regulation is termination of the EU-Denmark Agreement.[339] Denmark is

[331] The Contracting States to the Brussels Convention wished to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals; to strengthen in the Community the legal protection of persons therein established; and to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.

[332] See e.g. Jurisdiction Regulation, Recitals 2, 4.

[333] See e.g. *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07)* EU:C:2009:69; [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138 ('*West Tankers*'), discussed in Chapters 3-5.

[334] *Draka NK Cables Ltd v Omnipol Ltd (C-167/08)* EU:C:2009:263; [2009] ECR I-3477; *Falco Privatstiftung v Weller-Lindhorst (C-533/07)* EU:C:2009:257; [2010] Bus LR 210; *German Graphics Graphische Maschinen GmbH v van der Schee (C-292/08)* EU:C:2009:544; [2009] ECR I-8421; *Refcomp SpA v AXA Corporate Solutions Assurance SA (C-543/10)* EU:C:2013:62; [2013] 1 Lloyd's Rep 449; [2013] 1 All ER (Comm) 1201 and *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA (C-189/08)* EU:C:2009:475; [2010] 2 All ER (Comm) 265.

[335] The possibilities for cross-border recognition and enforcement of judgments if/once the UK leaves the EU are dealt with in Chapter 6.

[336] Jurisdiction Regulation, Arts 66, 76.

[337] The latter date is the date from which the Recast Regulation applies. See footnote 344 below.

[338] EU-Denmark Agreement, Art 3(1). See Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 486 and footnote 25 therein.

[339] *Ibid*. EU-Denmark Agreement, Art 3(7)(a).

also precluded from entering into any international agreements that may alter or affect the application of the Recast Regulation, unless the EU agrees.[340]

D. The recasting of the Jurisdiction Regulation

The revision of the Jurisdiction Regulation took some 5 years, starting in 2007 when the Heidelberg Report[341] was published and ending in 2010 when the Recast Regulation was finally adopted.[342] The Recast Regulation[343] applies to legal proceedings instituted on or after 10 January 2015[344] in all EU Member States, including Denmark.[345]

The Heidelberg Report collected views of various stakeholders regarding how the Jurisdiction Regulation should be reformed, as well as statistical data on the application of the Jurisdiction Regulation in the EU Member States. As regards the arbitration exclusion, practitioners of the London Bar unanimously expressed the view that any extension of the Jurisdiction Regulation to arbitration would be undesirable, as it would undermine the New York Convention.

Following the publication of the Heidelberg Report, the European Commission issued for public consultation[346] its Report[347] on the Jurisdiction Regulation's application and the problematic

[340] *Ibid*. EU-Denmark Agreement, Art 5(2).

[341] Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03), September 2007. The Heidelberg Report was updated and published in 2008, Hess, B., Pfeiffer, T., and Schlosser, P., *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (Beck, 2008).

[342] See Wilhelmsen, L., 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arbitration Int* 169-185, for a thorough review of the proposals relating to reform of the arbitration exclusion.

[343] 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) [2012] OJ L351/1. The Recast Regulation will ultimately repeal its predecessor, Recast Regulation, Art 80.

[344] Recast Regulation, Arts 66, 81. In England, this means the issue of a claim form.

[345] *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2013] OJ L79/4.

[346] 130 responses were received from various stakeholders, including governments, national associations, law firms and individuals. Conferences and meetings with national experts were convened, as well as the constitution of a separate expert group on the issue of arbitration. The expert group met on three occasions in 2010.

interface with arbitration,[348] which was accompanied by its Green Paper on the review of the Jurisdiction Regulation.[349] In its Green Paper, the Commission included a number of reform proposals relating to the interface between the Jurisdiction Regulation and arbitration, "not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings".[350]

The Commission proposed a partial deletion of the arbitration exclusion from the Jurisdiction Regulation to improve the interface between arbitral and court proceedings.[351] This would allow a new rule to be added that granted exclusive jurisdiction to EU Member State courts where the seat of the arbitration is located, possibly subject to agreement between the parties. Also, all of the Jurisdiction Regulation's jurisdictional rules would apply in respect of provisional measures in support of arbitration.[352]

Such a deletion would also allow recognition of judgments determining the validity of an arbitration agreement; judgments merging an arbitration award; and, judgments setting aside an award.[353] It was suggested that this may prevent parallel proceedings between courts and arbitral tribunals

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[347] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (2009) 174 final), Brussels, 21 April 2009.

[348] The difficulties resulting from the interface between the Jurisdiction Regulation and arbitration contained in the Commission's Report are summarised in Draetta, U., & Santini, A., 'Arbitration exception and Brussels I Regulation: no need for change' (2009) 6 *IBLJ* 741-747, p 742.

[349] 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), Brussels, 21 April 2009. The Commission's proposals regarding the arbitration exclusion in its Green Paper are analysed in Lavelle, J., 'Review of the Brussels I Regulation' (2009) 9(9) *STL* 3-5; and, Draetta, U., & Santini, A., 'Arbitration exception and Brussels I Regulation: no need for change' (2009) 6 *IBLJ* 741-747.

[350] Green Paper, p 8.

[351] Green Paper, p 9. Interested parties that responded to the Commission's proposals in its Green Paper were almost unanimous in their rejection of deleting the arbitration exclusion from the Jurisdiction Regulation, see Draetta, U., & Santini, A., 'Arbitration exception and Brussels I Regulation: no need for change' (2009) 6 *IBLJ* 741-747, p 743.

[352] Green Paper, p 9.

[353] Green Paper, p 9.

where the agreement is held invalid in one EU Member State and valid in another. There was no distinction in the Green Paper between domestic and foreign awards on this point.

It was also suggested that priority should be given to the EU Member State courts where the arbitration takes place to decide on the existence, validity and scope of an arbitration agreement. The Green Paper stated "A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention".[354] Further, it was suggested that arbitral awards, which were enforceable under the New York Convention, may benefit from a rule that would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award.[355] Exclusive competence would be given to the EU Member State courts where the arbitral award was given to certify the enforceability of the award and its procedural fairness. Alternatively, the Green Paper proposed a separate Community instrument to facilitate the recognition and enforcement of arbitral awards. The Green Paper clearly did not have in mind the enforcement of domestic awards when it was considering proposals to deal with irreconcilability between awards and judgments.

In its advisory role, the Economic and Social Committee issued an Opinion on the Commission's Green Paper[356] and the European Parliament issued a Resolution on the implementation and review of the Jurisdiction Regulation, advocating an all-embracing exclusion of arbitration.[357]

Subsequently, the European Commission issued its formal proposal on how the Jurisdiction Regulation should be recast.[358] The Commission's proposal continued to exclude arbitration from the

[354] *Ibid*.

[355] *Ibid*. (emphasis added).

[356] (2010/C 255/08), Brussels, 16 December 2009.

[357] (2009/2140(INI)), Strasbourg, 7 September 2010.

[358] Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (COM (2010) 748 final), Brussels, 14 December 2010. The Commission's proposal stated "As concerns finally the interface with arbitration, Member States cannot by themselves ensure that arbitration proceedings in their Member State are properly coordinated with court proceedings going on in another Member State because the effect of national legislation is limited by the territoriality principle. Action at EU level is therefore necessary", p 11. The

scope of the 'new' regulation, save in limited circumstances. Two explanatory recitals, Recitals 11[359] and 20,[360] were included, and the wording of the exclusion was extended.[361] New articles, Articles 29(4)[362] and 33(3),[363] further explained the relationship between the proposed regulation and arbitration.[364] In sum, determination of the existence and validity of arbitration agreements was

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Commission's final proposal regarding the arbitration exclusion is noted in Lavelle, J., 'A breath of fresh air from Europe' (2011) 11(1) *STL* 1-4.

[359] Proposed Recital 11 confirmed that the new Regulation would not apply to "[…] the form, existence, validity or effects of arbitration agreements, the powers of arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards", p 15. It will be noted that there is no distinction between foreign and domestic awards.

[360] Proposed Recital 20 set out "The effectiveness of arbitration agreements should also be improved in order to give full effect to the will of the parties. This should be the case, in particular, where the agreed or designated seat of an arbitration is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. The seat of the arbitration should refer to the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution or by any other authority directly or indirectly chosen by the parties", pp 16-17.

[361] The proposed exclusion provided "This Regulation shall not apply to […] (d) arbitration, save as provided for in Articles 29, paragraph 4 and 33, paragraph 3", p 21.

[362] Proposed Art 29(4) stated "Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II", p 36.

[363] Proposed Art 33(3) stated "For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution", p 37.

[364] The Commission's proposals in its Green Paper and its subsequent formal proposal are assessed in Roodt, C., 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' (2011) 19(2) *AJICL* 236-282, in particular pp 268-272; and Graves, J., 'Court Litigation over Arbitration Agreements: Is it time for a New Default Rule?' (op cit), pp 211-214.

excluded so that courts could apply national or international law to assess the validity of an agreement, except where the dispute related to insurance, consumer or employment contracts. This is because insureds (but not reinsureds), consumers and employees are deemed to be weaker socio-economic parties by the Recast Regulation, which protects them by giving them a choice of jurisdictions in which to sue but restricting litigation *against* them to the EU Member State in which they are domiciled.[365] Further, as regards parallel proceedings in relation to the validity of an arbitration agreement, if an arbitral tribunal had been seised or if the courts at the seat of the arbitration had been seised, the proposal obliged other EU Member State courts to stay their proceedings. Once the validity of the agreement had been established, all other EU Member State courts were required to decline jurisdiction.

It will be seen in this thesis that almost all of the proposals concerning arbitration were, regrettably, not adopted in the final version of the Recast Regulation. In an explanatory statement, the Parliament's Committee on Legal Affairs confirmed that the arbitration exclusion should be preserved with clarification given in the form of recitals.[366] The arbitration exclusion in the Recast Regulation is analysed in detail in Chapters 3-5.

II. ENFORCEMENT OF COURT JUDGMENTS

A. Enforcement of court judgments under the Recast Regulation

The Recast Regulation applies to proceedings concerning civil and commercial matters instituted on or after 10 January 2015.[367] Where a judgment is given in such proceedings, as long as it falls within the definition of 'judgment' provided in Article 2(a) of the Recast Regulation, the provisions on recognition and enforcement will be triggered.

[365] Recast Regulation, Chapter II, Sections 3-5. Similar provisions can be found in the Recast Regulation's predecessors.

[366] See further the Report of the Parliament's Committee on Legal Affairs of 15 October 2012 on the 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) (A7-0320/2012).

[367] Recast Regulation, Art 66. The provisions on recognition and enforcement in the Jurisdiction Regulation continue to apply to proceedings instituted up to and including 9 January 2015.

Save where there has been a deliberate amendment to the relevant provision, the jurisprudence regarding the equivalent provision in the earlier Brussels Regime instruments will continue to be illustrative of how the Recast Regulation should be interpreted and construed.[368]

The definition of 'judgment' in the Recast Regulation does, however, differ from that in its predecessor.[369] The amended definition[370] confirms that all judgments, including provisional and protective judgments, will fall to be recognised and enforced in accordance with the Recast Regulation, as long as the EU Member State court has jurisdiction over the substance of the matter. In proceedings concerned with the enforcement of judgments, the EU Member State court in which the judgment has been or is to be enforced has exclusive jurisdiction.[371] Arbitral awards (domestic and foreign) do not fall within this definition.

When a judgment falls within the scope of the Recast Regulation, that judgment may be enforced in another EU Member State without the need for any special procedure such as an application to a court for permission to enforce it or for its registration f*or* the purposes of enforcement.[372] In other words, no judicial declaration by a court in the EU Member State of enforcement is necessary.[373] The previous registration regime required under the Jurisdiction Regulation and Brussels Convention no longer applies.[374] Instead, the court handing down the judgment will issue the relevant certificate in

[368] Recast Regulation, Recital 34.

[369] Jurisdiction Regulation, Art 32 defines 'judgment' as "any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court".

[370] Recast Regulation, Art 2(a) provides "For the purposes of this Regulation: (a) 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement".

[371] Recast Regulation, Art 24(5). *Cf*. the concept of 'plenary jurisdiction' described in *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 876; [2009] 1 Lloyd's Rep 42; [2009] 2 WLR 699.

[372] Recast Regulation, Art 36(1).

[373] Recast Regulation, Art 39, Recital 26.

[374] The registration regime remains applicable under the 2007 Lugano Convention.

accordance with Article 53 of the Recast Regulation. This removes the need for the party seeking enforcement to register the judgment and to obtain a certificate in every EU Member State in which the judgment is to be enforced.

The party seeking to enforce the judgment may, if they so wish, apply for a declaration that none of the exceptions to recognition in Article 45 of the Recast Regulation apply to that judgment.[375]

B. Exceptions to recognition and enforcement

Refusal of recognition and enforcement of EU Member State court judgments is dealt with in Section 3 of Chapter III of the Recast Regulation.

The exceptions to recognition are set out in detail below, although it should first be noted that judgments may "under no circumstances" be reviewed as to their substance.[376] The Recast Regulation simply confirms that *enforcement* of a judgment will be refused where one of the exceptions to recognition is found to exist.[377] These are the only grounds upon which recognition of a judgment which falls within the scope of the Recast Regulation must be refused.[378] Unlike the discretionary ability to refuse recognition of foreign arbitral awards under the New York Convention,[379] the exceptions to recognition of judgments under the Recast Regulation are mandatory.

While there are some common themes with the exceptions to recognition of foreign arbitral awards provided in the New York Convention,[380] some of the exceptions to recognition of judgments in the Recast Regulation are very different to those in the New York Convention. As will be discussed in

[375] Recast Regulation, Art 36(2). As prescribed in Art 37(1), the applicant will need to obtain a copy of the judgment which satisfies the conditions necessary to establish its authenticity and a certificate issued by the court who delivered the judgment in accordance with Art 53. Recast Regulation, Annex I sets out the relevant template for a certificate.

[376] Recast Regulation, Art 52.

[377] Recast Regulation, Art 46.

[378] See *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS (C-302/13)* EU:C:2014:2319; [2014] 5 CMLR 27, on the equivalent regime for recognition and enforcement in the Jurisdiction Regulation.

[379] See Chapter 1, pp 40-50.

[380] *Ibid*.

Chapter 5,[381] there is a stark omission in the Recast Regulation, as there is no express exception to recognition based on irreconcilability of an EU Member State court judgment with an arbitral award. The exceptions to recognition and enforcement provided in the Recast Regulation are as follows.

1. Public policy

Recognition of a judgment must be refused where such recognition is manifestly contrary to public policy (*ordre public*) in the EU Member State addressed.[382] As an exception to recognition, this provision must be interpreted narrowly.[383] As explained by the ECJ, this concept refers to "a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought, or of a right recognised as being fundamental within that legal order".[384] It is therefore necessary to identify a legal rule which requires recognition to be withheld.[385] Even so, it is for EU Member State courts to determine whether recognition of a judgment would be contrary to public policy and not for the CJEU.[386]

Examples of judgments that have been refused recognition on this basis include cases where the respondent has been denied the fundamental right to a fair trial pursuant to Article 6 of the ECHR.[387] Judgments which do not provide any reasons or grounds for its findings or grounds which are not communicated to the respondent, so that the respondent is unable to determine whether or not the judgment can be appealed, must also be denied recognition.[388]

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[381] See Chapter 5, pp 194 *et ff*.

[382] Recast Regulation, Art 45(1)(a). See further, Briggs, *Civil Jurisdiction and Judgments*, pp 649-655. *Cf*. the public policy exception in the NYC discussed at Chapter 1, pp 49-50.

[383] *Apostolides v Orams (C-420/07)* EU:C:2009:271; [2011] QB 519, on the equivalent Jurisdiction Regulation, Art 34(1). See also Briggs, *Civil Jurisdiction and Judgments*, pp 29-31.

[384] *Bamberski v Krombach (C-7/98)* EU:C:2000:16; [2001] QB 709, [37].

[385] Briggs, *Civil Jurisdiction and Judgments*, p 650.

[386] *Gambazzi v DaimlerChrysler Canada Inc (C-394/07)* EU:C:2009:219; [2009] 1 Lloyd's Rep 647; [2010] QB 388.

[387] *Bamberski v Krombach*; *Régie Nationale des Usines Renault SA v Maxicar SpA (C-38/98)* EU:C:2000:225; [2000] ECR I-2973; *Maronier v Larmer* [2002] EWCA Civ 774; [2003] QB 620.

[388] *ASML Netherlands BV v Semiconductor Industry Services GmbH (C-283/05)* EU:C:2006:787; [2007] 1 All ER (Comm) 949, *cf. Trade Agency Ltd v Seramico Investments Ltd (C-619/10)* [2012] EU:C:2012:531. Contrast further *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS (C-302/13)* EU:C:2014:2319; [2014] 5 CMLR 27.

A procedure is not unfair if the court of origin applied rules of law, including private international law rules, which diverge from those that the court of recognition would have used.[389] Whether or not an EU Member State court can invoke the public policy exception to refuse recognition and enforcement of a judgment on the basis that the judgment was obtained in breach of an arbitration agreement that it would have found to be valid is dealt with in Chapter 5.[390] This is dubious.[391]

2. Judgments given in default of appearance

Recognition of a judgment must be refused where the judgment was given in default of appearance, or if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable them to arrange for their defence.[392] Again, this exception aims to protect the respondent's right to a fair trial and not to be subjected to judgments where the respondent was unaware that litigation had been commenced against them.[393]

This exception is also available to refuse recognition of orders given in proceedings where the respondent was not *intended* to have notice of the proceedings, i.e. *ex parte* applications,[394] although any subsequent judgment in *inter partes* proceedings will fall to be recognised in accordance with the Recast Regulation.

Where the respondent makes an appearance before the court, this exception is not available.[395] Unsurprisingly, this exception is also unavailable where the respondent fails to commence

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[389] *Trade Agency Ltd v Seramico Investments Ltd (C-619/10)* EU:C:2012:531.

[390] Chapter 5, pp 204 *et ff*.

[391] See Recast Regulation, Art 45(3), which states that "The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction". See further Wilhelmsen, L., 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arbitration Int* 169-185, pp 176-177.

[392] Recast Regulation, Art 45(1)(b). See also Jurisdiction Regulation, Art 34(2) and *G v de Visser (C-292/10)* EU:C:2012:142; [2013] QB 168; *Hendrikman v Magenta Druck & Verlag GmbH (C-78/95)* EU:C:1996:380; [1997] QB 426; *A v B (C-112/13)* EU:C:2014:2195. This exception should be compared with the due process exception in the NYC, discussed at Chapter 1, pp 43-44.

[393] See further, Briggs, *Civil Jurisdiction and Judgments*, pp 655-661.

[394] *Denilauler v SNC Couchet Frères (Case 125/79)* EU:C:1980:130; [1980] ECR 1553.

[395] *Sonntag v Waidmann (C-172/91)* EU:C:1993:144; [1993] ECR I-1963.

proceedings to challenge the judgment when it was possible for them to do so.[396] If the respondent did take the opportunity but failed, the case is *a fortiori*.[397]

3. Irreconcilability with a judgment given between the same parties in the EU Member State addressed

Recognition of a judgment must be refused where it is irreconcilable with a judgment given between the same parties in the EU Member State addressed.[398] The court of recognition is bound to follow its own decision in preference to one from another EU Member State.[399] Briggs argues that it is not necessary that the local judgment precedes the judgment of the other EU Member State court. Rather, once the judgment of the local court is given, the foreign judgment ceases to be entitled to recognition.[400]

The *lis alibi pendens* provisions in the Recast Regulation[401] aim to prevent such circumstances from occurring, by providing strict rules as to which court takes priority where courts in more than one EU Member State have been seised. Conversely, where the dispute is not between the same parties, this exception will not be available.[402] Interestingly, there is no reference to 'the same cause of action' in this exception although the 'irreconcilability' of the judgment should be illuminative of this fact. Judgments will be irreconcilable if their consequences are incompatible.[403]

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[396] Recast Regulation, Art 45(1)(b).

[397] *Apostolides v Orams (C-420/07)* EU:C:2009:271; [2011] QB 519, [78]. See Briggs, *Civil Jurisdiction and Judgments*, p 656, footnote 175.

[398] Recast Regulation, Art 45(1)(c). See also Jurisdiction Regulation, Art 34(3). See further, Briggs, *Civil Jurisdiction and Judgments*, pp 661-663. There is no equivalent irreconcilability exception available under the NYC.

[399] Briggs, *Civil Jurisdiction and Judgments*, p 661.

[400] *Ibid*. p 663.

[401] Recast Regulation, Art 29-34.

[402] *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj (C-406/92)* EU:C:1994:400; [1995] 1 Lloyd's Rep 302; [1999] QB 515 ('*The Tatry*').

[403] *Gubisch Maschinenfabrik KG v Palumbo (Case 144/86)* EU:C:1987:528; [1987] ECR 4861; *Hoffmann v Krieg (Case 145/86)* EU:C:1988:61; [1988] ECR 645; *Italian Leather SpA v Weco Polstermöbel GmbH & Co (C-80/00)* EU:C:2002:342; [2002] ECR I-4995; *The Tatry.*

Proceedings between the same parties that have been commenced in the EU Member State of enforcement but are still pending is not enough to trigger this exception.[404] Nor is a contractual settlement of the dispute sufficient, even if the settlement has been judicially approved.[405]

4. Irreconcilability with a judgment given in another EU Member State or third State

Recognition of a judgment must be refused where is it is irreconcilable with an earlier judgment given in another EU Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the EU Member State addressed.[406]

Unlike the previous exception, the earliest judgment is the judgment that is capable of recognition. The concept of irreconcilability is the same as that in the previous exception, i.e. that the judgments lead to or involve legal consequences that are mutually exclusive.[407]

Irreconcilability of EU Member State court judgments with arbitral awards will be dealt with in Chapter 5.[408]

5. Parties deemed to be weaker socio-economic parties

Recognition of a judgment must also be refused where the judgment conflicts with Sections 3-5 of Chapter II of the Recast Regulation where the policyholder, insured, beneficiary of the insurance contract, injured party, consumer or employee was the respondent.[409] Reinsureds are not included.

These exceptions were found also in the Jurisdiction Regulation,[410] although the exception to recognition of a judgment given in breach of the jurisdictional provisions relating to contracts of

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[404] *Landhurst Leasing plc v Marcq* [1998] ILPr 822.

[405] *Solo Kleinmotoren GmbH v Emilio Boch (C-414/92)* EU:C:1994:221; [1994] ECR I-2237.

[406] Recast Regulation, Art 45(1)(d). See further, Briggs, *Civil Jurisdiction and Judgments*, pp 663-664. There is no equivalent irreconcilability exception available under the NYC.

[407] Briggs, *Civil Jurisdiction and Judgments*, p 664.

[408] See Chapter 5, pp 194 *et ff*.

[409] Recast Regulation, Art 45(1)(e)(i). There is no equivalent exception available under the NYC.

[410] Jurisdiction Regulation, Art 35(1). See Briggs, *Civil Jurisdiction and Judgments*, pp 645-646.

employment in Section 5 is a new addition,[411] which fills an unjustifiable omission in the Jurisdiction Regulation.

These exceptions allow the jurisdiction of the court of origin to be reviewed prior to recognition of the judgment. If the court of origin is found to have accepted jurisdiction contrary to the rules provided in Sections 3-5 of Chapter II of the Recast Regulation, the court of enforcement must refuse to recognise the judgment. That being said, the findings of fact on which the court of origin based its jurisdiction remain binding on the court of enforcement.[412]

The judgment of the court of origin will not conflict with Sections 3-5 where the respondent has made an appearance before the court to defend the *merits* of the substantive dispute,[413] even though the court would otherwise not have had jurisdiction over the claim. Where the respondent makes an appearance and defends the merits, the court is deemed to have jurisdiction.[414] This rule does not apply where the respondent has made an appearance merely to contest the *jurisdiction* of the court.[415]

Given the potential injustice that may result where a respondent unwittingly submits to the jurisdiction of a court that does not have jurisdiction, the Recast Regulation provides a new safeguard in Article 26(2). Accordingly, where the policyholder, insured, beneficiary of the insurance contract, injured party, consumer or employee is the respondent, the court shall, before assuming jurisdiction, ensure that the respondent is informed of its right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance to contest the merits.

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[411] *Ibid*.

[412] Recast Regulation, Art 45(2).

[413] See Recast Regulation, Art 26(1).

[414] *Ibid*. See also *Česká Podnikatelská Pojišťovna as, Vienna Insurance Group v Bilas (C-111/09)* EU:C:2010:290; [2010] Lloyd's Rep IR 734 and *Spitzley v Sommer Exploitation SA (C-48/84)* EU:C:1985:105; [1985] ECR 787 (regarding defending the merits of a counterclaim), on the equivalent provision in Jurisdiction Regulation, Art 24. See further, Briggs, *Civil Jurisdiction and Judgments*, pp 120-125.

[415] *Ibid*.

6. Exclusive jurisdiction

Finally, recognition of a judgment must be refused where the judgment conflicts with Section 6 of Chapter II of the Recast Regulation.[416] Section 6 sets out the circumstances where a court of a specific EU Member State "shall have" exclusive jurisdiction, regardless of the domicile of the parties. These include proceedings which have as their object rights in rem of immovable property[417]; the validity of the constitution, the nullity or the dissolution of companies[418]; the validity of entries in public registers[419]; the registration or validity of patents, trademarks and designs[420]; and, in proceedings concerned with the enforcement of judgments, the EU Member State court in which the judgment has been or is to be enforced.[421] Again, the findings of fact on which the court of origin based its jurisdiction remain binding on the court of enforcement.[422]

Conversely to the position outlined in the previous sub-section, where the respondent enters an appearance before a court that would otherwise not have jurisdiction over proceedings of the type set out in Article 24 of the Recast Regulation, such an appearance does not confer jurisdiction on that court.[423] As a result, any judgment delivered by that court must be refused recognition by the court of enforcement.

7. Bilateral Treaties

Further, the Recast Regulation will not affect pre-existing bilateral treaties.[424] For example, the effect of bilateral treaties with Australia[425] and Canada[426] remains intact under the Recast Regulation.

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[416] Recast Regulation, Art 45(1)(e)(ii). There is no equivalent exception available under the NYC.

[417] Recast Regulation, Art 24(1).

[418] Recast Regulation, Art 24(2).

[419] Recast Regulation, Art 24(3).

[420] Recast Regulation, Art 24(4).

[421] Recast Regulation, Art 24(5).

[422] Recast Regulation, Art 45(2).

[423] Recast Regulation, Art 26(1).

[424] See Recast Regulation, Art 72, concerning agreements concluded prior to the entry into force of the Jurisdiction Regulation, under which EU Member States agreed, pursuant to Brussels Convention, Art 59, to not recognise judgments given in other Contracting States to the Brussels Convention, against respondents domiciled or habitually resident in a third State where, in cases provided for in Brussels Convention, Art 4, the

In addition, the Recast Regulation will not affect the application of bilateral conventions and agreements which concern matters governed by the Recast Regulation between a third State and an EU Member State that were concluded before the date of entry into force of the Jurisdiction Regulation.[427]

C. Application for refusal of enforcement

An application for refusal of *enforcement* may be made by the party against whom the judgment was given in accordance with Articles 46-51 of the Recast Regulation. This application is similar to the *inter partes* appeal under the Jurisdiction Regulation. A party may also apply for refusal of *recognition* pursuant to Article 45(4) of the Recast Regulation.

The procedure for making an application for refusal of enforcement is set out in part in the Recast Regulation and in part by procedural rules of national law.[428] The application is made to the court in which the judgment is being enforced.[429] The application will succeed if any of the exceptions set out in Article 45 can be shown to be satisfied.[430] Under the Recast Regulation, the applicant may request an order that enforcement be refused and there is no statutory time limit for the application to be brought. Conversely, under the Jurisdiction Regulation, the applicant would instead appeal against an order that the judgment be registered for enforcement, for which a strict time limit applies.

The court must rule on the application for refusal of enforcement without delay[431] and whichever party loses when the application is determined may appeal.[432] The losing party to the appeal may

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judgment could only be founded on a ground of jurisdiction specified in Brussels Convention, Art 3, second paragraph.

[425] Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901.

[426] Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987, SI 1987/468, which provides that the UK will not recognise and enforce, to the extent permitted by Brussels Convention, Art 59, a judgment given in another Contracting State against a person domiciled or habitually resident in Canada.

[427] Recast Regulation, Art 73(3). See Chapter 6, pp 246-247 on the potential relevance of this Article once the UK leaves the EU.

[428] CPR, r 74.7A. See also Briggs, A., *Civil Jurisdiction and Judgments*, pp 687-688.

[429] CPR, r 74.7A(1)(b).

[430] Recast Regulation, Art 46(1).

[431] Recast Regulation, Art 48.

subsequently appeal that decision.[433] In sum, the decision made in the *inter partes* application for refusal of enforcement is subject to two levels of appeal.

During the period within which the application for refusal of enforcement is pending, the court may stay the proceedings before it if the original judgment is under appeal in the State of origin[434]; order protective measures as soon as there is an enforceable judgment[435]; and/or, allow enforcement subject to the provision of security.[436]

D. Enforcement of judgments under the Brussels Convention, 2007 Lugano Convention and Jurisdiction Regulation

The recognition and enforcement provisions in the Brussels Convention are still relevant in the territories where the Brussels Convention applies but the Jurisdiction Regulation does not.[437]

The 2007 Lugano Convention will exist (almost) in parallel with the Recast Regulation in respect of recognition and enforcement of judgments delivered by courts in Norway, Switzerland and Iceland. The relevant provisions in the 2007 Lugano Convention are the same as those found in the Jurisdiction Regulation, with the result that the EFTA Member States do not benefit from the innovations of the Recast Regulation where the 2007 Lugano Convention is applicable.[438]

III. INTERPRETATION OF THE BRUSSELS REGIME BY THE CJEU

Given the differing legal systems in which the Recast Regulation applies, uniform interpretation of its provisions is vital for it to be successful. As will be seen in this Part of the Chapter, this need has

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[432] Recast Regulation, Art 49.

[433] Recast Regulation, Art 50.

[434] Recast Regulation, Art 51.

[435] Recast Regulation, Art 40.

[436] Recast Regulation, Art 44.

[437] See footnote 323 above. The likelihood of the English court having to enforce a judgment from one of these territories is remote.

[438] The 1988 Lugano Convention was revised to bring it in line with the Jurisdiction Regulation. The 2007 Lugano Convention will therefore differ where provisions in the Recast Regulation are no longer the same as those in the Jurisdiction Regulation.

been met in two ways. First, by the ability of national courts to make references to the CJEU for preliminary rulings; and, secondly, by the development of autonomous and independent meanings for the basic definitional terms in the Recast Regulation.[439]

Notwithstanding the above, it now appears, as expressed by one author, that autonomous meanings are not confined to certain terms but extend to the entire Brussels Regime; "it is the entire system, rather than the individual terms used within it, which should be understood to be autonomous and independent of the rules of national law which formerly applied in the territory".[440]

A. Interpretation by the CJEU

The 1968 Convention brought with it the 1968 Joint Declaration. In the 1968 Joint Declaration, the six original Contracting States declared themselves ready to examine the possibility of conferring jurisdiction in certain matters on the ECJ and, if necessary, to negotiate an agreement to that effect. This was in order to ensure that the 1968 Convention was applied as effectively as possible; to prevent differences of interpretation of the Convention from impairing its unifying effect; and, to settle any claims and disclaimers of jurisdiction that may arise in the application of the Convention.

As a result, the *Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters*[441] swiftly followed, "bestowing powers" on the ECJ to interpret the 1968 Convention. The 1971 Protocol specifically provided the ECJ with jurisdiction to give preliminary rulings on the

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[439] *Shearson Lehmann Hutton Inc v TVB Treithandgesellschaft fur Vermogensverwaltung und Beteiligungen mbH (C-89/91)* EU:C:1993:15; [1993] ECR I-139. See further, Briggs, A., & Rees, P., *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 5th edn, 2009), p 29. See also p 30 for a list of concepts that have been given an autonomous interpretation by the ECJ. This list has not been included in the 6th edition, as the author suggests that autonomous meanings have been or will be given to practically all the definitional terms used in the Recast Regulation, Briggs, A., *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 6th edn, 2015), p 28. See also Dicey, Morris & Collins, [11-066]-[11-068], Magnus, U., & Mankowski, P., 'ECPIL: Brussels Ibis Regulation' (Verlag Dr Otto Schmidt KG, 2016) ('Magnus & Mankowski'), p 38 *et ff*; Briggs, *Private International Law in English Courts*, pp 50-55.

[440] Briggs, A., 'The hidden depths of the law of jurisdiction' (2016) 2(May) *LMCLQ* 236-255, p 236.

[441] (75/464/EEC) [1975] OJ L204/28 (consolidated version) ('1971 Protocol'). The 1971 Protocol conferred on the ECJ jurisdiction which was additional to but did not affect its existing jurisdiction. The Protocol has been amended by the 1978 and 1982 Accession Conventions.

interpretation of the 1968 Convention and 1968 Protocol, as well as on the 1971 Protocol itself.[442] Notably, future EEC Member States were required by the 1971 Protocol itself to accept it.[443] The explanatory 'Jenard Report on the Protocols'[444] examines the 1971 Protocol as well as a further Joint Declaration,[445] both of which deal with interpretation of the 1968 Convention by the ECJ.

Pursuant to the 1971 Protocol, the highest and final courts of appeal in each State, namely courts of last instance, were bound to request that the ECJ provide a preliminary ruling where they considered that such a decision was necessary to enable them to give judgment on a case pending before them.[446] Other appellate courts had the option of making a request.[447] These provisions were adopted in order to achieve the greatest possible uniformity in Community law. At the time that the 1971 Protocol was adopted, it was feared that applications for a preliminary ruling might be used unjustifiably to delay proceedings or to put pressure on an opponent of modest financial means. On this basis, the right to apply to the ECJ for a preliminary ruling was not given to courts of first instance.[448] Moreover, arbitral tribunals are not, and never have been, able to request a preliminary ruling from the ECJ/CJEU, as they are not considered 'courts or tribunals' of EU Member States.[449]

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[442] 1971 Protocol, Art 1.

[443] 1971 Protocol, Art 9.

[444] Report on the Protocols on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/66.

[445] *Joint Declaration of 3 June 1971* [1975] OJ L204/32 (consolidated version) ('1971 Joint Declaration'). The 1971 Protocol and 1971 Joint Declaration were signed in Luxembourg on 3 June 1971 and entered into force on 1 September 1975. The 1971 Joint Declaration expresses the willingness of the original six Member States, in cooperation with the Court of Justice, to organise an exchange of information on the judgments given by Member State courts in application of the 1968 Convention and 1968 Protocol.

[446] 1971 Protocol, Art 3(1). Competent authorities can request preliminary rulings if earlier court decisions made in that EU Member State conflict with the interpretation given by the ECJ or by courts of another Member State.

[447] 1971 Protocol, Art 3(2).

[448] Jenard Report on the Protocols, Arts 8, 9.

[449] *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG (Case 102/81)* EU:C:1982:107; [1982] ECR 1095; *Eco Swiss China Time Ltd v Benetton International NV*; *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributaria e Aduaneira (C-377/13)* EU:C:2014:1754; [2014] BTC 30; *Gazprom*.

The 1971 Protocol also provided that the resulting interpretation by the ECJ did not affect the decisions in respect of which the preliminary ruling was requested.[450] However, as set out in the Jenard Report on the Protocols, if the ECJ were to interpret a provision of the 1968 Convention so as to rule that the court seised should not have jurisdiction, for example, proceedings may have to be started all over again elsewhere.[451]

Since the Lisbon Treaty[452] entered into force in 2009, the CJEU's competence to interpret the Jurisdiction Regulation, and now the Recast Regulation, flows from Article 267[453] of the TFEU.[454] Any national court (including courts of first instance) may request a ruling if the national court considers that a ruling on the issue is necessary to enable it to give judgment.[455] Where a case is pending

[450] 1971 Protocol, Arts 4(1)-(2).

[451] Jenard Report on the Protocols, pp 59/67-68.

[452] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* [2007] OJ C306/1.

[453] TFEU, Art 267 states "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court […]".

[454] The 1971 Protocol remains in force in respect of those territories where the Brussels Convention is still applicable, see footnote 323 above. For a detailed review on the preliminary reference procedure, see Lord Mance, 'The interface between national and European law' (2013) 38(4) *ELRev* 437-456.

[455] See further 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' [2012] OJ C338/1.

before a court against whose decision there is no judicial remedy under national law,[456] that court remains bound to request a ruling from the CJEU, unless the CJEU has already decided the issue.[457]

When making a request to the CJEU, questions on national law provisions cannot be referred.[458] For example, the CJEU cannot interpret provisions of the Recast Regulation which have voluntarily been implemented into national law[459] or provisions of national law to which the Recast Regulation specifically refers, although the CJEU can interpret the scope of the Recast Regulation provision that refers to national law. The CJEU can also construe the term "public policy" where it is used in the Recast Regulation, although it cannot determine the national public policy of an individual EU Member State.[460] In addition, the CJEU cannot pronounce on whether a particular term in a contract is an "unfair term" in accordance with EU law; it can only interpret general criteria to define the concept of unfair terms.[461]

The request made must be in relation to proceedings pending before the EU Member State court concerned and the interpretation issue in question must have a bearing on the outcome of those proceedings. The request cannot refer to a hypothetical question of law or fact.[462] The referring

[456] *Criminal Proceedings against Lyckeskog (C-99/00)* EU:C:2002:329; [2003] 1 WLR 9; *Cartesio Oktato es Szolgaltato bt (C-210/06)* EU:C:2008:723; [2009] Ch 354. This would be the Supreme Court of England and Wales. Although, if the case was pending before e.g. the High Court and there is no appeal available, the High Court is obliged to request a preliminary reference in the same way as the Supreme Court would be so obliged, *Danmarks Rederiforening v LO Landsorganisationen i Sverige (C-18/02)* EU:C:2004:74; [2004] 2 Lloyd's Rep 162; [2004] ECR I-1417.

[457] *Da Costa en Schaake NV v Nederlandse Belastingadministratie (Case 28/62)* EU:C:1963:6; [1963] ECR 31; *CILFIT Srl v Ministero della Sanita (Case 283/81)* EU:C:1982:335; [1982] ECR 3415. A reference becomes inadmissible if the issue is clear beyond reasonable doubt.

[458] *CILFIT Srl v Ministero della Sanita (Case 283/81)* EU:C:1982:335; [1982] ECR 3415.

[459] *Kleinwort Benson Ltd v Glasgow City Council (C-346/93)* EU:C:1995:85; [1996] QB 57, although *cf. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2 (C-28/95)* EU:C:1997:369; [1998] QB 182; *Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost (C-130/95)* EU:C:1997:372; *Banque internationale pour l'Afrique occidentale SA (BIAO) v Finanzamt für Großunternehmen (C-306/99)* EU:C:2003:3.

[460] *Bamberski v Krombach*; *Régie Nationale des Usines Renault SA v Maxicar SpA (C-38/98)* EU:C:2000:225.

[461] *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter (C-237/02)* EU:C:2004:209; [2004] ECR I-3403, *cf. Oceano Grupo Editorial SA v Quintero (C-240/98)* EU:C:2000:346; [2000] ECR I-4941.

[462] *PreussenElektra AG v Schleswag AG (C-379/98)* EU:C:2001:160; [2001] ECR I-2099; *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02)* EU:C:2005:120; [2005] 1 Lloyd's Rep 452; [2005] QB 801; *Societe Regie Networks v Direction de Controle Fiscal Rhone-Alpes Bourgogne (C-333/07)* EU:C:2008:764; [2008] ECR I-10807;

court must explain in its request why the ruling is necessary and provide the facts and legal background to the dispute.[463] If these criteria are not met, the CJEU may reject the reference as inadmissible.[464] Alternatively, the CJEU may reformulate the questions referred.[465]

The Brussels Regime instruments should be interpreted in accordance with the methods required under EU law. These can be summarised as verbal, historic, systematic and purposive.[466] The CJEU may also employ comparative and conformative interpretation methods to achieve uniformity with other instruments of EU law. Further, the CJEU may also consider the ECHR.[467]

The CJEU is assisted in its decision making by Opinions of the nine Advocates General of the Court.[468] These Opinions are not binding on national courts, nor do they provide a source of persuasive authority; they are merely advisory.[469] The Advocates General review written and oral submissions from interested parties, including the governments of the EU and EFTA Member States, and subsequently submit independent and impartial legal solutions to the CJEU for consideration. The

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Proceedings against Melki (C-188/10) EU:C:2010:363; [2010] ECR I-5667; *Criminal Proceedings against Radu (C-396/11)* EU:C:2013:39; [2013] QB 1031; *Gazprom*.

[463] *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV (C-111/01)* EU:C:2003:257; [2003] ECR I-4207.

[464] *Telemarsicabruzzo SpA v Circostel (C-320/90)* EU:C:1993:26; [1993] ECR I-393; *ProRail BV v Xpedys NV (C-332/11)* EU:C:2013:87; [2013] CEC 879; *Ministero dello Sviluppo economico v SOA Nazionale Costruttori - Organismo di Attestazione SpA (C-327/12)* EU:C:2013:827; [2014] PTSR D10; *Hi Hotel HCF SARL v Spoering (C-387/12)* EU:C:2014:215; [2014] 1 WLR 1912; *Weber v Weber (C-438/12)* EU:C:2014:212; [2015] Ch 140. See further, Briggs, *Private International Law in English Courts*, p 52.

[465] *Assedic Pas-de-Calais AGS v Dumon (C-235/95)* EU:C:1998:365; [1998] ECR I-4531; *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany (C-279/09)* EU:C:2010:811; [2011] 2 CMLR 21.

[466] *Falco Privatstiftung v Weller-Lindhorst (C-533/07)* EU:C:2009:257; [2010] Bus LR 210; *Kainz v Pantherwerke AG (C-45/13)* EU:C:2014:7; [2015] QB 34. See Magnus & Mankowski for an explanation of these methods, pp 42-46. See further, Briggs, *Civil Jurisdiction and Judgments*, pp 28 *et ff*. Although *cf. GlaxoSmithKline v Rouard (C-462/06)* EU:C:2008:299; [2008] ECR I-3965, where the ECJ adopted a literal interpretation of the Jurisdiction Regulation, arguably reaching an outcome that wholly contradicts the protection given to employees as deemed weaker parties in Section 5 of the same Regulation. See further Harris, J., 'The Brussels I Regulation, the ECJ and the rulebook' (2008) 124(Oct) *LQR* 523-529.

[467] *Ibid*. pp 46-47.

[468] The role of Advocate General was created by TEU, Art 19(2), "The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General […]". See also TFEU, Arts 253-254.

[469] Lenaerts, K., Maselis, I., & Gutman, K., *EU Procedural Law* (Oxford: OUP, 2014), [2.16].

CJEU is not bound to follow the Opinions and there are plenty of examples where the CJEU has made little or no reference to the relevant Opinion.[470] Even so, the Opinions are usually much more detailed than the ultimate CJEU judgment and they provide an excellent source for academics and lawyers to deliberate over. As will be seen,[471] it is Advocate General Wathelet's Opinion in *Gazprom* that has sparked fiery debate, as opposed to the much shorter CJEU judgment.

Once the CJEU delivers its preliminary ruling, it has a binding effect for the referring court and the parties of the referred dispute in so far as the interpretation issue is concerned. It is not a final decision on the referred dispute, nor does it have a binding effect on other parties or other disputes.[472] For instance, the referring court can request a further ruling on the same interpretation issue in another dispute pending before it.[473] In practice, EU Member State courts will follow the CJEU's rulings.

B. Denmark and the CJEU

Danish courts are obliged to apply to the CJEU for a preliminary reference whenever an EU Member State court would be so obliged.[474] Danish courts must also "take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures".[475] This includes judgments of EU Member State courts, as well as judgments of the CJEU.

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[470] The CJEU did not make a single reference to Advocate General Wathelet's Opinion in its judgment in *Gazprom*. See also *Gubisch Maschinenfabrik KG v Palumbo (Case 144/86)* EU:C:1987:528; [1987] ECR 4861; *GlaxoSmithKline v Rouard (C-462/06)* EU:C:2008:299; [2008] ECR I-3965; *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02)* EU:C:2005:120; [2005] 1 Lloyd's Rep 452; [2005] QB 801.

[471] See Chapters 3-5.

[472] Magnus & Mankowski, p 52.

[473] *Da Costa en Schaake NV v Nederlandse Belastingadministratie (28/62)* EU:C:1963:6; [1963] ECR 31.

[474] *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2005] OJ L299/62, Art 6(1). See also *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2013] OJ L79/4 on the application of the Recast Regulation to relations between the EU and Denmark. For a recent example of the Danish Supreme Court requesting a preliminary reference, see *Assens Havn v Navigators Management (UK) Limited (C-386/16)* EU:C:2017:546; [2018] Lloyd's Rep IR 10; [2018] QB 463.

[475] *Ibid*. Art 6(2).

As the EU-Denmark Agreement forms an integral part of the EU legal order, it can be subject to a request for a preliminary ruling pursuant to Article 267 of the TFEU.[476]

C. Interpretation of the 2007 Lugano Convention

In accordance with Protocol No 2 to the 2007 Lugano Convention,[477] the EFTA Member States are bound to take "due account of" judgments in the same manner as the courts of Denmark. Protocol No 2 seeks to reduce divergent interpretations of the provisions of the Jurisdiction Regulation and the 2007 Lugano Convention.[478]

Courts in EFTA Member States are not permitted, however, to make a preliminary reference request to the CJEU.[479] EFTA Member States are entitled only to submit statements of case or to make written submissions on references made by EU Member State courts to the CJEU.[480] Even so, the CJEU is competent to interpret the 2007 Lugano Convention, which, via ratification by the EU, has become part of EU law.[481] Bizarrely, EU Member State courts can request preliminary references in respect of provisions of the 2007 Lugano Convention, even if courts in EFTA Member States cannot.

D. International conventions

The CJEU does not have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between EU Member States and non-EU Member States.[482] It is only where the EU has assumed powers previously exercised by EU Member States in the field to which an international convention not concluded by the EU applies (such that the provisions of the

[476] *Revenue and Customs Commissioners v Sunico ApS (C-49/12)* EU:C:2013:545; [2014] QB 391.

[477] 2007 Lugano Convention, Protocol No 2 broadly follows the equivalent Protocol to the 1988 Lugano Convention.

[478] 2007 Lugano Convention, Art 75 and Protocol No 2, Arts 1(1), 3.

[479] It is also not possible to request a ruling on the 1988 Lugano Convention from the CJEU under TFEU, Art 267.

[480] 2007 Lugano Convention, Protocol No 2, Art 2.

[481] Magnus & Mankowski, p 47, footnote 230.

[482] *Vandeweghe v Berufsgenossenschaft fur die Chemische Industrie (Case 130/73)* EU:C:1973:131; [1974] ECR 1329; *Bogiatzi (or Ventouras) v Deutscher Luftpool (C-301/08)* EU:C:2009:649; [2010] 1 All ER (Comm) 555; *TNT Express Nederland BV v AXA Versicherung AG (C-533/08)* EU:C:2010:243; [2011] RTR 11, [61].

convention have the effect of binding the EU), that the CJEU has jurisdiction to interpret such a convention.[483] Accordingly, the CJEU is unable to interpret the New York Convention.

In a similar vein, the Vienna Convention does not apply to interpretation of the Jurisdiction Regulation or the Recast Regulation, as these are instruments of EU law and not international conventions. The Vienna Convention is relevant however for the Brussels and Lugano Conventions.[484] As such, the Vienna Convention may be indirectly relevant to the interpretation of the Jurisdiction Regulation and the Recast Regulation where provisions in the Brussels and Lugano Conventions are identical or similar.

IV. CONCLUDING REMARKS

Part I of this Chapter has provided an overview of the instruments that make up the Brussels Regime. It has also discussed how the Brussels Regime applies in Denmark and in the EFTA Member States. The exclusion of arbitration from the Brussels Regime has been introduced, along with some of the proposals that were put forward during the recasting of the Jurisdiction Regulation.

The limited exceptions to recognition and enforcement of judgments under the Brussels Regime were reviewed in Part II. It was seen that the exceptions concerning public policy and due process are similar to the equivalent exceptions to recognition and enforcement of foreign arbitral awards in the New York Convention. It was also noted that the New York Convention does not include equivalent exceptions based on irreconcilability of a judgment with a judgment given between the same parties in the EU Member State addressed or in another EU Member State or third State. That being said, the public policy exception in the New York Convention may be relied upon to refuse recognition where a dispute on the same matter between the same parties is *res judicata*. Further, the New York Convention does not include equivalent exceptions that relate to a breach of a jurisdictional rule that is concerned with weaker socio-economic parties or exclusive jurisdiction, as the New York Convention does not provide similar jurisdictional rules for arbitrations.

Likewise, the Recast Regulation does not contain exceptions to recognition that in reality are concerned with arbitration as an autonomous process of dispute resolution. This is because there is

[483] *TNT Express Nederland*, [62].

[484] *Weber v Universal Ogden Services Ltd (C-37/00)* EU:C:2002:122; [2002] QB 1189.

alleged to be mutual trust between the EU Member States as regards their judicial systems. The same is not true for arbitration, as tribunals are not organs of a State and arbitration differs in the EU Member States.[485] Further, as arbitration is excluded from the Recast Regulation, exceptions based on the improper composition of an arbitration tribunal, for example, would be outside the scope of the Regulation, so any enforcement rules in that regard would be redundant.

Part II also introduced the difficult issue of enforcement where there are competing arbitral awards and court judgments. This conundrum is dealt with in Chapter 5.

Finally, the interpretative powers of the CJEU were assessed in Part III. It was noted that courts in Denmark and the EFTA Member States that subscribe to the 2007 Lugano Convention must take due account of judgments given by EU Member State courts, as well as judgments of the CJEU.

[485] See p 82 and footnote 449 above.

CHAPTER 3 – THE EXCLUSION OF ARBITRATION FROM THE BRUSSELS REGIME

This Chapter continues to explore the exclusion of arbitration from the Brussels Regime. The main objective of this Chapter is to ascertain whether the relationship between arbitration and the Brussels Regime improved with the introduction of the Recast Regulation. In doing so, this Chapter aims to identify the parameters of the arbitration exclusion and how they may have changed since the inception of the Brussels Convention in 1968.

Throughout this Chapter, the explanatory reports that accompanied the Brussels Convention and accession conventions are reviewed, along with the working papers that led to the adoption of the Jurisdiction Regulation. In addition, reference will be made to the proposals that were given during the reform of the Jurisdiction Regulation, which ultimately resulted in the Recast Regulation. It is questioned whether the amendments and additions to the Recast Regulation go far enough to clarify how the arbitration exclusion should work in practice.

If the Recast Regulation confirms how the arbitration exclusion should always have been interpreted,[486] a comparison of the exclusion, the intentions of the draftsmen and preliminary rulings concerning the exclusion is required. Importantly, the Recast Regulation provides the only tool that can be used to evaluate the correctness of the ECJ/CJEU's jurisprudence retrospectively.

While the Recast Regulation has clarified the scope of the arbitration exclusion to a great extent, it will be seen that there are a number of outstanding issues that need to be clarified as soon as possible. Most importantly, the EU Member States must be able to comply with their obligations under the New York Convention without fear of breaching the Recast Regulation.

[486] As suggested by Advocate General Wathelet in *Gazprom*, [AG91]. See further pp 101-103 below.

I. JURISPRUDENCE ON THE ARBITRATION EXCLUSION

A. Case law from the ECJ/CJEU

There is no express definition of 'arbitration' in the Brussels Regime. To put it mildly, this omission has caused endless disputes regarding the scope of the arbitration exclusion and, as a result of the single word exclusion, "Linguistic arguments do not carry the matter very far".[487]

Surprisingly however, the ECJ/CJEU has to date only commented directly on the scope of the arbitration exclusion in very few cases, namely, *The Atlantic Emperor*; *Van Uden*; *West Tankers*; and, *Gazprom*. The approach taken to the arbitration exclusion by the European Court in these cases is assessed below.

1. *The Atlantic Emperor*

The ECJ first considered[488] the scope of the arbitration exclusion in its seminal judgment in *The Atlantic Emperor*.[489] The issue in dispute was whether court proceedings to appoint an arbitrator were excluded from the scope of the Brussels Convention. The ECJ was asked whether the arbitration exclusion extended (a) to any litigation or judgments; and, if so, (b) to litigation and

[487] *Partenreederei M/S Heidberg v Grosvenor Grain & Feed Co Ltd (The Heidberg) (No 2)* [1994] 2 Lloyd's Rep 287, p 300, per Diamond QC.

[488] At the time of the ECJ judgment in *The Atlantic Emperor*, the Jenard Report, Schlosser Report and Evrigenis & Kerameus Report were in circulation and the 1988 Lugano Convention had entered into force.

[489] The dispute arose out of a sales contract for a cargo of Iranian oil by the respondents, Società Italiana Impianti SpA, to the plaintiffs, Marc Rich & Co AG. The cargo was found to be contaminated and the dispute concerned on which party liability fell. The respondents issued proceedings in Italy seeking a declaration of non-liability. On the same day, the plaintiffs commenced arbitration proceedings in London and applied to the English court under Arbitration Act 1950, s 10(3) for the appointment of an arbitrator on behalf of the respondents, who refused to appoint their own arbitrator within the time specified in the arbitration agreement, along with leave to serve out of the jurisdiction. The plaintiffs contended that the sales contract contained an arbitration clause, while the respondents argued that the clause was never accepted by them and, in consequence, that there was no submission to arbitration. At first instance, as to the application of the Brussels Convention, Hirst J held that the dispute fell within the arbitration exclusion and therefore outside the scope of the Convention, and that the arbitration agreement was validly incorporated into the sales contract, *Marc Rich & Co AG v Società Italiana Impianti SpA (The Atlantic Emperor) (No 1)* [1989] ECC 198.

judgments where the initial existence of an arbitration agreement was in issue.[490] The importance of the questions was not lost on the ECJ, given that a full court was convened to deliver the preliminary ruling.[491]

It is worth noting that the respondents instructed Professors Jenard and Schlosser to provide expert reports[492] in the proceedings.[493] In summary, Jenard opined that the arbitration exclusion did not extend to all litigation relating to arbitration and that a court first seised of a dispute which had jurisdiction under the Brussels Convention must determine the validity of the arbitration agreement. If that court determined that the arbitration agreement was valid, it must send the parties to arbitration; otherwise, that court should determine the merits of the dispute. In the meantime, a court second seised should stay its proceedings in accordance with Article 21 of the Brussels Convention.[494]

Interestingly, Schlosser stated at the outset of his expert report that he had reconsidered the views set out in the Schlosser Report (which are discussed below).[495] Schlosser submitted that great difficulties could arise if the Brussels Convention did not apply to court proceedings relating to arbitration and that these difficulties would not be tolerated in the legal framework of the Community.[496] He argued that a judgment relating to arbitration was a judgment like any other and that, if the Brussels Convention was not applicable to court proceedings relating to arbitration, "a

[490] The Court of Appeal referred the matter to the ECJ, *Marc Rich & Co AG v Società Italiana Impianti SpA (The Atlantic Emperor) (No 1)* [1989] 1 Lloyd's Rep 548. The ECJ was also asked if the present dispute did not fall within the arbitration exclusion, whether the plaintiffs could nevertheless establish jurisdiction in England pursuant to Brussels Convention, Art 5(1) and/or Art 17; and, if the buyers were otherwise able to establish jurisdiction in England, whether the English court was required to decline jurisdiction or to stay its proceedings under Brussels Convention, Art 21 or Art 22 on the grounds that the Italian court was first seised.

[491] It was also the first time that a UK court had made a request for a preliminary ruling in respect of the Brussels Convention, having acceded to the Convention over 10 years earlier in 1978.

[492] For the expert reports, see Schlosser, P., 'The 1968 Brussels Convention and arbitration' (1991) 7(3) *Arbitration Int* 227-242 and Jenard, P., 'Opinion' (1991) 7(3) *Arbitration Int* 243-250.

[493] See further Merkin & Flannery, pp 271-272.

[494] Jenard, P., 'Opinion' (op cit), [28]-[34].

[495] Schlosser, P., 'The 1968 Brussels Convention and arbitration' (op cit), p 227. See Merkin & Flannery, p 272, where the authors submit that there is evidence that Schlosser's change of heart was genuine and not made to serve the interests of the respondents in the dispute.

[496] Schlosser, P., 'The 1968 Brussels Convention and arbitration' (op cit), p 228.

very deplorable gap" in the free movement of judgments would be left open.[497] Schlosser confirmed that the reason for the arbitration exclusion was the New York Convention and, at the time, all EEC Member States were already Contracting States to the New York Convention or were preparing to become Contracting States. The 1966 European Convention was also intended to fill gaps left open by the New York Convention but this did not transpire.[498] According to Schlosser, the expression "arbitration awards" in the Treaty of Rome was changed to "arbitration" in the Brussels Convention.[499] Schlosser concluded that the Brussels Convention should apply to all court proceedings relating to arbitration, save for court judgments relating to the enforcement of foreign arbitral awards under the New York Convention.[500]

Advocate General Darmon submitted his Opinion in February 1991. He noted that while the key issue was the existence of the arbitration agreement, the principal subject matter of the dispute was the appointment of an arbitrator, which fell outside the scope of the Brussels Convention.[501] The Advocate General also opined that the existence of the arbitration agreement was outside the scope of the Brussels Convention.[502] Even so, it was the "principal subject matter" of the dispute that had to be considered in order to determine whether the Brussels Convention applied.[503] If, however, the principal subject matter of the dispute was within the scope of the Brussels Convention, the Advocate General appears to have accepted that the fact that a preliminary issue was outside the scope would not be enough to take the dispute outside the scope of the Brussels Convention also.[504]

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[497] Schlosser, P., 'The 1968 Brussels Convention and arbitration' (op cit), p 230. Merkin & Flannery comment that "This could hardly have turned out to be a more prescient statement", p 272, footnote 81.

[498] See Chapter 2, pp 60-61 for an overview of the 1966 European Convention.

[499] Schlosser, P., 'The 1968 Brussels Convention and arbitration' (op cit), p 231. Schlosser also commented "it is not open to courts, not even the ECJ, to create a legal instrument in substitution for a Convention which has not been concluded merely because the States involved had erred in anticipating the coming into force of other legal instruments. However, if a wording is open to various interpretations, the courts are allowed to construe it in a manner which appears to be the most reasonable in the light of the legislative and pre-enactment intentions of the drafters of the words", p 231.

[500] Schlosser, P., 'The 1968 Brussels Convention and arbitration' (op cit), p 242.

[501] *The Atlantic Emperor*, [AG25], [AG29]. Advocate General Darmon even commented that there was "no room for hesitation" on the issue, [AG30].

[502] *The Atlantic Emperor*, [AG34]-[AG35].

[503] *The Atlantic Emperor*, [AG33].

[504] *The Atlantic Emperor*, [AG43]-[AG47].

He rejected the submission by Schlosser that the Brussels Convention applied to all court proceedings relating to arbitration.[505]

The ECJ agreed with the Advocate General, rejecting the expert opinions of Jenard and Schlosser. It held that "In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever the issue may be, justify application of the Convention".[506]

Importantly, the ECJ held that "by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts".[507] Accordingly, the process of setting arbitral proceedings in motion, such as appointing an arbitrator, was excluded from the Brussels Convention.[508]

At the time that it was given, the ECJ judgment in *The Atlantic Emperor* was likely to have satisfied expectations in terms of the interpretation of the arbitration exclusion. As noted by Hartley,[509] if the ECJ had not ruled in the way that it did, the arbitration exclusion would have had little meaning and the use of arbitration as a means of settling legal disputes would have been undermined.[510] As set out below, the ECJ's approach to the arbitration exclusion subsequently changed. It is not clear why, as the use of arbitration as a method of dispute resolution was growing in popularity and was arguably even more important in the years that followed the ECJ's judgment in *The Atlantic Emperor*.

[505] *The Atlantic Emperor*, [AG61] *et ff*.

[506] *The Atlantic Emperor*, [26].

[507] *The Atlantic Emperor*, [18] (emphasis added). The fact that only some of the EEC Member States were Contracting States to the NYC at that time was deemed to be irrelevant. For the current Contracting States to the NYC, see Chapter 1, footnote 143.

[508] *The Atlantic Emperor*, [18]-[19].

[509] Hartley, T., 'The scope of the Convention: proceedings for the appointment of an arbitrator' (1991) 16(6) *ELRev* 529-533.

[510] *Ibid*. p 531.

Nurmela[511] also argues that the ECJ had no choice but to decide *The Atlantic Emperor* in the way that it did because of, *inter alia*, a lack of common enforcement standards.[512] While the Brussels Convention contains formal requirements to assess the validity of jurisdiction agreements,[513] there are no provisions in the Brussels Convention to assess the validity of arbitration agreements. Rather, as discussed in Chapter 2, the 1966 European Convention was intended to deal with the validity of arbitration agreements,[514] although the New York Convention already included some minimum requirements.[515] The Recast Regulation still does not include standards to assess the validity and enforceability of *arbitration* agreements.[516]

2. *Van Uden*

The judgment in *Van Uden*[517] was the second ECJ judgment to deal with the arbitration exclusion. An application had been made to the Dutch court for an immediate preliminary payment of a quarter of the sums claimed in the substantive dispute. The respondent contested the jurisdiction of the Dutch court on the basis that it was domiciled in Germany. Further, the substantive dispute was being heard by an arbitral tribunal sitting in the Netherlands pursuant to an arbitration agreement between the parties. The validity of the arbitration agreement was not in question.

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[511] Nurmela, I., 'Sanctity of dispute resolution clauses: Strategic coherence of the Brussels system' (2005) 1(1) *J Priv Int L* 115-149.

[512] *Ibid*. p 125.

[513] Brussels Convention, Art 17.

[514] See Chapter 2, pp 61-62.

[515] For example, the arbitration agreement must be in writing or evidenced in writing, NYC, Art II. See further, Chapter 1, p 35.

[516] Recast Regulation, Art 25(1) deals only with the formal requirements for jurisdiction agreements, as does Jurisdiction Regulation, Art 23(1).

[517] *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line (C-391/95)* EU:C:1998:543; [1999] QB 1225. The plaintiff, Van Uden, had entered into a slot charter agreement with the respondent, Deco-Line. After Deco-Line had failed to pay a number of invoices issued by Van Uden, Van Uden commenced arbitral proceedings in the Netherlands in accordance with the terms of the charter. Deco-Line did not have any assets in the Netherlands capable of being seised. Alleging that Deco-Line was delaying the nomination of arbitrators and that non-payment of the invoices was causing serious cash-flow problems, Van Uden applied for interim relief, requesting that the President of the District Court in Rotterdam order Deco-Line to make an immediate preliminary payment. Deco-Line contested the jurisdiction of the President on the basis of Brussels Convention, Art 2, claiming that, as the company was domiciled in Germany, only the German courts had jurisdiction to determine the application.

Against that background, the ECJ was asked to determine whether the Dutch court nevertheless had jurisdiction to order provisional measures in accordance with Article 24 of the Brussels Convention. Approving the Schlosser Report and reinforcing its judgment in *The Atlantic Emperor*, the ECJ held that the intention behind the arbitration exclusion was to exclude arbitration in its entirety, including proceedings before national courts. The ECJ also confirmed that the subject matter of any proceedings was 'arbitration' if they served to protect the right to have the dispute determined by an arbitral tribunal.

Notwithstanding the above, the ECJ also held that the Dutch court retained jurisdiction to order interim relief. This was because "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the [Brussels] Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect".[518]

In order to determine whether a court has jurisdiction to grant provisional measures,[519] the ECJ stated that where "the subject matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators".[520] The ECJ ultimately concluded

[518] *Van Uden,* [33], citing *Reichert v Dresdner Bank AG (C-261/90)* EU:C:1992:149; [1992] ECR I-2149, [32]. The UK and German governments argued that where parties have agreed to submit their dispute to arbitration, interim proceedings also fall outside the scope of the Convention. The UK government had further opined that the measures sought in the case could be regarded as ancillary to the arbitration procedure and therefore excluded from the scope of the Convention, [26]. As discussed in Chapter 1, pp 26-27 it is typically the courts at the seat of the arbitration who retain curial jurisdiction to support the arbitration and, for example, order the relief sought by the plaintiff in *Van Uden*.

[519] Recast Regulation, Art 35 (see footnote 688 above) removes what would otherwise be a barrier to the jurisdiction of the court ordering protective measures, *Solvay SA v Honeywell Fluorine Products Europe BV (C-616/10)* EU:C:2012:445. It does not, however, confirm that court's jurisdiction and the court must apply its national law to determine whether it has jurisdiction to order the measures requested, Briggs, *Private International Law in English Courts*, [4.309]. The English courts will need to refer to CJJA 1982, s 25.

[520] *Van Uden*, [34], [48].

that the Brussels Convention was applicable and that the Dutch court had jurisdiction to order the requested relief, even though the substantive proceedings were to be determined in arbitration.[521]

The assessment of the *subject matter of a dispute* notwithstanding any arbitration agreement in the underlying contract between the parties, as advocated in *Van Uden*, presumably led the ECJ to decide *West Tankers* in the way that it did. This judgment is discussed next.

3. *West Tankers*

It was some twenty years later when the arbitration exclusion was once again considered by the ECJ in its judgment in *West Tankers*.[522] The judgment is renowned for blurring the parameters of the arbitration exclusion. As the dispute concerned facts and legal relationships that are relatively common place in the shipping and insurance industries, they are set out below.

In August 2000, the vessel, the *Front Comor*, collided with an oil jetty at a refinery owned by ERG Petroli SpA ("ERG"), causing significant physical damage. ERG suffered multiple losses, including repair costs of the jetty, as well as loss of profits caused by disruption of refinery operations and liability to pay demurrage to third parties. ERG had chartered the *Front Comor* under an amended Asbatankvoy charterparty dated 24 July 2000, which provided for London arbitration and English law. The claimants, West Tankers Inc, were the owners of the vessel. ERG claimed compensation from the respondent insurers up to the limits of its insurance cover. The contract of insurance was governed by Italian law. ERG also commenced arbitration proceedings against the owners in tort in respect of their uninsured losses and excess.

On 27 June 2002, ERG was paid over 15 million euros by the insurers. Subsequently, in July 2003, the insurers commenced court proceedings against the owners in their own name in accordance with their subrogated rights[523] before the Tribunale di Syracuse in Sicily, claiming the amount that they had paid to ERG. The insurers also arrested the vessel and security was provided by the owners' hull

[521] *Ibid*. [34].

[522] The judgment in *West Tankers* was also the last ECJ judgment before the Recast Regulation was adopted, although there are subsequent ECJ/CJEU judgments on the Jurisdiction Regulation given its temporal scope e.g. *Gazprom*.

[523] The action was based on the insurers' statutory right of subrogation pursuant to Art 1916 of the Italian Civil Code.

insurers, thereby extending to the insurers' claim security that it had already put up to secure ERG's claim in arbitration. Subject to the arbitration agreement, the Sicilian court had jurisdiction over the dispute by virtue of Article 5(3)[524] of the Jurisdiction Regulation. The owners disputed the jurisdiction of the Sicilian court and applied for a stay on the basis of the arbitration agreement. An anti-suit injunction, which restrained the insurers from proceeding with their claim in Sicily, was granted *ex parte* by Gross J on 20 September 2004. The main issue in both proceedings was whether the owners could rely on the error of navigation exclusion in clause 19 of the charterparty or by way of Article IV(2)(a) of the Hague Rules.[525]

The preliminary reference in *West Tankers* was primarily concerned with whether the anti-suit injunction granted by Gross J was incompatible with the Jurisdiction Regulation. At that time, the English courts were of the view that anti-suit injunctions could be granted in support of arbitration, as arbitration was excluded from the Jurisdiction Regulation.[526] This was in spite of earlier ECJ judgments, which together had the effect of prohibiting such injunctions being granted to uphold jurisdiction agreements.[527] Unfortunately for the English courts and for parties wishing to settle their disputes by way of arbitration, the ECJ held that anti-suit injunctions that were ordered to restrain a party from commencing or continuing proceedings before an EU Member State court contrary to an arbitration agreement were also incompatible with the Jurisdiction Regulation.[528] Anti-suit injunctions are dealt with in Chapter 4.

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[524] Jurisdiction Regulation, Art 5(3) provides "A person domiciled in a member state may, in another state, be sued […] in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

[525] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (Brussels, 25 August 1924) ("Hague Rules"), 120 LNTS 155.

[526] *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510; *Phillip Alexander Securities & Futures Ltd v Bamberger* [1997] ILPr 73; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; [2005] 1 All ER (Comm) 715; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794.

[527] See *Erich Gasser GmbH v MISAT Srl (C-116/02)* EU:C:2003:657; [2004] 1 Lloyd's Rep 222; [2005] QB 1 and *Turner v Grovit (C-159/02)* EU:C:2004:228; [2004] 2 Lloyd's Rep 169; [2005] 1 AC 101, discussed further in Chapter 4, pp 147-152.

[528] *West Tankers*, [32], [34].

It is necessary in this Chapter to review the parts of the ECJ's judgment in *West Tankers* that impacted upon the scope of the arbitration exclusion. For instance, in its judgment, the ECJ confirmed that in order to determine whether a dispute falls within the scope of the Jurisdiction Regulation, reference must be made *solely* to the subject matter of the proceedings[529] and a dispute's place in the scope of the Jurisdiction Regulation is determined by the nature of the rights which the proceedings in question serve to protect.[530] In *West Tankers*, the subject matter of the proceedings was the granting of an anti-suit injunction and the nature of the rights to be protected was the contractual bargain to arbitrate in accordance with the arbitration agreement.

Even though the ECJ did not consider proceedings where a court granted an anti-suit injunction to fall within the Jurisdiction Regulation, it was concerned that those proceedings may undermine the effectiveness of the Regulation.[531] Therefore, the ECJ thought it appropriate to review the subject matter of the underlying dispute before the Sicilian court, namely, a claim for damages in tort. Tort claims clearly fall within the scope of the Jurisdiction Regulation[532] and Recast Regulation.[533] By doing so, the ECJ moved away from assessment of the subject matter of the *proceedings* and instead examined the subject matter of the *underlying dispute* in spite of the existence of the arbitration agreement. One wonders whether the ECJ also considered that arbitration in itself would undermine the effectiveness of the Jurisdiction Regulation.

As a result of this controversial approach, the ECJ decided that where the subject matter of a dispute, that is the nature of the rights to be protected i.e. the claim for damages, falls within the Jurisdiction Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including its validity, also falls within the Jurisdiction Regulation.[534]

This approach arguably contradicts that taken by the ECJ in *The Atlantic Emperor*. There, the ECJ felt that it would be "contrary to the principle of legal certainty, which is one of the objectives pursued

[529] *West Tankers*, [22] citing *The Atlantic Emperor*, [26]. Confirmed in *Gazprom*, [29]. See also *Qingdao Ocean Shipping Co v Grace Shipping Establishment Transatlantic Schiffahrtskontor GmbH (The Xing Su Hai)* [1995] 2 Lloyd's Rep 15.

[530] *West Tankers*, [22] citing *Van Uden*, [33].

[531] *West Tankers*, [23]-[24].

[532] Jurisdiction Regulation, Art 5(3).

[533] Recast Regulation, Art 7(2).

[534] *West Tankers*, [26].

by the Convention for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties".[535]

The ECJ in *West Tankers* found that its conclusion was supported by the Evrigenis & Kerameus Report, particularly where it states that "the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope".[536] The ECJ curiously did not refer to either the Jenard Report or Schlosser Report in its judgment, which each provides a much more detailed analysis of the arbitration exclusion.

The above extract was also considered by Advocate General Darmon in *The Atlantic Emperor*, where he stated "Let me say at the outset that I would have very serious doubts as to the correctness of that statement if it meant that it is the Convention which confers on a court seised of a main action within the scope of the Convention jurisdiction to deal with an incidental issue falling outside the Convention".[537] The *incorrectness* of the extract has now been confirmed by the Recast Regulation.[538]

In *West Tankers*, the question of the jurisdiction of the Sicilian court and, in parallel, the existence and validity of the arbitration agreement, was held to fall within the scope of the Jurisdiction Regulation, with the result that it was exclusively for the Sicilian court to rule on the claimant's objection to its jurisdiction.[539] As anti-suit injunctions interfered with this right, they were held to be incompatible with the Jurisdiction Regulation.[540]

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[535] *The Atlantic Emperor,* [27].

[536] *West Tankers*, [26]. Evrigenis & Kerameus Report, p 298/10.

[537] *The Atlantic Emperor*, [AG44]. The Advocate General took the view that "the authors of the [Evrigenis & Kerameus Report] in fact intended to refer to the application of the Convention to recognition and enforcement of a judgment which disposes of a dispute within the scope of the Convention after giving a decision on the validity of an arbitration agreement", [AG45]. *Cf*. Recast Regulation, Recital 12, para 3, discussed at Chapter 5, pp 190 *et ff*.

[538] See Recast Regulation, Recital 12, para 2, discussed at Chapter 5, pp 186 *et ff*.

[539] *West Tankers*, [27].

[540] See Chapter 4, pp 157 *et ff*.

The ECJ was particularly concerned that, if courts were prevented from examining the validity of arbitration agreements, a party could avoid court proceedings "merely by relying" on an arbitration agreement with the result that the opponent party (who may consider the agreement to be invalid) being denied access to a court and deprived of the judicial protection to which it is entitled.[541] This is the inverse of the approach taken in *The Atlantic Emperor* where the ECJ held that the respondents could not circumvent the arbitration exclusion by denying the existence of the arbitration agreement.

The facts in *West Tankers* show a real-life example of the problems that arise without a mechanism to deal with circumstances where two or more forums are seised and the validity of an arbitration agreement undergoes examination. As will be seen in Chapter 4, anti-suit injunctions offered a neat solution to this issue, as parties were less likely to breach their contractual agreement to arbitrate, or, at the very least, they were less successful in doing so.

4. *Gazprom*

A more recent judgment on the arbitration exclusion was handed down by the CJEU in *Gazprom*. Even though the Recast Regulation had been adopted some time before the judgment was delivered, it was not temporally applicable to the proceedings in question, as they had been commenced prior to 10 January 2015.[542] Accordingly, the judgment correctly concerns only the Jurisdiction Regulation. Nevertheless, Advocate General Wathelet opted to refer to the Recast Regulation in his Opinion, as he contended that the Recast Regulation "somewhat in the manner of a retroactive interpretative law" explained how the arbitration exclusion "must be and always should have been interpreted".[543]

The preliminary reference requested in *Gazprom* concerned whether the Jurisdiction Regulation had to be interpreted as precluding an EU Member State court from recognising and enforcing an arbitral award/injunction[544] that prohibited a party from bringing certain claims before that court. As the

[541] *West Tankers*, [31]. Confirmed in *Gazprom*, [34].

[542] See Chapter 2, p 66 and footnote 344 on the temporal application of the Recast Regulation.

[543] *Gazprom*, [AG91]. Apparently, the Lithuanian, German and French Governments, the European Commission and the Swiss Confederation were of the same opinion.

[544] The referring court categorised the award as an anti-suit injunction. The relevant parts of the judgment in respect of anti-suit injunctions are discussed in Chapter 4, p 161*f*.

award had already been delivered, the CJEU was not concerned directly with the scope of the arbitration exclusion or the validity of arbitration agreements. Rather, the CJEU was required to examine the rules on recognition and enforcement in the Jurisdiction Regulation, which are discussed in Chapter 5 of this thesis.

The CJEU did, however, make a few brief points that assist in interpreting the arbitration exclusion. Specifically, the CJEU confirmed that, as arbitral tribunals are not courts of an EU Member State, there was no conflict of jurisdiction in the applicable proceedings.[545] Further, there was no question of an infringement of the principle of mutual trust, which was accorded by EU Member States to their respective legal systems and judicial institutions (and not to arbitral tribunals), as a court in one EU Member State was not interfering with the jurisdiction of another.[546]

As mentioned in Chapter 2, it has long been held that arbitral tribunals are not considered to be 'courts or tribunals' as referred to in the Brussels Regime instruments.[547] In addition, rules on the recognition and enforcement of foreign arbitral awards are catered for by the New York Convention.[548] This is why the Recast Regulation does not include an express exception to recognition in Article 45 based on irreconcilability of a judgment with an arbitral award.[549] The supranational regimes concerning court jurisdiction and judgments, and arbitral tribunals and awards are therefore intended to be completely separate and independent of each other. The CJEU in *Gazprom* was simply reaffirming this point. In this regard, Briggs notes that it makes no more sense to say that *Gazprom* means that arbitration is "better", or "better placed", than judicial adjudication before the courts of a Member State, than it does to assert that apples are better than pears. They are different, and that is that; *de gustibus non est disputandum*. By appearing to envisage "arbitration" as referring to "arbitrators, tribunals, and the proceedings of those tribunals", but not as "national laws regulating arbitration", the ECJ has placed [*West Tankers*] in its proper perspective. If the decision in *Gazprom* is held in due course to be applicable to the Recast Regulation, it will be neither a surprise nor a bad thing".[550]

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[545] *Gazprom*, [36].

[546] *Gazprom*, [37].

[547] See Chapter 2, p 82 and footnote 449.

[548] See Chapter 1, pp 36 *et ff*.

[549] The exceptions to recognition in the Recast Regulation are discussed at Chapter 2, pp 72 *et ff*.

[550] Briggs, A., 'Arbitration and the Brussels Regulation Again' (2015) 3(Aug) *LMCLQ* 284-288, p 288. The Latin wording roughly translates to "there is no dispute when it comes to taste".

The crucial point that is perhaps overlooked by the rather simplistic analysis above is that, while the supranational regimes may be intended to be separate and independent, this leaves a remarkable gap where one party to a dispute commences arbitration and the other seises a court. Such circumstances may arise without either party acting in a vexatious manner. The fundamental problem is that there is no supranational mechanism to prevent parallel arbitral and court proceedings being commenced or continued, which inevitably results in conflicting court judgments and arbitral awards. As seen in Chapters 1 and 2, neither is there a supranational rule that guides national courts as to which decision should be given primacy, the judgment or the award, and on what basis. This conundrum is assessed further in Chapter 5.[551]

The CJEU also held in *Gazprom* that an arbitral tribunal's prohibition on a party from bringing proceedings before an EU Member State court could not deny that party the judicial protection sought, as the order or award could be contested.[552] As explained in Chapter 1, an arbitral award can be challenged before the courts at the seat of the arbitration and also before the courts where recognition and enforcement of the award is sought (if it is a foreign award).[553]

The next section reviews the judgments of the English courts that attempted to follow and apply these ECJ/CJEU judgments.

B. Decisions of the English courts on the arbitration exclusion

Perhaps unsurprisingly, the English courts struggled to espouse the preliminary rulings given by the ECJ/CJEU and consequently were unable to adopt a consistent approach to the interpretation of the arbitration exclusion. Conflicting judgments were given on the relevance of the arbitration exclusion to requests for declaratory relief and/or anti-suit injunctions, as well as in respect of whether proceedings and judgments on the validity of an arbitration agreement and/or an award fell within the arbitration exclusion. A brief overview of some of the English judgments is provided here. Decisions of the English courts concerning the recognition and enforcement of judgments obtained in breach of an arbitration agreement were also at odds, although these decisions are discussed in more detail in Chapter 5.

[551] See Chapter 5, pp 194 *et ff*.

[552] *Gazprom*, [38].

[553] See Chapter 1 generally, although particular reference should be made to pp 28 *et ff*.

Certain judges looked solely at the dispute in question and whether that dispute was concerned with the parties' rights to arbitrate. Other judges preferred to look at the characterisation of the dispute, for example, did the dispute concern construction of a contract or had a tort been committed. Another approach was to consider whether, notwithstanding an alleged agreement to arbitrate, the rights that the parties were seeking to enforce were those in an underlying contract.

1. The essential subject matter of the dispute

Some judges approached the application of the arbitration exclusion by reviewing the "essential subject-matter" of the dispute or of the judgment to be recognised. In *The Heidberg (No 2)*,[554] Diamond QC held that the issue of whether an arbitration agreement had been incorporated into a bill of lading did not fall within the arbitration exclusion, in part because the essential subject-matter of the judgment was the construction of the underlying contract rather than a pure question of arbitration, as well as for more general policy reasons arising out of the Brussels Convention as a whole.[555] This judgment was given some 15 years prior to *West Tankers* but the approach taken by the courts in each case appears to be similar.

In reaching his conclusion, Diamond QC gave a detailed judgment on the application of the arbitration exclusion and some of his comments are worth reproducing here. He surmised that it was primarily a policy issue whether a decision on the validity of an arbitration agreement was held to be excluded by the arbitration exclusion.[556] In his view, there were "solid practical and policy reasons" for holding that a decision on the validity of an arbitration agreement fell generally within the scope of the Brussels Convention. The "chief advantage" of this conclusion was that any court

[554] *Partenreederei M/S Heidberg v Grosvenor Grain & Feed Co Ltd (The Heidberg) (No 2)* [1994] 2 Lloyd's Rep 287. The French Tribunal de Commerce had concluded that no valid arbitration agreement had been shown to exist. The judgment also dealt with matters other than the validity of the agreement.

[555] *The Heidberg (No 2)*, p 303.

[556] *The Heidberg (No 2)*, p 300. Diamond QC stated "If [the arbitration exclusion] requires that the only subject matter of the Court's judgment must be "arbitration", then the exception does not apply. If [the arbitration exclusion] excludes "mixed" questions of arbitration and the construction of a particular agreement, then the exception may apply. One is thus driven to consider whether, as a matter of policy, the exception should be given a wider or a narrower meaning", p 300. See further, *The Atlantic Emperor (No 2)* where it is questioned whether, where a dispute concerning the validity of an arbitration agreement is the sole subject matter of the dispute, such disputes are covered by the arbitration exclusion, discussed at pp 125-126 below.

with substantive jurisdiction in accordance with the Brussels Convention may be required to rule on the validity of an arbitration agreement and send parties to arbitration in accordance with the New York Convention. If such decisions were not binding, then there was nothing to prevent a disappointed party from seeking to obtain a different and more favourable judgment elsewhere. Also, if two courts reached differing conclusions on the validity of an arbitration agreement, a race to a judgment or an award would ensue. Further, there would be no way to prevent or resolve a potential conflict between an award and a judgment once obtained.[557] Conversely, if such judgments fell to be recognised under the Brussels Convention, this would prevent most if not all of these conflicts.[558]

Diamond QC argued that "it would seem logical, moreover, that if this Court is bound to recognize the judgment of the [French Court] on the substance of the dispute, it should also recognize its decision that there is no valid arbitration agreement binding the parties".[559] A failure to recognise the judgment could ultimately result in the English court being asked to enter a judgment which was inconsistent with that of the French court on the merits.[560] Diamond QC concluded that it was "beyond doubt" that the French court's judgment had to be recognised, even if it had been given in breach of an arbitration agreement that the English court would have held to be valid.[561]

Diamond QC noted that there was a perceived disadvantage in his conclusion, as it would result in the courts at the seat of the arbitration being deprived of the right to rule on the validity of an arbitration agreement.[562] He commented "It seems clear that those who drafted the Convention never applied their minds to the question of how this type of issue was to be resolved, no doubt because they expected the problems to be solved in a future European Convention on arbitration law.[563] This perhaps supports the view that such issues were never intended to fall within the scope of the Convention and that they are better left to be dealt with by amending and updating the New York Convention".[564] Even so, Diamond QC concluded that the arbitration exclusion did not apply

[557] Regrettably, this is the outcome of the amendments made to the Recast Regulation. See pp 186 *et ff* below.

[558] *The Heidberg (No 2)*, pp 300-301.

[559] *The Heidberg (No 2)*, p 301.

[560] *Ibid*.

[561] *Ibid*.

[562] *The Heidberg (No 2)*, p 302.

[563] See Chapter 2, pp 58 *et ff* on the European conventions dealing with arbitration.

[564] *The Heidberg (No 2)*, p 303.

because the judgment was not confined to arbitration and because of the practical and policy reasons outlined above.[565]

Adopting a similar approach, Rix J in *The Xing Su Hai*[566] held that Diamond QC's judgment in *The Heidberg (No 2)* illustrated that "the essential subject-matter of a dispute has to be categorized and that for the purpose of such categorization a dispute is not to be casually categorized as relating to arbitration merely because what is really a question of construction relates to an arbitration clause".[567] In relation to the issues before him, Rix J held that the "essential subject-matter of the writ" was whether the respondents were liable to the owners either in contract or in tort. There was no mention in the pleadings of arbitration or of the arbitration agreement in the time charter, and no relief was claimed which was in any way related to arbitration.[568] The respondents submitted that the action was related to arbitration because it was brought in aid of the arbitration claim being pursued against the charterers, or, because the proceedings, following delivery of an interim award, could be turned into an action to enforce the award. Rix J held that it may have been the owners intention to use the writ, in combination with their arbitration claim against the charterers to seek to enforce the charterers' liabilities as determined in arbitration, but that "in no way" made arbitration the "essential subject-matter of the action". Accordingly, the dispute fell within the scope of the Brussels Convention.[569]

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[565] It is likely that the same conclusion would result in the light of Recast Regulation, Recital 12, as the French court had proceeded to give a judgment on the merits of the dispute.

[566] *Qingdao Ocean Shipping Co v Grace Shipping Establishment Transatlantic Schiffahrtskontor GmbH (The Xing Su Hai)* [1995] 2 Lloyd's Rep 15. The dispute concerned non-payment of hire under a charterparty that contained a London arbitration clause. The claimants, alleging tortious misrepresentation, conspiracy and inducement of breach of contract, commenced proceedings before the English High Court and obtained leave to serve the Writ out of the jurisdiction. The respondents argued that the High Court had no jurisdiction, as they were domiciled in Germany and therefore only the German court had jurisdiction pursuant to Brussels Convention, Art 5. The claimants argued that the Brussels Convention did not apply as there was an arbitration clause in the charterparty. Presumably, the outcome of this case would not differ today, as the claimants arguably waived their right to rely on the arbitration agreement by commencing court proceedings in the first place.

[567] *The Xing Su Hai*, p 21.

[568] *The Xing Su Hai*, p 21. Given the proliferation of private international law disputes, solicitors are likely to be savvier to arguments on jurisdiction and arbitration agreements today, and the Writ would be drafted accordingly.

[569] *Ibid*.

While the judgments in the *The Heidberg (No 2)* and *The Xing Su Hai* were no doubt coloured by the specific facts and pleadings before them, it is doubtful whether an English judge would adopt a similar approach to construction or categorisation today. So long as the right to have the dispute arbitrated is pleaded, that right should take precedence over any other rights arising in the underlying contractual or tortious dispute unless and until the arbitration agreement is found to be invalid or not binding.

Looking at the issue from the other side, Tomlinson J held in *Youell v La Reunion Aerienne*[570] that the arbitration exclusion did not oust the jurisdiction of a court under Article 5(1) of the Jurisdiction Regulation "merely because" the contract to which the claim relates contains an arbitration clause.[571] He stated "It would be absurd to regard the arbitration exclusion as extending to an action which does not have as its subject matter arbitration".[572] Affirming Tomlinson J's decision, the Court of Appeal[573] held that the validity of the arbitration agreement was a matter "incidental" to the underlying contractual dispute – in spite of the fact that the English claimants were asserting that no contract existed.[574]

The approach taken in these judgments, which were given prior to the ECJ judgment in *West Tankers*, is very different from those that are discussed in the next section, as the focus is on the protection of the rights in the underlying dispute, in spite of the existence of an arbitration agreement. It is questionable whether the change in the judgment in *Youell* reflected a developed understanding of the arbitration exclusion taking into consideration the growing body of ECJ jurisprudence generally and the ECJ's approach to construction of EU law. Alternatively, perhaps this

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[570] *Youell v La Reunion Aerienne* [2008] EWHC 2493 (Comm); [2009] Lloyd's Rep IR 405; [2009] 1 All ER (Comm) 301. Arbitration had been commenced in Paris by the respondents pursuant to an arbitration agreement in the French policy of insurance, whereas the claimants had commenced proceedings for a declaration of non-liability before the English court on the basis that London was the place of performance of the contract. Tomlinson J did not consider the subject matter of the proceedings before him as 'arbitration'.

[571] *Ibid*. [24]. Tomlinson J's judgment was handed down after Advocate General Kokott's Opinion in *West Tankers* but prior to the judgment of the ECJ.

[572] *Ibid*.

[573] *Youell v La Reunion Aerienne* [2009] EWCA Civ 175; [2009] 1 Lloyd's Rep 586; [2009] 2 All ER (Comm) 1071. See further, Knight, C., 'Arbitration and Litigation after West Tankers' (2009) 3(Aug), *LMCLQ* 285-291.

[574] *Ibid.* [40]-[42].

judgment is an example of the English court attempting to have its cake and eat it, as the arbitration agreement in dispute nominated a tribunal in Paris, rather than London.

In any event, these judgments highlight the problems that can arise where there are no supranational *lis alibi pendens* rules to prevent parallel arbitration and litigation proceedings.[575]

2. Applications for declaratory or injunctive relief

In *Toepfer v Molino Boschi*,[576] Mance J did not comment on the scope of the arbitration exclusion. He did however surmise that a declaratory award on the parties' obligation to arbitrate might be regarded as more closely related to arbitration than an anti-suit injunction requiring a party not to pursue (and/or to discontinue) foreign proceedings. Nevertheless, Mance J noted that the declaration may do no more than establish the basis for a claim for damages for breach of contract in failing to arbitrate or for an issue estoppel in relation to foreign proceedings. Mance J also concluded that a declaration was not integral to the arbitration process in the same way as an application to the court to appoint an arbitrator. On this reasoning, Mance J held that claims for declaratory relief and also claims for anti-suit injunctions directed at stopping foreign proceedings (as opposed to bringing arbitration proceedings into existence) did not fall within the arbitration exclusion in the Brussels Convention.[577] This judgment would not be considered correct under the Recast Regulation. Even the ECJ in *West Tankers* considered proceedings for an anti-suit injunction to fall outside the scope of the Jurisdiction Regulation.[578]

Certain English judges held that the application of the arbitration exclusion did not depend on the form of the application to the court; rather, it was a question of whether the relief sought was ancillary to or an "integral part of the arbitration process". In *The Lake Avery*,[579] salvage operators had commenced proceedings in the Netherlands. Shortly after, the respondent shipowners commenced proceedings before the English High Court for a declaration that the arbitration

[575] This issue is examined in further detail in Chapter 5.

[576] *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510. The case concerned an application by sellers of cargo for a declaration and for three injunctions restraining the buyers from proceeding before the Italian courts in breach of a London arbitration clause in the sales contracts.

[577] *Ibid*. [7].

[578] *West Tankers*, [23]-[24].

[579] *Union de Remorquage et de Sauvetage SA v Lake Avery Inc (The Lake Avery)* [1997] 1 Lloyd's Rep 540.

agreement in the Lloyd's Open Form (LOF) 95 was binding on the parties. Clarke J accepted that both sets of proceedings concerned the same cause of action between the same parties. Even so, Clarke J held that the legal issue in question was whether there was an effective agreement to arbitrate and not whether an agreement was made on the LOF 95. The correct test was therefore "whether the relief sought in the action can fairly be said to be ancillary to, or perhaps, an integral part of the arbitration process".[580] Clarke J held that the ECJ judgment in *The Atlantic Emperor* required him to conclude that the proceedings for a declaration of validity fell within the arbitration exclusion. Accordingly, the proceedings were held to be ancillary to arbitration as described in the Schlosser Report with the result that Article 21 of the Brussels Convention did not apply and there was no need for the English court to stay the proceedings.[581] Clarke J did however recognise that "there will often be a narrow line between a case which falls within the [arbitration exclusion] and a case which does not".[582]

Clarke J did not agree with the policy considerations of Diamond QC in *The Heidberg (No 2)*. Clarke J held that Diamond QC's approach would lead to the conclusion that judgments as to the validity of arbitration agreements were never within the arbitration exclusion, whereas it was clear from the ECJ decision in *The Atlantic Emperor* that there were some circumstances in which the real issue between the parties was whether the relevant contract was valid or effective so as to entitle a party to arbitrate and it was those actions that were within the exclusion.[583] This is undoubtedly correct, as this approach gives primacy to protection of the right to arbitrate a dispute.

In *Toepfer v Société Cargill*,[584] Colman J once again held that the "underlying function" of the arbitration exclusion was to exclude proceedings before national courts that involved a subject-matter falling within an international convention on arbitration, such as the New York Convention.[585] The subject-matter of the proceedings was whether the alleged liability of the plaintiffs for damages for delivery of sub-specification goods should be determined by the French court or by GAFTA arbitration. The respondents admitted that the claim before the French court breached the arbitration agreement in the sales contract. Colman J found that, as one of the purposes of the New

[580] *The Lake Avery*, p 548, referring to Mance J's approach in *Toepfer v Molino Boschi*.

[581] *Ibid*.

[582] *Ibid*.

[583] *Ibid*. Clarke J also noted that it was not easy to know on which side of the line a particular case fell, p 549.

[584] *Alfred C Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyd's Rep 98.

[585] *Ibid*. p 103.

York Convention was to ensure that national courts gave full effect to arbitration agreements, it followed that the dispute "unquestionably" fell within the scope of the New York Convention and that it would be inconsistent with the ECJ judgment in *The Atlantic Emperor* to hold that the arbitration exclusion did not exclude the dispute from the scope of the Brussels Convention.[586]

Colman J considered the approach of Mance J in *Toepfer v Molino Boschi* of confining the applicability of the arbitration exclusion to proceedings claiming remedies facilitating or regulating arbitration as distinct from remedies enforcing arbitration agreements to be too narrow. The author agrees. Colman J held that an application to the courts of the seat to enforce an arbitration agreement by stay or by injunction, must, on the reasoning in *The Atlantic Emperor* be excluded by the arbitration exclusion.[587] Colman J stated that it was "entirely inconceivable" that the legislative intention of the parties to the Brussels Convention that a judgment of a national court staying an action before it should be outside the Convention but that proceedings to restrain an action in a foreign court should be subject to the Convention.[588] On appeal, the Court of Appeal[589] decided that the issues in dispute were of general importance and the solutions far from clear, and questions were referred to the ECJ for a preliminary ruling.[590] Regrettably, before the ECJ could deliver its preliminary ruling, the parties settled.

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[586] *Ibid*.

[587] *Ibid*. p 104. Colman J therefore granted the anti-suit injunction restraining the proceedings before the French court.

[588] *Ibid*. p 105. In Colman J's view, proceedings to prevent litigation in breach of an arbitration agreement where arbitration had ceased to be unconditionally available due to effluxion of time were proceedings whose subject-matter was of the same kind as that of NYC, Art II(3) and such proceedings were therefore clearly covered by the arbitration exclusion, p 105.

[589] *Alfred C Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379.

[590] The Court of Appeal asked "1. Does the exception in art. 1.4 of the Brussels Convention extend to proceedings commenced before the English Courts seeking: (a) a declaration that the commencement and continuation of proceedings before a French Court constitutes a breach of an arbitration agreement; (b) an injunction restraining the appellants from continuing the proceedings before the French Court, or instituting any further proceedings before any other Court, in breach of the arbitration agreement? If not, 2. Do such proceedings constitute the same cause of action as a challenge to the jurisdiction of the French Court founded on the same arbitration agreement, so as to require the English Court to stay the proceedings pursuant to art. 21 of the Convention?"

In *The Ivan Zagubanski*,[591] Aikens J held that claims for declaratory relief and for anti-suit injunctions fell within the arbitration exclusion, such that Article 21 of the Brussels Convention was inapplicable. He noted that there was "no indication" that some issues concerning arbitration which come before a court of a Contracting State were to be included within the Brussels Convention. Aikens J held that his "instinctive reaction to the laconic wording of Article 1(4) is that where proceedings in a court or tribunal in a Contracting State will result in a judgment where the (or a) principal focus is on "arbitration", then those proceedings and any resulting judgment are excluded from the scope of the Convention. The Convention is therefore not intended to give any "legal protection" to persons in Contracting States in relation to "arbitration" so defined, because "arbitration" is outside the Convention's scope".[592]

Aikens J opined that Diamond QC's conclusion on the scope of the arbitration exclusion in *The Heidberg (No 2)* was "contrary to the tenor of the decision" of the ECJ in *The Atlantic Emperor* and that his reasoning on policy was "quite contrary to the views" of Advocate General Darmon.[593] Disagreeing with Diamond QC, Aikens J held that judgments on the validity of arbitration agreements fell within the arbitration exclusion.[594] As will be seen in Chapter 5, this position is now expressly confirmed by Recital 12 of the Recast Regulation.

In *The Hari Bhum (No 1)*, the English courts were once again faced with an application for declaratory and injunctive relief where court proceedings had allegedly been commenced in breach of an arbitration agreement. At first instance,[595] Moore-Bick J held that the arbitration agreement bound the parties and, following the judgment in *The Ivan Zagubanksi*, that the declaratory and injunctive relief fell within the arbitration exclusion. Accordingly, the relief sought was granted. It is

[591] *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski)* [2002] 1 Lloyd's Rep 106. In another maritime dispute, shipowners sought to restrain cargo interests and their insurers from proceeding before the French courts in breach of London arbitration agreements.

[592] *The Ivan Zagubanski*, [65].

[593] *The Ivan Zagubanski*, [80]-[81]. Aikens J also held that the courts at the seat of the arbitration should have primacy.

[594] *The Ivan Zagubanski*, [82].

[595] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2003] EWHC 3158 (Comm); [2004] 1 Lloyd's Rep 206. Cargo insurers had commenced court proceedings in Finland against the carrier's P&I Club. The Club contested the jurisdiction of the Finnish court, while at the same time applying to the English High Court for declaratory and injunctive relief on the basis of an arbitration clause in the Club's Rules.

worth noting that Moore-Bick J had not been made aware of the ECJ ruling in *Gasser v MISAT*,[596] which had been handed down less than ten days earlier. The cargo insurers appealed.

Reversing the High Court judgment in part, the Court of Appeal[597] commented that the reasoning of Advocate General Darmon and the ECJ in *The Atlantic Emperor* still supported the conclusion that it was open to the court seised, even if it was second seised, to consider whether the arbitration exclusion applied.[598] At the time, the English courts were generally of the opinion that the combined effect of the ECJ judgments in *Turner v Grovit*[599] and *Gasser v MISAT* was not applicable where an arbitration agreement was in dispute,[600] and so the judgment in *Gasser v MISAT* was distinguished.[601] The Court of Appeal found that the English proceedings were nothing more than protective of the right to arbitrate and therefore, Moore-Bick J was correct to hold that the proceedings fell within the arbitration exclusion, as their principal focus was arbitration.[602] The Court of Appeal further held that, as the Contracting States to the Brussels Convention intended to exclude arbitration in its entirety, arbitration must be treated as entirely outside the Convention.[603]

While the ability to grant anti-suit injunctions in support of arbitration proceedings is questionable in the light of the Recast Regulation,[604] the remainder of the Court of Appeal's judgment appears to be correct following the clarifications provided by Recital 12.

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[596] See *Erich Gasser GmbH v MISAT Srl (C-116/02)* EU:C:2003:657; [2004] 1 Lloyd's Rep 222; [2005] QB 1, discussed further in Chapter 4, pp 147 *et ff.*

[597] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; [2005] 1 All ER (Comm) 715.

[598] *Ibid*. [37]. This position has now been confirmed by Recast Regulation, Recital 12.

[599] See Chapter 4, pp 149 *et ff*.

[600] It is interesting to note that the Court of Appeal had considered referring the issues to the ECJ but that, under Article 234 of the revised EC Treaty, the Court of Appeal no longer had the power to refer questions for a preliminary ruling. See Chapter 2, pp 82-84 on the ability (and obligation) of national courts to request preliminary rulings.

[601] *The Hari Bhum (No 1),* [36]-[38].

[602] *The Hari Bhum (No 1),* [46]-[47].

[603] *The Hari Bhum (No 1),* [84].

[604] See Chapter 4.

3. Exercise of the court's curial law jurisdiction to support arbitration

Security for costs

English judges also recognised that matters falling within the arbitration exclusion were not confined to enforcement of arbitral agreements and awards. *Lexmar v Nordisk*[605] concerned a claim for security for costs under section 12(6) of the Arbitration Act 1950 and the arbitration exclusion in the 1988 Lugano Convention. Colman J held that the ECJ's construction of the arbitration exclusion in *The Atlantic Emperor* was that it encompassed matters relating to arbitration that were covered by international conventions on the reciprocal recognition and enforcement of foreign arbitral awards such as the New York Convention.[606] Colman J considered that the New York Convention dealt with the enforcement of foreign arbitral awards, as well as "powers of regulation and control of arbitrations under the curial law governing the procedure of the arbitration, usually, but not always, that of the place where the arbitration is held".[607] As such, Colman J held that "judicial proceedings which are directed to the regulation and support of arbitration proceedings and awards" fell within the arbitration exclusion.[608] As there is no equivalent to Recital 12 of the Recast Regulation in the 1988 Lugano Convention, there was no express rule to assist Colman J in reaching this conclusion. Nonetheless, it appears that his conclusion would remain correct under the Recast Regulation.[609]

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[605] *Lexmar Corp and Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforening* [1997] 1 Lloyd's Rep 289. The substantive claim between shipowners and charterers had settled. The shipowners' costs had been agreed and charterers had given letters of undertaking (LOU) as security. The LOUs were subject to an express choice of English law and jurisdiction. The shipowners commenced proceedings before the English court to recover their costs. Charterers submitted that the matter should be dealt with in proceedings already commenced before the Norwegian courts and that the English court should stay its proceedings pursuant to 1988 Lugano Convention, Art 22. Colman J had to consider whether the proceedings fell within the arbitration exclusion.

[606] *Lexmar v Nordisk,* p 292.

[607] *Lexmar v Nordisk,* p 292. Merkin & Flannery argue that the latter part of Colman J's conclusion is not a tenable proposition, Merkin & Flannery, p 278.

[608] *Lexmar v Nordisk,* p 292. Colman J stated that there was "no doubt" that matters falling within the arbitration exclusion were not confined to the enforcement of awards.

[609] See Chapter 3, pp 124 *et ff*.

Enforcement of a Letter of Undertaking

In the same case, Colman J held that proceedings to enforce a LOU given by a third party pursuant to an order for costs made in an arbitration involving the beneficiary of the security and the party required to provide it, did not fall within the arbitration exclusion. Colman J was of the opinion that such proceedings had nothing to do with the exercise of the English courts of their curial law jurisdiction to regulate and support arbitration or their jurisdiction to enforce awards. Rather, such proceedings were simply to enforce a debt.[610] Further, the Norwegian court's attachment order did not introduce the stamp of arbitration in order for the proceedings to fall within the exclusion.[611]

Permission to serve an arbitration claim form on a third party

In a case concerned with the 1988 Lugano Convention,[612] the claimants served an arbitration claim form seeking a declaration that the respondents were a party to a contract of affreightment. They also applied for permission to serve the claim form on brokers based in Norway, as the party who allegedly procured the contract. The brokers disputed the existence of the contract and applied to have the claim set aside on the basis that the English court did not have jurisdiction, as the claim did not fall within the arbitration exclusion in the 1988 Lugano Convention.

The court refused to grant the declaration and also set the claim form aside. Amongst other conclusions, the court did not consider the matter to fall within the arbitration exclusion, as the brokers were not a party to the disputed arbitration agreement. Thomas J held that the ECJ judgment in *The Atlantic Emperor* meant that the arbitration exclusion could not refer to anything other than the arbitration itself and to proceedings brought before national courts between the parties to the arbitration or to the arbitration agreement. Thomas J did not consider that any of the English authorities that had applied the ECJ judgment in *The Atlantic Emperor* had suggested a wider application.[613] Indeed, the ECJ in *The Atlantic Emperor* arguably adopted a wide construction of the

[610] *Lexmar v Nordisk*, pp 292-293. The LOU in this matter was subject to an express choice of English law and jurisdiction. In other cases, it may be that disputes arising out of an LOU are subject to arbitration and therefore a different conclusion would be reached.

[611] *Lexmar v Nordisk*, p 293.

[612] *Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 Lloyd's Rep 1; [2000] 2 All ER (Comm) 70.

[613] *Ibid*. [12].

arbitration exclusion, so it had not been necessary for the English judges to come to any other conclusion.

Appointment of an arbitrator

In *The Hari Bhum (No 2)*,[614] an application was issued before the High Court to appoint an arbitrator in the proceedings. The P&I Club's persistence to pursue arbitration proceedings was to obtain an award declaring it not liable to the cargo insurers, which it would then seek leave to enforce as a judgment under sections 66(1) and 66(2) of the Arbitration Act 1996,[615] in order to oppose enforcement of any Finnish judgment in accordance with Article 34(3) of the Jurisdiction Regulation. Moore-Bick J granted the application as, "unlike the granting of an anti-suit injunction, the appointment of an arbitrator could not in any sense be said to interfere with the jurisdiction of the Finnish courts which will remain free to pronounce on the claim in accordance with the rules of Finnish law".[616] Whether or not an award that has been converted into a judgment would suffice as a shield to a conflicting judgment of an EU Member State court on the same matter between the same parties is examined in Chapter 5.[617]

Statutory rights of third parties

In *The Norseman*,[618] the High Court had to review the effect of an arbitration agreement in an insurance contract where the right of a third party to sue the insurer was provided by statute,[619] as opposed to the insurance contract itself. Following the Court of Appeal's judgment in *The Hari Bhum (No 1)*,[620] Morison J held that rights conferred on third parties by the Tunisian statute could not be characterised as enforcing a contractual obligation to which the arbitration agreement would apply. Morison J stated "The fact that it is a necessary condition for the application of [the statute] that there is in existence a contract of insurance does not say anything about the characterisation of the

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[614] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 2)* [2005] EWHC 455 (Comm); [2005] 2 Lloyd's Rep 378.

[615] See Chapter 1, pp 28 *et ff*.

[616] *Ibid.* [36]-[37].

[617] See Chapter 5, pp193-194.

[618] *Markel International Co Ltd v Craft (The Norseman)* [2006] EWHC 3150 (Comm); [2007] Lloyd's Rep IR 403.

[619] Specifically, Article 26 of the Tunisian Insurance Code.

[620] Discussed at pp 111 *et ff* above.

right or obligation".[621] Furthermore, whether or not an arbitration agreement in a contract is binding on a third party, such as a party commencing a direct action against the insurers of a tortfeasor or an assignee of a bill of lading claiming against a charterer,[622] differs between the EU Member States. As such, the application of the arbitration exclusion to such claims is questionable.[623]

Unsurprisingly, the somewhat incompatible jurisprudence of the ECJ/CJEU and of the English courts does not go very far in defining the parameters of the arbitration exclusion prior to the adoption of the Recast Regulation. The next Part of this Chapter examines whether the Recast Regulation has clarified any of the contentious issues that the courts attempted to tackle.

II. THE SCOPE OF THE ARBITRATION EXCLUSION IN THE RECAST REGULATION

Just like those that came before it, the Recast Regulation applies to "civil and commercial matters",[624] although there are certain disputes that are excluded from its scope.[625] In particular, Article 1(2)(d) of the Recast Regulation provides that it "shall not apply to […] arbitration". The same wording is used in the Regulation's predecessors.[626]

The Recast Regulation does however differ from the other Brussels Regime instruments. It includes a new explanatory Recital to assist with the construction of the arbitration exclusion,[627] along with a new Article that confirms that the Recast Regulation "shall not affect the application of the 1958

[621] *Ibid*. [31]. Morison J also added that he would have refused to grant injunctive relief on the grounds of delay, [32].

[622] For a detailed review on incorporating arbitration agreements into bills of lading from charterparties, see Ozdel, M., *Bills of Lading Incorporating Charterparties* (Oxford: Hart Publishing, 2015). See also, Baatz, Y., 'Incorporation of a charterparty arbitration clause into a bill of lading and its effect on third parties' (op cit).

[623] For example, see the CJEU judgment in *Assens Havn v Navigators Management (UK) Limited (C-386/16)* EU:C:2017:546; [2018] Lloyd's Rep IR 10; [2018] QB 463, where the Court held that a third party direct action claimant was not bound by an exclusive jurisdiction clause in a contract between the tortfeasor shipowner and their insurers.

[624] Recast Regulation, Art 1(1).

[625] Recast Regulation, Art 1(2).

[626] See Chapter 2, footnote 283.

[627] Recast Regulation, Recital 12. The Jurisdiction Regulation does not contain any Recitals that aid interpretation of the arbitration exclusion.

New York Convention".[628] These provisions are explored in detail in this Chapter and in Chapters 4 and 5.

When reviewing Recital 12, it must be kept in mind that the Recitals do not have legislative force.[629] Further, during the legislative process, seemingly there was consensus that the Recitals were not intended to change the *status quo*.[630] This suggests that, in spite of Recital 12, as the wording of the arbitration exclusion in the Recast Regulation is the same as that in the Jurisdiction Regulation, the relationship *vis-à-vis* arbitration and the Brussels Regime has *not* changed with the recasting of the Jurisdiction Regulation. If this is true, any case law that appears to no longer be correct in the light of the Recast Regulation suggests that the ECJ/CJEU misinterpreted the arbitration exclusion in their preliminary reference rulings. The same can be said in respect of judgments from national courts.

As noted in Chapter 2, the Jurisdiction Regulation is to be interpreted in a way that is consistent with the case law of the ECJ on the Brussels Convention, save where provisions have expressly been revised.[631] By extension of this principle, ECJ/CJEU rulings and the explanatory reports on the accession conventions and Lugano Conventions remain relevant to the interpretation of the Recast Regulation.[632] Unfortunately, in-depth commentary on the arbitration exclusion in the Brussels Convention is confined to the Jenard and Schlosser Reports.[633] Nevertheless and as discussed above,[634] a short extract from the Evrigenis & Kerameus Report has caused some controversy.[635]

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[628] Recast Regulation, Art 73(2).

[629] See Chapter 2, pp 64-65 and footnote 330.

[630] Comment by Hess, B., 'Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views', published on www.conflictoflaws.net on 22 January 2015 (accessed 19/02/2015), citing Hartley, T., 'The Brussels I Regulation and arbitration' (2014) 63(4) *ICLQ* 843-866 ('Hartley (2014)'), p 861.

[631] See Chapter 2, p 65 and footnote 334. *West Tankers*, [29].

[632] See also Recast Regulation, Recital 34, which provides "Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it".

[633] The Jenard & Möller Report and the Cruz, Real & Jenard Report do not discuss the arbitration exclusion. The Pocar Report on the 2007 Lugano Convention merely states that the working party considered reviewing jurisdiction derived from an arbitration agreement, however, as it was pointed out to them that arbitration fell outside the scope of the Convention, it was not felt advisable that the working party should consider it, p 319/90.

[634] See p 100 above.

A. The Recast Regulation does not apply to 'arbitration'

Recital 12 confirms that "*This Regulation should not apply to arbitration* […]".[636] As seen from the discussion of the case law at the beginning of this Chapter, it has always been unclear what the arbitration exclusion encompasses. One of the reasons for not including a definition of arbitration in the Brussels Regime is the fact that the common law concept of arbitration differs from the civil law concept and both systems can be found within the EU Member States.[637] The concept of arbitration within the Recast Regulation must therefore continue to be interpreted autonomously.

Also, Recital 12 and the arbitration exclusion together can be understood as reinforcing the concept that arbitrators are not bound to take account of the Recast Regulation.[638] As set out above, the CJEU in *Gazprom* confirmed that the Jurisdiction Regulation does not expressly require that it is applied by arbitral tribunals, rather, the references to courts or tribunals therein are to bodies exercising judicial functions.[639] The same is true of the Recast Regulation. Accordingly, whether an arbitral tribunal is required to apply the Brussels Regime instruments depends entirely on the law of the seat of the arbitration. In other words, a tribunal with its seat in England may be bound to apply

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[635] In full, the relevant extract states "Arbitration, a form of proceedings encountered in civil and, in particular, commercial matters, (Article 1, second paragraph, point 4) is excluded because of the existence of numerous multilateral international agreements in this area. Proceedings which are directly concerned with arbitration as the principal issue, e.g. cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of an arbitration award, are not covered by the Convention. However, the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope", [35]. These points are examined in detail in this Chapter and in Chapter 5.

[636] Recast Regulation, Recital 12, para 1. This sentence does not add anything to the arbitration exclusion, as the different use of "should not apply" to "shall not apply" is immaterial.

[637] See the Opinion of Advocate General Darmon in *The Atlantic Emperor*, where he states that "The Brussels Convention […] raises numerous difficulties since, as well as being inherently complex, it uses concepts which the various national laws define precisely but in a manner which often differs from one member-State to another, with the result that the [ECJ] has often felt it necessary to educe from it an independent meaning", [AG1].

[638] Briggs, *Civil Jurisdiction and Judgments*, pp 80-81; Briggs, *Private International Law in English Courts*, [14.22].

[639] *Gazprom*, [36]-[37]. See further, Chapter 2, p 82 and footnote 449; Briggs, *Private International Law in English Courts*, [4.79], footnote 126.

English law and thereunder, it may be obliged to recognise and enforce a judgment of an EU Member State court. For example, arbitral tribunals may be bound by the doctrine of *res judicata* and on that basis they may be obliged to decline proceedings or to recognise a judgment of a court in another EU Member State.[640] Even so, the obligation on arbitrators is found in English law and is not derived from the Recast Regulation.[641]

In *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*,[642] Burton J argued that, "if the [Jurisdiction Regulation] does not apply to an arbitration tribunal, then arbitration tribunals are not obliged to recognise foreign judgments, even if UK courts are so obliged, and to that extent the arbitrators were right not to be persuaded by the beguiling argument that arbitrators are applying English law, and if English law requires recognition of a foreign judgment then the arbitrators must recognise the foreign judgment. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, estopping it from considering the facts underlying that judgment".[643] It is now clear from the CJEU's judgment in *Gazprom* that arbitral tribunals are not bound by the rules on recognition and enforcement in the Recast Regulation.[644] Burton J was therefore 'spot-on' and the criticism of his judgment by the Court of Appeal in *The Wadi Sudr* is unfounded.[645]

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[640] *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193; [2010] 2 All ER (Comm) 1243.

[641] Briggs, *Private International Law in English Courts*, [14.23].

[642] *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm); [2009] 1 Lloyd's Rep 213; [2009] 1 All ER (Comm) 568.

[643] *Ibid*. [46]. Burton J did not comment directly on the doctrine of *res judicata* in his judgment. He merely stated that "This is not a question of not recognising a judgment, but concluding that, as the parties were obliged to go to arbitration, it is only the outcome of arbitration which is of any relevance" [40]. Burton J made passing reference to the public policy exception to recognition and enforcement in Jurisdiction Regulation, Art 34, and implied that a party that had breached an arbitration agreement should not be entitled to benefit from its own wrong i.e. by a court judgment being recognised, in accordance with the judgment in *New Zealand Shipping Co Ltd v Société Des Ateliers et Chantiers de France* [1919] AC 1, and therefore the public policy exception would be applicable.

[644] *Gazprom*, [36]-[41].

[645] Briggs, A., 'Arbitration and the Brussels Regulation Again' (2015) 3(Aug) *LMCLQ* 284-288, p 285. See further the discussion of *The Wadi Sudr* below.

It is submitted that Burton J's reasoning can be extended to an arbitral tribunal's powers to order an anti-suit injunction[646] in support of an arbitration agreement where a court of an EU Member State has been seised in breach of that agreement. In other words, an arbitral tribunal may continue to issue anti-suit injunctions notwithstanding the ECJ judgment in *West Tankers* and, as a result of the CJEU judgment in *Gazprom*, such injunctions or awards would be entitled to recognition and enforcement under the New York Convention. This argument would be even stronger where the relevant instrument is the Recast Regulation, given that *Gazprom* was concerned with enforcement of an arbitral award under the Jurisdiction Regulation, which is not expressly 'without prejudice' to the New York Convention (as the Recast Regulatiojn now is).

It has been argued by Briggs[647] that within the Common Law, 'arbitration' is understood to be an agreement to resolve disputes by non-judicial means. Conversely, under the Jurisdiction Regulation, and perhaps also the Recast Regulation, arbitration means the operations and acts of arbitral tribunals.[648] Arguably, however, the arbitration exclusion as interpreted by Recital 12 goes much further than simply excluding operations and acts of arbitral tribunals from the Recast Regulation. This assertion is examined in this Chapter.

In any event, this part of Recital 12 does not aid understanding of the arbitration exclusion in itself.

B. The Recast Regulation does not prevent compliance with the New York Convention

The Recast Regulation also confirms that EU Member State courts are not precluded from dealing with arbitration agreements in accordance with their national laws and, by extension, in accordance with their international law obligations. Paragraph 1 of Recital 12 continues

> "[…] *Nothing in this 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 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*".

[646] See *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm); [2008] 1 Lloyd's Rep 230; [2008] 1 All ER (Comm) 593.

[647] Briggs, A., 'The hidden depths of the law of jurisdiction' (2016) 2(May) *LMCLQ* 236-255.

[648] *Ibid*. p 252.

Recital 12 essentially permits EU Member State courts to fulfil the obligation found in Article II(3) of the New York Convention.[649] By way of reminder, courts in Contracting States to the New York Convention must, at the request of one of the parties, refer the matter to arbitration, unless the arbitration agreement in question is null and void, inoperative or incapable of being performed.[650] Chapter 1 discussed how this obligation leaves open the question of which forum, i.e. the arbitral tribunal or the court seised, should be given priority to determine the validity of the arbitration agreement.[651]

As mentioned in Chapter 2, there are no *lis alibi pendens* provisions in the Recast Regulation or in the New York Convention that requires a forum second seised to stay their proceedings if another forum has already been seised and is considering the validity of an arbitration agreement. The result is that an arbitral tribunal and a court can both determine the matter, thereby wasting time and costs, even if the court ultimately finds the arbitration agreement to be valid and grants a stay. That being said, it should be remembered that the 1961 European Convention deals with *lis alibi pendens* between arbitral tribunals and courts.[652] The 1961 European Convention requires the court seised to wait until an arbitral award is given before dealing with the matter, unless there are "good and substantial reasons" to the contrary.[653] Regrettably, eleven of the EU Member States are not Contracting States to the 1961 European Convention.[654]

It is unclear what steps are allowed to be taken for a court to find that there are "good and substantial reasons" to not wait for the arbitral tribunal to hand down an award in accordance with the 1961 European Convention. Presumably, the court cannot take into consideration the fact that it would otherwise have jurisdiction under the Recast Regulation when assessing whether there are good and substantial reasons to not wait for an arbitral award to be given. It is submitted that the fact that the court may otherwise have jurisdiction pursuant to the Recast Regulation should not, in

[649] Hartley (2014), p 860, footnote 68. NYC, Art II(3) is discussed at Chapter 1, pp 34-36.

[650] In the UK, a party may request that the court seised stays its proceedings in accordance with AA 1996, s 9(4). See further Chapter 1, pp 19 *et ff*.

[651] Chapter 1, pp 19 *et ff* also considered how detailed the examination of the court should be when determining whether the arbitration agreement is null and void, inoperative or incapable of being performed. The courts of other EU Member States may take a different approach to the English courts on both issues.

[652] See Chapter 2, pp 59 *et ff* on the 1961 European Convention.

[653] 1961 European Convention, Art VI(3). See further, Chapter 2, pp 60 *et ff*.

[654] See Chapter 2, footnote 288.

any circumstances, be considered when assessing the validity of an arbitration agreement.[655] Such an approach arguably led to the highly criticised ECJ judgment in *West Tankers*.[656]

Even if an EU Member State court determines that an arbitration agreement is invalid, if an arbitral tribunal has already been constituted, it is submitted that the court should wait until an award is given in accordance with the 1961 European Convention. To clarify, the Recast Regulation does not require EU Member State courts to do so. Nonetheless, it is the author's opinion that it would be good practice if the provisions on *lis alibi pendens* in the 1961 European Convention were extended to all EU Member States. Although this is controversial as such rules were proposed during the recasting of the Jurisdiction Regulation and rejected.

Moreover, an arbitral tribunal can ignore court proceedings in another EU Member State and pronounce on its own jurisdiction.[657] The Schlosser Report confirms that the 1968 Convention "in no way restricts the freedom of the parties to submit disputes to arbitration. This applies even to proceedings for which the 1968 Convention has established exclusive jurisdiction".[658] This position ostensibly remains the same under the Recast Regulation.

Further, it seems that if/where more than one court in different EU Member States has been seised by parties that are allegedly bound by an arbitration agreement, both courts can ignore the proceedings before the other and either send the parties to arbitration in accordance with the New York Convention or determine the substantive matter for itself if that court considers the arbitration agreement to be null and void etc. and that court has jurisdiction pursuant to the Recast Regulation. This is extremely unsatisfactory for parties.

As a result, where more than one forum finds that it has jurisdiction, the issue then becomes a race to an award or judgment. This problem is discussed further in Chapter 5.

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[655] *cf. West Tankers*.

[656] See pp 97 *et ff* above.

[657] Subject to the EU Member State court having already decided the matter, thereby rendering the issue *res judicata*. See further p 199 *et ff* below.

[658] Schlosser Report, p 59/93, [63]. Interestingly, Norway declared when it acceded to the NYC that it "will not apply the [NYC] to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property".

C. Recognition and enforcement of arbitral awards

The interplay between the recognition and enforcement of arbitral awards and the corresponding rules for court judgments in the Recast Regulation are discussed in Chapter 5. Even so, it is necessary to briefly summarise here the respective provisions in Recital 12 to aid understanding of the remainder of this Chapter and those that follow.

Judgments of EU Member State courts concerning whether or not an arbitration agreement is null and void, inoperative or incapable of being performed are not subject to the rules on recognition and enforcement laid down in the Recast Regulation.[659] This is regardless of whether the court determines the validity of the arbitral agreemeent as a principal issue or as an incidental question.[660]

Briefly, this clarification suggests that not only could there be *lis alibi pendens* between courts and/or arbitral tribunals on the validity of an arbitration agreement but also, any judgment on the validity of the agreement is not subject to recognition and enforcement under the Recast Regulation. As such, if courts and/or arbitral tribunals in EU Member States do not enforce such judgments under another regime, *lis alibi pendens* on the substantive issues in dispute are also likely to follow. That being said, it should be remembered that foreign arbitral awards on the validity of arbitration agreements, as well as foreign arbitral awards on the merits equally require recognition and enforcement under the New York Convention, subject to the limited exceptions therein.[661]

Recital 12 further states that where an EU Member State court seised in breach of an arbitration agreement determines that the agreement *is* null and void, inoperative or incapable of being performed, if that court has jurisdiction by virtue of the Recast Regulation or national law, any judgment given by that court on the merits of the dispute should be recognised and enforced in accordance with the Recast Regulation.[662] Following on from the above comments, this means that there truly is a race to an award or a judgment, subject to the following rule as explained by Recital 12.

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[659] Recast Regulation, Recital 12, para 2. See Chapter 5, pp 186 *et ff*.

[660] *Ibid*. See Chapter 5, p 187.

[661] See Chapter 1, pp 40 *et ff.*

[662] *Cf*. *Philip Alexander Securities & Futures Ltd v Bamberger* [1996] (unreported) (Independent, July 8, 1996) and *The Heidberg (No 2)*.

Recognition and enforcement of a judgment on the merits is "without prejudice" to the competence of EU Member State courts to decide on the recognition and enforcement of foreign arbitral awards in accordance with the New York Convention, which "takes precedence" over the Recast Regulation.[663] Reading Recital 12 as a whole, it appears that foreign arbitral awards that require recognition under the New York Convention may override conflicting EU Member State court judgments that would otherwise fall to be recognised under the Recast Regulation. The new Article 73(2) also confirms that the Recast Regulation "shall not" affect the application of the New York Convention.[664] It is for the EU Member State court seised to determine whether the foreign arbitral award or an EU Member State court judgment is to be given priority and thereby enforced in accordance with its national law.

Conversely, an award given by a tribunal with its seat in England that is to be enforced in England would not be a 'New York Convention award', as it is not a foreign arbitral award.[665] As such, the perceived primacy given to arbitration by Recital 12 of the Recast Regulation falls away where there is a conflicting *domestic* arbitral award and an EU Member State court judgment. The question that follows is how this irreconcilability is resolved either by national law or by the Recast Regulation.

The consequences of Recital 12 as regards recognition and enforcement of arbitral awards are examined in more detail in Chapter 5.

D. The Recast Regulation does not apply to court proceedings in support of arbitration

Recital 12 further explains that court proceedings in support of arbitration along with actions and judgments on the recognition and enforcement of arbitral awards fall outside the scope of the Recast Regulation. It states

> *"This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure* […]".[666]

[663] Recast Regulation, Recital 12, para 3. See Chapter 5, pp 191 *et ff*.

[664] See Chapter 5, p 196.

[665] See Chapter 1, p 28, footnote 103.

[666] Recast Regulation, Recital 12, para 4.

The Schlosser Report similarly provides "The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as 'statement of a special case' (Section 21 of the Arbitration Act 1950)".[667]

As mentioned above,[668] Schlosser later departed from this position, arguing instead that if the Brussels Convention was not applicable to court proceedings relating to arbitration, a very deplorable gap in the free movement of dispute resolution instruments would be left open.[669] Recital 12 now confirms that this gap is to remain.

In *The Atlantic Emperor*, the ECJ held that "the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in Article 1(4) of the Convention".[670] Over 15 years later, this position unsurprisingly remains correct under the Recast Regulation.

The ECJ continued, "the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator".[671] In *The Atlantic Emperor (No 2)*,[672] Neill LJ

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[667] Schlosser Report, p 59/93, [64]. It should be noted that the Special Case Procedure mentioned in the extract was abandoned in the UK by the Arbitration Act 1979.

[668] See the discussion of *The Atlantic Emperor* at pp 91 *et ff* above.

[669] See further, Seriki, H., 'Litigating in breach of arbitration: what exactly does Article 1(4) of the Brussels Convention cover?' (2000) 66(1) *Arbitration* 49-58, p 52.

[670] *The Atlantic Emperor,* [19].

[671] *The Atlantic Emperor,* [28], [29].

[672] *Marc Rich & Co AG v Societa Italiana Impianti SpA (The Atlantic Emperor) (No 2)* [1992] 1 Lloyd's Rep 624. Unfortunately for the Swiss buyers (who had earlier alleged that their dispute was governed by an arbitration agreement and applied to the English High Court for an order that an arbitrator must be appointed by the sellers), the Court of Appeal held that the lodging of documents on the substantive merits of the dispute amounted to submission by the buyers to the jurisdiction of the Italian court, which had been seised by the sellers in spite of the arbitration agreement. As a result, the buyers could not challenge the validity of the Italian court's earlier decision that the contract did not contain an arbitration agreement as the submission

questioned whether this part of the ECJ's judgment went further and was equally applicable to cases where the challenge to the validity of the arbitration agreement constituted the dispute and stood alone.[673] It is submitted that Recital 12 solves this conundrum, as it confirms that a judgment given in such proceedings would fall outside the scope of the Recast Regulation, in particular, outside the provisions on recognition and enforcement.[674]

In the light of Recital 12, it appears that court proceedings for security for the costs of the arbitration would also fall within the arbitration exclusion.[675]

This paragraph of Recital 12 is uncontroversial. However, as court judgments given in such proceedings do not fall to be recognised in accordance with the rules on recognition and enforcement in the Recast Regulation, such judgments may be futile if they are not upheld by another EU Member State court (where necessary).

Arguably, proceedings for an anti-suit injunction in support of a disputed arbitration agreement would also fall within this paragraph and therefore within the arbitration exclusion. The potential consequences of this interpretation are discussed further in Chapter 4.

E. Comparison of the arbitration exclusion with the other exclusions in the Recast Regulation

It is doubtful whether any assistance in understanding the arbitration exclusion can be gleaned from the other exclusions. Nonetheless, some brief observations are made below.

Advocate General Léger has commented that the exclusions concern "matters which cannot be regulated by the intention of the parties and which concern public policy".[676] This statement is

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covered the whole proceedings, [43]-[45]. The buyers' applications for injunctive relief from the English courts failed.

[673] *Ibid*. p 628. This conundrum was repeated by Diamond QC in *The Heidberg (No 2)*, pp 297, 299. See also *The Lake Avery*, where Clarke J made a point of opining that the issue of the validity of the arbitration agreement did not "stand alone".

[674] See further, Chapter 5, pp 186 *et ff*.

[675] See *Lexmar v Nordiski*, discussed at pp 113 *et ff* above.

[676] *Preservatrice Fonciere TIARD SA v Staat der Nederlanden (Case C-266/01)* EU:C:2003:282; [2003] ECR I-4867, [AG52]. The Advocate General also commented that such matters should be excluded from the ambit of the

confusing as arbitration is by definition instituted by way of private agreement between the parties. That being said, there are certain disputes that are precluded by national law from being dealt with by way of arbitration and it is perhaps these issues to which the Advocate General was referring.[677]

According to the Evrigenis & Kerameus Report, "Most [exclusions] represent a genuine limitation of the civil and commercial matters covered, with their exclusion being necessitated for different reasons in every instance".[678] As seen in Chapter 2, one of the main reasons for the arbitration exclusion was the regime already in place under the New York Convention and the European conventions on arbitration.[679] On this basis, a wide interpretation of the arbitration exclusion that encompasses all of the matters intended to be dealt with by other instruments on arbitration should be given.[680] In particular, any matters governed by the New York Convention, the 1961 European Convention and the 1966 European Convention should not fall within the scope of the Recast Regulation. By way of reminder, the 1966 European Convention deals with the validity of arbitration agreements; appointment of arbitrators; the right for an arbitrator to rule on their own jurisdiction; arbitral proceedings; awards and appeals of awards; enforcement of awards; and, compromises entered into before arbitrators.[681] Such an interpretation also sits in line with Recital 12 of the Recast Regulation.

Brussels Convention only if they constitute the principal subject matter of the action. The Advocate General was clearly in favour of a narrow interpretation of the arbitration exclusion.

[677] See Chapter 1, pp 48 *et ff*.

[678] Evrigenis & Kerameus Report, p 298/9.

[679] See Chapter 2, pp 58 *et ff*.

[680] This approach accords with that given to the exclusion of "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" in Recast Regulation, Art 1(2)(b), which excludes matters dealt with by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19 ('Recast Insolvency Regulation'). It was confirmed in *Seagon v Deko Marty Belgium NV (C-339/07)* EU:C:2009:83; [2009] 1 WLR 2168 that the predecessors to both instruments were intended to provide mutually exclusive codes in relation to jurisdiction, with the Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1) dealing with jurisdiction in insolvency and insolvency-related proceedings and with the Jurisdiction Regulation providing rules on jurisdiction in all other civil and commercial matters. See further, McCormack, G., 'Reconciling European conflicts and insolvency law' (2014) 15(3) *EBOR* 309-336.

[681] See Chapter 2, pp 61 *et ff*.

When compared to the other exclusions, it is obvious that the arbitration exclusion is *sui generis*. The other exclusions in Article 1 of the Recast Regulation refer merely to certain classes of disputes, whereas the arbitration exclusion omits a general category of dispute resolution from the Recast Regulation, not to mention one where most of the disputes concern civil and commercial matters.[682] As expressed by Briggs, "it is unwise to be dogmatic about whether the issue is civil or commercial, or arbitration: it is usually both, and the exclusion must be understood accordingly".[683]

Also, when reviewing the arbitration exclusion, the Jenard Report does not qualify the arbitration exclusion as it does the other exclusions, nor are any examples given as to circumstances where proceedings relating to arbitration may nevertheless fall within the Brussels Convention.[684] This supports the notion that the arbitration exclusion sits quite far apart from the other exclusions.

III. MATTERS REQUIRING FURTHER CLARIFICATION

This Part of the Chapter discusses the additional issues that require further clarification in spite of, or perhaps because of, Recital 12. Some suggest that Recital 12 has in reality muddied the waters so that there is even more confusion than before. For example, Merkin & Flannery argue that Recital 12 "will do little to clear the air: it is confusing, internally inconsistent and ambivalent as to its effect in many respects. Its drafters have unwittingly fallen headfirst into the ditch separating litigation and arbitration, causing significant damage, so much so that one is left wondering what their true intentions were".[685]

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[682] Petrochilos, G., 'Arbitration and interim measures: in the twilight of the Brussels Convention' (2000) 1(Feb) *LMCLQ* 99-112, p 99.

[683] Briggs, *Private International Law in English Courts*, [4.78].

[684] See e.g. Jenard Report, p 59/12, where it states "Proceedings relating to bankruptcy are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded". The European Union Convention on Insolvency Proceedings ('Bankruptcy Convention') was the predecessor to the Insolvency Regulations mentioned in footnote 680 above.

[685] Merkin & Flannery, p 285.

A. Provisional and protective measures

An EU Member State court exercising substantive jurisdiction over a dispute is able to order any provisional and protective measures that its procedural law allows,[686] save for anti-suit injunctions aimed at precluding proceedings before another EU Member State court.[687] Equally, as per the ECJ judgment in *Van Uden*, EU Member State courts that *do not* have substantive jurisdiction over proceedings already commenced before another EU Member State court may also order provisional and protective measures, e.g. freezing injunctions. According to Article 35 of the Recast Regulation,[688] it appears that such proceedings remain *outside* the scope of the arbitration exclusion in the Recast Regulation.[689]

As provisional measures are deemed to be granted in 'parallel' proceedings, it does not matter if another EU Member State court has exclusive jurisdiction over the merits of the case, or, according to the ECJ, if the parties have agreed to settle their disputes by way of arbitration. An order for such measures must be provisional to the extent that it will be reversed if it is later found that the order should not have been made and there must be a real connecting link to the EU Member State court that makes the order.[690]

The crucial distinction between ancillary and parallel measures remains to be determined, although in practice it should not be difficult to determine whether measures affect the arbitral process or not.[691] As a general rule of thumb, if the measures affect the arbitral process, they should fall within the arbitration exclusion.

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[686] *Van Uden*; *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 303; [2008] 2 Lloyd's Rep 128; [2009] QB 450; Briggs, *Private International Law in English Courts*, [4.307].

[687] The prohibition on anti-suit injunctions is discussed in Chapter 4.

[688] Recast Regulation, Art 35, provides "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter". See the equivalent provisions in Brussels Convention, Art 24 and Jurisdiction Regulation, Art 31.

[689] *cf. Mietz v Intership Yachting Sneek BV (C-99/96)* EU:C:1999:202; [1999] ECR I-2277, where the ECJ held that certain measures classified as provisional and/or protective measures under the national law of an EU Member State may not fall within the definition provided in Brussels Convention, Art 24.

[690] *Van Uden*, [48]; Briggs, *Private International Law in English Courts*, [4.308].

[691] Ambrose, C., 'Arbitration and the free movement of judgments' (2003) 19(1) *Arbitration Int* 3-26, pp 23-24.

It has been argued that the ECJ's judgment in *Van Uden* is difficult to reconcile with the terms of Article 24 of the Brussels Convention, given that the arbitration agreement in question was to the effect that no court of any Contracting State could have had jurisdiction in relation to the dispute between the parties.[692] The wording of the Article remains the same in the Recast Regulation.[693] However, as there is no clarification on this point within Recital 12, it is assumed that the ECJ judgment in *Van Uden* remains correct in the light of the Recast Regulation. This is presumably preferable for parties, as, if orders for provisional and protective measures were instead deemed to be ancillary to arbitration as explained in Recital 12, they would not be required to be recognised by other EU Member State courts in accordance with the rules on recognition and enforcement in the Recast Regulation.

B. Parallel arbitral and court proceedings

As discussed above,[694] the Recast Regulation does not preclude parties from commencing or continuing arbitration proceedings. This is because the Regulation binds only the courts of EU Member States and not arbitrators or arbitral tribunals.[695] Accordingly, irrespective of the undesirability of parallel proceedings, there is nothing in the Recast Regulation that expressly gives primacy to arbitration or litigation *proceedings* where each forum is seised of the same matter between the same parties. This issue is discussed further in the following Chapter.

C. Mandatory EU law

Three days after Wathelet delivered his Opinion in *Gazprom*, Advocate General Jääskinen provided his Opinion in *CDC*.[696] The case was mainly concerned with the interpretation of Articles 5(3), 6(1) and 23 of the Jurisdiction Regulation, although the Advocate General also addressed the role of arbitration agreements with regard to the enforcement of mandatory EU cartel law.

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[692] Rodger, B., 'Interim relief in support of foreign litigation?' (1999) 18(Jul) *CJQ* 199-202, p 200, *cf*. Petrochilos, G., 'Arbitration and interim measures: in the twilight of the Brussels Convention' (2000) 1(Feb) *LMCLQ* 99-112.

[693] See footnote 688 above.

[694] See pp 118 *et ff* above.

[695] See pp 118 *et ff* above; *Gazprom*; *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm); [2009] 1 Lloyd's Rep 213; [2009] 1 All ER (Comm) 568. See further, Briggs, *Private International Law in English Courts*, [14.22].

[696] *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (C-352/13)* EU:C:2015:335; [2015] QB 906. Advocate General Jääskinen's Opinion was delivered on 11 December 2014.

The respondents were employees of a former cartel, which was one of several companies held by the European Commission to have participated in a single and continuous infringement of the prohibition of cartel agreements, decisions and concerted practices laid down in Article 81 of the EC Treaty[697] and Article 53 of the *Agreement on the European Economic Area 1992*.[698] The respondents were attempting to rely on jurisdiction and arbitration agreements in unlawful contracts of sale between the suppliers in the cartel and their purchasers to contest the jurisdiction of the German court.

While very little was said on the interplay between arbitration, the Brussels Regime and mandatory EU law, Jääskinen took a divergent approach to the interpretation of arbitration agreements as compared to Wathelet. For Jääskinen, the efficient implementation of mandatory EU cartel law across the EU Member States was paramount.

In sum, Jääskinen argued that the German court was at liberty to interpret the scope of the arbitration agreements in question[699]; that party autonomy permitted parties to agree jurisdiction and arbitration agreements,[700] particularly where they were aware of the claims that may be governed by such agreements; that the scope of the agreements should be determined according to their wording[701]; and, most significantly, that jurisdiction and arbitration agreements should not be interpreted in a way that would impede the full effectiveness and the enforcement of mandatory EU law.[702] On the facts of the case in question, Jääskinen opined that the jurisdiction and arbitration agreements should be interpreted in a manner that would allow delictual claims for breaches of Article 101 of TFEU to be excluded from their scope.[703] If this is correct, the exception to enforcement based on the 'arbitrability' of a dispute could be relied upon.[704]

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[697] Now TFEU, Art 101. The wording of Art 81 is essentially the same as that contained in TFEU, Art 101 and EEA Agreement, Art 53.

[698] *Agreement on the European Economic Area 1992* [1994] OJ L1/3 ('EEA Agreement').

[699] *CDC*, [AG98], [AG127].

[700] *CDC*, [AG99], [AG119].

[701] *CDC*, [AG121], [AG127]-[AG131].

[702] *CDC*, [AG124]-[AG126], [AG132].

[703] Comment by Hess, B., 'Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views' (op cit).

[704] See Chapter 1, pp 48 *et ff*.

Frustratingly, the CJEU did not comment either way on the relationship between arbitration agreements and mandatory EU law. The Court did hold, contrary to Jääskinen's Opinion, that a valid jurisdiction agreement could not be called into question by the requirement of the effective enforcement of the prohibition of cartel agreements.[705] Relying on its judgment in *Trasporti Castelletti*,[706] the CJEU confirmed that the substantive rules applicable to the substance of a case must not affect the validity of a jurisdiction clause.[707] Presumably these sentiments can be extended to arbitration agreements that are deemed valid in accordance with the New York Convention or national law.

Further, it should be noted that Jääskinen believed that the likelihood of provisions of EU competition law not being applied, even by way of public policy rules, was much greater when jurisdiction was conferred on arbitrators or courts of States not bound by the Jurisdiction Regulation or 2007 Lugano Convention.[708] This suggests a completely unjustified lack of trust and respect for the arbitral process and for courts outside the EU and EFTA Member States. Thankfully, the CJEU did not endorse this approach, although it did not expressly reject it either. The CJEU referred only to the systems of legal remedies in the EU Member States, which were to be trusted.[709]

CDC was the first case in which the CJEU has been asked to adjudicate directly on the interaction between provisions of primary law guaranteeing freedom of competition within the EU and the harmonised rules relating to jurisdiction in civil and commercial matters. Previously, the Court of Justice had held that Community law required questions surrounding Article 85 of the EC Treaty to be open to examination by national courts in considering an arbitral award. Therefore, an arbitral award should be annulled by a national court if it contravened Article 85 on the basis of the public policy exception.[710]

[705] *CDC*, [61]-[62].

[706] *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA (C-159/97)* EU:C:1999:142; [1999] ECR I-1597, [51].

[707] *CDC*, [62].

[708] *CDC*, [AG100].

[709] *CDC*, [63].

[710] *Eco Swiss China Time Ltd v Benetton International NV*.

D. Hybrid Clauses

ADR clauses take on many different forms and may not fall within the traditional definition or concept of an arbitration or jurisdiction agreement.[711] Examples include med-arb clauses where mediation is required to be attempted before reverting to arbitration, or clauses where there is a gradation of softer methods, like negotiation before providing for a binding resolution process such as arbitration or adjudication, possibly in the alternative.[712] In addition, some clauses require a certain form of ADR to be attempted, by way of a condition precedent, before recourse to the courts, e.g. so called 'Scott & Avery clauses'.[713]

The straightforward approach would be to classify all ADR clauses as 'arbitration agreements' for the purposes of the Recast Regulation. However, as set out in Chapter 2, the main reason for excluding arbitration is the regime provided by the New York Convention and European conventions on arbitration.[714] There is no equivalent international regime for other ADR methods,[715] so there is scope to argue that such hybrid clauses should not be considered as arbitration clauses where there may be a clash with the provisions of the Recast Regulation. Further, the Arbitration Act 1996 applies only to arbitration proper.[716]

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[711] *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303, where the court held that a negotiation/experts/arbitration agreement was not binding on the parties as to any particular method of dispute resolution such that the court had jurisdiction to determine the dispute.

[712] Nurmela, I., 'Sanctity of dispute resolution clauses: Strategic coherence of the Brussels system' (op cit), pp 127-128.

[713] *Alexander Scott v George Avery* (1856) 10 ER 1121; (1856) 5 HL Cas 811. See also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291; [1993] AC 334.

[714] See Chapter 2, pp 58 *et ff.*

[715] Although Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 ('EU Mediation Directive') aims "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings", Art 1(1).

[716] Merkin & Flannery, p 29.

Difficulties will arise where a hybrid clause requires parties to attempt mediation or arbitration before providing for the exclusive jurisdiction of a court.[717] Whether such clauses fall within the scope of the Recast Regulation will need to be clarified.

IV. CONCLUSION

Recital 12 of the Recast Regulation has certainly clarified many issues that have vexed the courts of EU Member States for decades, although the results are not necessarily welcome. As Recital 12 is not an operative part of the Recast Regulation, a preliminary ruling of the CJEU will be needed before the consequences of the Recital can truly be understood. Notwithstanding the questions that remain to be answered, the following conclusions can be drawn in respect of the arbitration exclusion in the Recast Regulation.

1. In spite of no definition of 'arbitration' being provided in the Recast Regulation, the concept of arbitration remains autonomous.

2. Court proceedings where parties are ultimately referred to arbitration, i.e. where the court grants a stay under section 9(4) of the Arbitration Act 1996 or dismisses the proceedings entirely,[718] fall within the arbitration exclusion.

3. Court proceedings where a court exercises its curial law jurisdiction to support arbitral proceedings fall within the arbitration exclusion. This includes, *inter alia*, proceedings to appoint or dismiss an arbitrator,[719] or to set up the arbitral body[720]; to fix the place of arbitration[721]; to extend the time limit for making awards[722]; and/or, to order security for the costs of the arbitration.[723]

[717] As was the case in *Al-Midani v Al-Midani* [1999] 1 Lloyd's Rep 923.

[718] Recast Regulation, Recital 12, para 1.

[719] *The Atlantic Emperor*; Schlosser Report, p 59/93, [64].

[720] *The Atlantic Emperor*; Evrigenis & Kerameus Report, p 298/10.

[721] Schlosser Report, p 59/93, [64].

[722] Schlosser Report, p 59/93, [64].

[723] *Lexmar v Nordisk,* discussed at pp 111 *et ff* above.

4. In addition, court proceedings concerned with the existence, validity and/or scope of an arbitration agreement and/or proceedings to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with national law[724] fall within the arbitration exclusion.

5. It is not only court proceedings and proceedings before an arbitral tribunal that fall within the arbitration exclusion. Judgments on the validity of an arbitration agreement, irrespective of whether the agreement is found to be valid or otherwise, are not subject to the rules on recognition and enforcement in the Recast Regulation.[725] In the same vein, a declaration that an arbitration agreement binds the parties[726] and/or that the parties must arbitrate is also not subject to the rules on recognition and enforcement in the Recast Regulation.

6. Further, actions before a court or ancillary court proceedings concerning the establishment of the tribunal; the powers of arbitrators; the conduct of the arbitration[727]; and/or, any other aspects of the arbitration procedure fall within the arbitration exclusion.

7. It is clear that an application for an anti-suit injunction in support of arbitral proceedings has arbitration as its subject matter.[728] Accordingly, an application before a court for an

[724] Recast Regulation, Recital 12, para 1.

[725] Recast Regulation, Recital 12, para 2; Schlosser Report, p 59/93, [64]. This means that the judgment in *The Lake Avery*, where Clarke J held that a declaratory action (and the resulting order) regarding the existence or validity of an arbitration agreement was indistinguishable from an action for the appointment of an arbitrator and therefore fell within the arbitration exception, is correct. Conversely, the judgment in *The Heidberg (No 2)*, that a judgment of a French court on the valid incorporation of an arbitration clause did not fall within the arbitration exclusion and must therefore be recognised under the Brussels Convention, can no longer be regarded as good law. Diamond QC also held that breach of the arbitration agreement was not a valid defence under the Brussels Convention to refuse recognition and enforcement of a judgment. These judgments are discussed at pp 104 *et ff* above. These issues are dealt with further in Chapter 5.

[726] Thereby confirming the High Court decision in *The Ivan Zagubanski*. See also *The Hari Bhum (No 1)*. These judgments are discussed at pp 1119 *et ff* above.

[727] Recast Regulation, Recital 12, para 4.

[728] *West Tankers*; Briggs, *Private International Law in English Courts*, [4.80].

anti-suit injunction should be described as ancillary to the arbitral proceedings and therefore outside the scope of the Recast Regulation.[729]

8. Finally, court actions or judgments concerning the annulment, review, appeal, recognition or enforcement of an award fall within the arbitration exclusion.[730] This includes proceedings and judgments setting aside the arbitral award.[731]

Contrary to previous case law, very little appears to fall within the scope of the Recast Regulation in so far as arbitration is concerned. This approach is likely to be welcomed by those in favour of a wide interpretation of the arbitration exclusion. As a result, it does not appear correct to say that the Recast Regulation and Recital 12 thereof simply clarify how the arbitration exclusion in the other Brussels Regime instruments should always have been interpreted. Certain academics also take this view. For instance, Briggs notes that the arbitration exclusion in the Jurisdiction Regulation is narrower than that in the Recast Regulation.[732] In addition, Merkin & Flannery argue that the drafters of the Recast Regulation have cast in stone a version of the arbitration exclusion "that goes way beyond the true extent of the original rationale behind the exception".[733]

The consequences of this wide interpretation of the arbitration exclusion once realised are less likely to be applauded. In particular, the issues that are most concerning are the possibility of *lis alibi pendens* on the question of the validity of the arbitration agreement; the non-recognition of judgments on the validity of an arbitration agreement; the likelihood of *lis alibi pendens* on the substantive merits of a dispute; and, the subsequent race to an award or judgment on the merits.

The next two Chapters discuss whether these problems can be avoided. Chapter 4 discusses whether anti-suit injunctions are once again permitted to hold parties to their contractual agreement to arbitrate. Chapter 5 assesses the recognition and enforcement of arbitral awards where there is a conflicting EU Member State court judgment on the same matter between the same parties.

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[729] Even if such proceedings are correctly categorised as falling within the arbitration exclusion, whether anti-suit injunctions are once again permitted under Recast Regulation is dealt with in the next Chapter.

[730] Recast Regulation, Recital 12, para 4; Jenard Report, p 59/43; Schlosser Report, p 59/93, [65]; Evrigenis & Kerameus Report, p 298/10.

[731] Jenard Report, p 59/13.

[732] Briggs, *Civil Jurisdiction and Judgments*, p 78. Arguing the same point, see also, Gaffney, J., 'Should the European Union regulate commercial arbitration' (2017) 33(1) *Arbitration Int* 81-98, p 84.

[733] Merkin & Flannery, p 284.

CHAPTER 4 – ANTI-SUIT INJUNCTIONS

This Chapter examines anti-suit injunctions and their role in holding parties to their contractual obligation to arbitrate their disputes. It sets out the case law of the ECJ that led to a complete prohibition on the use of anti-suit injunctions where a party has commenced proceedings before an EU Member State court either in breach of an exclusive jurisdiction agreement that nominates another EU Member State court or in breach of an arbitration agreement. This Chapter also considers whether the prohibition on anti-suit injunctions in support of arbitration has been reversed by the recasting of the Jurisdiction Regulation, and if unclear, whether the Recast Regulation should be construed as though it has.

It is confirmed that the ECJ's prohibition on anti-suit injunctions only extends to litigants who commence proceedings before EU Member State courts. Removal of the prohibition would consequently align the English courts' power to grant anti-suit injunctions with the power that the courts have continued to exercise in respect of proceedings commenced in breach of jurisdiction and arbitration agreements before courts outside the EU.

This Chapter further confirms that arbitration and litigation are intended to be completely separate methods of dispute resolution, as discussed in the preceding Chapters. It was highlighted in Chapter 2 that the Recast Regulation contains *lis alibi pendens* provisions to avoid irreconcilable judgments being given by courts within the EU. The New York Convention does not provide similar *lis alibi pendens* rules for arbitral proceedings, although there is express scope in the Arbitration Act 1996 for a litigant to request that an English court stays its proceedings on the basis that there is a binding arbitration agreement between the parties. It is therefore necessary to use or develop other devices or rules to prevent the same matter between the same parties being arbitrated and/or litigated in more than one State. As set out in Chapter 2, attempts at precluding parallel arbitral and court proceedings by a partial or full deletion of the arbitration exclusion at the time that the Recast Regulation was being deliberated failed.

Without a supranational regime to prevent parallel arbitral and court proceedings, and subsequently, conflicting arbitral awards and court judgments, parties must be able to rely on options provided by national law to protect their interests. This was the role of the anti-suit injunction. Accordingly, the prohibition on anti-suit injunctions in support of arbitration must be set aside, if it has not already been reversed by the Recast Regulation. Not only does the prohibition

allow for abusive litigation by precluding useful and necessary national law devices aimed at preventing arbitration agreements being breached, it unjustifiably blurs the distinction between arbitration and litigation, the former being outside the scope of the Brussels Regime. The ECJ had no remit to reach the conclusions that it did in its judgment in *West Tankers*.

Further, the changes brought about by Recital 12 of the Recast Regulation are likely to lead to prolific breaches of parties' agreements to arbitrate in bad faith, as Recital 12 has confirmed that EU Member State court judgments on the validity of arbitration agreements do not fall to be recognised by the rules on recognition and enforcement in the Recast Regulation. Binding authority from a court, preferably the CJEU, as to the reversal of the ECJ's prohibition is needed as a matter of urgency.

I. ANTI-SUIT INJUNCTIONS

A. Introduction

An anti-suit injunction[734] is a device usually ordered by a court against a litigant to preclude them from commencing or continuing proceedings before the courts of other States.[735] While anti-suit injunctions were originally developed[736] to preclude proceedings before one court in favour of another, it is now quite common for anti-suit injunctions to be used in support of arbitration.[737]

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[734] For a detailed analysis of anti-suit injunctions, see Raphael, T., *The Anti-Suit Injunction* (Oxford: OUP, 2008) and its *Updating Supplement* (Oxford: OUP, 2010); Joseph, Chapter 12.

[735] See *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749 and the cases cited therein.

[736] The first reported application for an anti-suit injunction can be found in *Love v Baker* (1665) 22 ER 698; (1665) 1 Ch Cas 67, although the application was rejected.

[737] *Pena Copper Mines Ltd v Rio Tinto Co* (1911) 105 LT 846; *Tracomin SA v Sudan Oil Seeds Co Ltd (No 2)* [1983] 2 Lloyd's Rep 624; [1983] 3 All ER 140; *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87; *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500; [2001] 1 All ER (Comm) 530; *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No 2)* [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep 509; *American International Speciality Lines Insurance Co v Abbott Laboratories* [2002] EWHC 2714 (Comm); [2003] 1 Lloyd's Rep 267; *Goshawk Dedicated Ltd v ROP Inc* [2006] EWHC 1730 (Comm); [2006] Lloyd's Rep IR 711; *Kallang Shipping SA v AXA Assurances Senegal (The Kallang)* [2006] EWHC 2825 (Comm); [2007] 1 Lloyd's Rep 160; *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc* [2008] EWHC 914 (Comm);

The anti-suit injunction is addressed to and is binding upon the named litigant and is not intended to directly affect a foreign court.[738] This is because the purpose behind anti-suit injunctions is to hold parties to their contractual agreement to litigate before a pre-agreed forum or to refer their dispute to an arbitral tribunal in a particular location. Alternatively, an anti-suit injunction may be ordered to preclude proceedings that are deemed to be "vexatious or oppressive"[739] or "unconscionable".[740] That is not to say that proceedings commenced in breach of jurisdiction or arbitration agreements are not vexatious, oppressive or unconscionable; the opposite could not be truer. Rather, the distinction is used to refer to anti-suit injunctions that are granted where there has not been a breach of a contractual obligation to litigate or to arbitrate in a particular forum. Anti-suit injunctions therefore aim to protect the 'innocent party'.

Anti-suit injunctions are very popular with litigants before the English courts, as injunctions ordered by the English courts are usually an extremely effective deterrent against vexatious behaviour.[741] Non-compliance with an injunction may result in a party being held in contempt of court, being fined or having any assets within the UK seized.

Today, the English courts' principal statutory basis for the power to grant an anti-suit injunction is derived from section 37(1) of the Senior Courts Act 1981, which enables a court to order an injunction, whether interlocutory or final, in all cases in which it appears to be "just and convenient"

[2008] 2 Lloyd's Rep 269; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889.

[738] See the seminal judgment of Sir John Leach VC in *Bushby v Munday* (1821) 56 ER 908; (1821) 5 Madd 297 in this regard.

[739] *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871; *Airbus Industrie GIE v Patel* [1998] 1 Lloyd's Rep 631; [1999] 1 AC 119; *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749; *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725; [2009] 2 Lloyd's Rep 617; [2010] 1 WLR 1023; *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178; [2009] 1 Lloyd's Rep 59; [2009] 2 All ER (Comm) 213.

[740] *British Airways Board v Laker Airways Ltd* [1985] AC 58; *Midland Bank Plc v Laker Airways Ltd* [1986] QB 689; *South Carolina Insurance Co v Assurantie Maatschappij 'De Seven Provincien' NV* [1986] 2 Lloyd's Rep 317; [1987] AC 24.

[741] Briggs, A., 'Anti-suit injunctions and Utopian ideals' (2004) 120 *LQR* 529.

to do so.[742] 'Final' injunctions are granted under section 37(1), whereas the court can also grant 'interim' injunctions pursuant to sections 44(1) and 44(2)(e) of the Arbitration Act 1996 in relation to arbitral proceedings.[743]

As anti-suit injunctions are equitable remedies, there are a number of matters for the courts to consider when exercising their discretion to grant an injunction. It would be wrong to assume that the English courts grant anti-suit injunctions as a matter of course. There are plenty of examples, both recent and historical, where the English courts have declined to exercise their discretion and have refused to grant the requested injunction.[744]

In terms of court injunctions that are issued in order to support arbitration, as summarised by Merkin & Flannery,[745] the claimant will need to demonstrate to the court that,

(i) there is a valid arbitration agreement;

(ii) the claim[746] or threatened claim[747] in the foreign proceedings is made by or with the collusion of a party to the arbitration agreement;

(iii) the claim is one which ought properly to fall within the scope of the arbitration agreement[748];

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[742] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889.

[743] Final injunctions in support of arbitration cannot be granted under these sections of AA 1996, *Sokana Industries Inc v Freyre & Co Inc* [1994] 2 Lloyd's Rep 57, p 64. Although, the court does not have to satisfy the provisions of both Acts when granting an injunction in support of arbitration, *Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo)* [2015] EWHC 1974 (Comm); [2015] 2 Lloyd's Rep 578.

[744] *Petter v EMC Europe Ltd* [2015] EWHC 1498 (QB), although the injunction was granted on appeal, [2015] EWCA Civ 828; [2015] CP Rep 47; *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14; [2012] 1 Lloyd's Rep 376; [2012] 2 All ER (Comm) 225; *Markel International Co Ltd v Craft (The Norseman)* [2006] EWHC 3150 (Comm); [2007] Lloyd's Rep IR 403; *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749; *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510; *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461; *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119; *Evans Marshall & Co Ltd v Bertola SA (No 1)* [1973] 1 Lloyd's Rep 453; [1973] 1 WLR 349.

[745] Merkin & Flannery, p 189, citing *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644; [2012] 1 Lloyd's Rep 649.

[746] *Louis Dreyfus Commodities Kenya Ltd v Bolster Shipping Co Ltd* [2010] EWHC 1732 (Comm); [2011] 1 Lloyd's Rep 455.

[747] *Shell International Petroleum Co Ltd v Coral Oil Co Ltd (No 1)* [1999] 1 Lloyd's Rep 72.

(iv) the claim is made without delay[749];

(v) the claimant has not submitted to the jurisdiction of the foreign court;

(vi) the respondent is amenable to the jurisdiction of the English court[750]; and,

(vii) on the balance of convenience, it is right to make the order.[751]

The English courts in turn uphold foreign anti-suit injunctions restraining proceedings in England.[752] The same is true of other, mainly common law, jurisdictions that ordinarily grant anti-suit injunctions.[753]

An arbitral tribunal can also issue an anti-suit injunction restraining a party from commencing or continuing proceedings in breach of an arbitration agreement.[754] Parties are however free to exclude

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[748] *Bankers Trust Co v PT Jakarta International Hotels and Development* [1999] 1 Lloyd's Rep 910; [1999] 1 All ER (Comm) 785; *American International Specialty Lines Insurance Co v Abbott Laboratories* [2002] EWHC 2714 (Comm); [2003] 1 Lloyd's Rep 267; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66; [2010] 2 Lloyd's Rep 543.

[749] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87; *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510; *Verity Shipping SA v NV Norexa (The Skier Star)* [2008] EWHC 213 (Comm); [2008] 1 Lloyd's Rep 652; *ADM Asia-Pacific Trading PTE Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm); *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360; [2016] 1 WLR 2231.

[750] *Glencore International AG v Metro Trading International Inc (No 3)* [2002] EWCA Civ 528; [2002] 2 All ER (Comm) 1.

[751] *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66; [2010] 2 Lloyd's Rep 543; *Transfield Shipping Inc v Chiping Xinfa Huaya Alumina Co Ltd* [2009] EWHC 3629 (QB); *Malhotra v Malhotra* [2012] EWHC 3020 (Comm); [2013] 1 Lloyd's Rep 285; [2013] 2 All ER (Comm) 353; *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328; [2013] 1 CLC 596.

[752] *Western Electric Co Incorporated v Racal-Milgo Limited* [1979] RPC 501; *Through Transport Mutual Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; [2005] 1 All ER (Comm) 715; *Walanpatrias Stiftung v Lehman Brothers International (Europe)* [2006] EWHC 3034 (Comm); *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch); [2009] 2 All ER (Comm) 735.

[753] *OT Africa Line Ltd v Magic Sportswear Corp* [2006] FCA 284; [2007] 1 Lloyd's Rep 85 (Federal Court of Appeal, Canada).

[754] *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm); [2008] 1 Lloyd's Rep 230; [2008] 1 All ER (Comm) 593.

an arbitrator's power to issue an anti-suit injunction or to increase its scope to do so.[755] Should a situation arise where the tribunal cannot issue an injunction, the court at the seat of the arbitration should still be able to exercise its supervisory jurisdiction to issue an anti-suit injunction if requested to do so by one of the parties (subject to certain exceptions, including disputes where an EU Member State court has been seised in breach of an arbitration agreement, as discussed further below).

Less common is the 'anti-arbitration injunction', which aims to preclude parties from initiating or continuing arbitral proceedings, as opposed to court litigation.[756] These may be issued, for example, where an arbitrator's impartiality has been questioned or where there are doubts as to whether a valid arbitration agreement exists.[757] While relatively rare, one author has commented that the use of anti-arbitration injunctions "has been spreading at a disturbing pace".[758]

[755] AA 1996, ss 38-39. See also UNCITRAL Model Law, Art 17 and Convention on the settlement of investment disputes between States and nationals of other States, 575 UNTS 159 ('Washington Convention'), Art 47. See also Merkin & Flannery, p 187, footnote 104.

[756] *Hub Power Co (HUBCO) v Pakistan WAPDA* (PLD 2000 SC 841) 14 June 2000 (Supreme Court, Pakistan); (2000) 16 *Arbitration Int* 439; *Société Générale de Surveillance SA (SGS) v Pakistan* (2002 SCMR 1694) (Supreme Court, Pakistan); (2003) 19(2) *Arbitration Int* 182. Schwebel argues that anti-arbitration injunctions threaten the efficacy, integrity and the very viability of international arbitration and that such injunctions appear to violate conventional and customary international law, international public policy and the accepted principles of international arbitration; Schwebel, S. M., 'Anti-suit injunctions in international arbitration – an overview' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005), p 5.

[757] See further AA 1996, s 72(1).

[758] Gaillard, E., 'Introduction' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (op cit), p 1. It is outside the scope of this thesis to consider the use of anti-arbitration injunctions, although some of the considerations discussed in this Chapter apply equally to both types of injunction. For further discussion of anti-arbitration injunctions, see Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (op cit); Merkin & Flannery, pp 11-12.

B. Perception of anti-suit injunctions

In spite of the wide-spread practice of courts in common law countries issuing anti-suit injunctions, injunctions are controversial; are sometimes ignored by courts and/or litigants[759]; and, are often met with distaste,[760] predominantly by courts in civil law countries.

Generally speaking, this is because anti-suit injunctions may be construed as suggesting that one court or tribunal is better placed or equipped to determine the validity and scope of a jurisdiction or arbitration agreement than another. Additionally, it is often argued that the foreign court would have declined jurisdiction where there is an agreement in favour of another court or an arbitral tribunal without input from an external source. For these reasons, the court issuing the anti-suit injunction will often go out of its way to iterate that the injunction is directed at the litigant and not the foreign court.[761] Yet, if complied with, the injunction will have an indirect effect on the foreign court as the proceedings before it will be stayed or terminated.[762]

Courts in other jurisdictions have therefore often made clear their dislike of anti-suit injunctions. For instance, in *Re the Enforcement of An English Anti-Suit Injunction*, service of an anti-suit injunction was refused by the Court of Appeal of Dusseldorf, Germany, in accordance with Article 13(1) of the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and*

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[759] van Houtte, H., 'May court judgments that disregard arbitration clauses and awards be enforced under the Brussels and Lugano Conventions?' (1997) 13 *Arbitration Int* 85.

[760] Foreign courts are often offended by the perceived interference with its sovereignty and no case can provide a better example of such a situation than *Re the Enforcement of An English Anti-Suit Injunction (Case 3 VA 11/95)* [1997] ILPr 320. See also *Marseilles Fret SA v Seatrano Shipping Co Ltd (C-24/02)* EU:C:2002:220 (Tribunal de Commerce de Marseille); *Somali High Seas International Fishing Co (SHIFCO) v Davies,* 29 May 2003 (Tribunale di Latina, Italy).

[761] See e.g. *Markel International Co Ltd v Craft (The Norseman)* [2006] EWHC 3150 (Comm); [2007] Lloyd's Rep IR 403, where Morison J stated "It is traditional for [English] courts, when making an anti-suit injunction to emphasise that it is an order directed to a party and not to the court and is not to be seen as an interference with the foreign court's process. Courtesy alone demands that such statements be made; however, the reality is that it is to be seen as an interference with another court's jurisdiction", [30].

[762] *Ibid*. According to Raphael, there is a growing acceptance that the anti-suit injunction does indirectly interfere with the foreign court's jurisdictional sovereignty, see Raphael, T., *The Anti-Suit Injunction*, [1.16] and the cases cited at footnote 59 therein.

Commercial Matters 1965[763] on the basis that service was likely to infringe German sovereignty.[764] In their judgment, the German Court of Appeal gave a strong indication of their distaste for such injunctions.[765] The German Court of Appeal held that the fact that the injunction was not directly addressed to the German courts had no bearing on their decision, as it was likely to influence directly the work of the German courts and to constitute interference with Germany's sovereignty. The German Court of Appeal also deemed an anti-suit injunction to be inadmissible according to the Anglo-Saxon concept of justice.[766]

The English courts have also been provided with evidence that the French,[767] Italian[768] and Finnish[769] courts would not look favourably on anti-suit injunctions. Such hostility presumably arises as few comparable remedies, if any, exist in civil law jurisdictions.[770] That being said, certain civil law

[763] 658 UNTS 163. Art 13(1) provides "Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security".

[764] *Re the Enforcement of An English Anti-Suit Injunction (Case 3 VA 11/95)* [1997] ILPr 320, [12].

[765] The German Court of Appeal stated "injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts). Furthermore, foreign courts cannot issue instructions as to whether and, if so, to what extent (in relation to time-limits and issues) a German court can and may take action in a particular case", *Ibid.* [14].

[766] *Ibid*. [14]-[19].

[767] In *The Ivan Zagubanski*, evidence was given that the French court would consider "the imposition of an anti-suit injunction by an English court [as] a grossly offensive intrusion of its own functioning. This is particularly the case in international arbitration where French courts have a long-standing adherence to the provisions of the 1958 New York Convention", p 124. Although, in that case, Aikens J did not believe that this statement accorded with the actual opinion of French judges. *Cf*. *In Zone Brands International Inc v In Beverage International* (Arrêt n° 1017 du 14 octobre 2009 (08-16.369/08-16.549)); [2010] ILPr 30 (Cour De Cassation, First Civil Chamber).

[768] *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240.

[769] In *The Hari Bhum (No 1)*, there was evidence that the Finnish courts would not recognise or give effect to an anti-suit injunction, [77].

[770] Asariotis, A., 'Antisuit Injunctions for Breach of a Choice of Forum Agreement: A Critical Review of the English Approach' (2000) *YEL* 447.

jurisdictions have remedies similar to anti-suit injunctions[771] and/or there are instances of courts in civil law countries upholding anti-suit injunctions issued by foreign courts.[772]

Notwithstanding the opposition to anti-suit injunctions, the English courts are not deterred and the potential attitude of foreign courts is often treated as irrelevant, especially if the anti-suit injunction is ordered in support of a jurisdiction or arbitration agreement. Further, irrespective of the innocent party justification, injunctions also aim to retain the jurisdiction of a court or tribunal which has *itself* already determined that it is the most appropriate forum for the resolution of the dispute in question.

For example, in *The Angelic Grace*,[773] Millett LJ stated that "the time has come to lay aside the ritual incantation that [the jurisdiction to grant an anti-suit inunction] is a jurisdiction which should only be exercised sparingly and with great caution […] where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced".[774]

Also, during the first instance proceedings to set aside an interim anti-suit injunction in *West Tankers*,[775] it was submitted that the Sicilian court would regard anti-suit injunctions as unenforceable and probably as either neutral or irrelevant to its jurisdiction. Colman J determined that the Sicilian court would simply ignore the anti−suit injunction and would go on to decide

[771] See the examples provided in Raphael, T., *The Anti-Suit Injunction*, [1.02], footnote 2, of remedies used in Scotland, Québec, Netherlands, France, Belgium and even Germany.

[772] See Raphael, T., *Updating Supplement*, [1.02] noting, in particular, the judgment in *In Zone Brands International Inc v In Beverage International* (op cit), where the French Cour de Cassation upheld the enforcement of an American anti-suit injunction to enforce an exclusive jurisdiction clause.

[773] *The Angelic Grace* [1995] 1 Lloyd's Rep 87.

[774] *Ibid*. p 96. Millett LJ justified his position stating that "without [an injunction] the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case", p 96. Even though the Italian court had been first seised, there was no argument that the granting of an anti-suit injunction was incompatible with the Brussels Convention.

[775] *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240.

whether to stay the proceedings on the grounds of the arbitration clause.[776] Nevertheless, Colman J concluded that whatever terminology is adopted, "offended", "affronted" or "contrary to comity", evidence that the foreign court would treat the order as an impermissible exercise of jurisdiction by the English courts is, as a matter of English private international law rules, not in itself any reason to withhold such an order to procure compliance with an agreement to arbitrate.[777]

Perhaps the perception on the Continent is the reason why a Resolution[778] was adopted in 2003 by the Institut de Droit International on the principles for determining when the use of the doctrine of *forum non conveniens* and anti-suit injunctions was appropriate. Principle 5 of the Resolution states

> "Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates and insolvency".

As will be seen, this Resolution is now futile, given that EU Member State courts are precluded from applying the doctrine of *forum non conveniens*[779] and granting anti-suit injunctions.[780]

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[776] Colman J stated that the Italian courts "would not treat [the injunction] as having any effect on their own jurisdiction to determine the point. It is thus implicit that an anti-suit injunction would be regarded as an ineffective attempt to anticipate the issue in the Italian proceedings which could be ignored", *Ibid.* [44]-[45].

[777] *Ibid*. [51].

[778] Institut de Droit International, Bruges Session 2003, Second Commission, 2 September 2003, *The principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate*, available http://www.idi-iil.org/app/uploads/2017/06/2003_bru_01_en.pdf (accessed 07/04/2018).

[779] *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02)* EU:C:2005:120; [2005] 1 Lloyd's Rep 452; [2005] QB 801.

[780] The Resolution was adopted prior to the ECJ judgments in *Gasser v MISAT*, *Turner v Grovit* and *West Tankers*, and is now of little relevance. It is interesting to note, however, that the Institut, as late as 2003, accepted the granting of anti-suit injunctions as a valid device to hold partiers to their contractual agreement to litigate or arbitrate in a particular forum and/or to preclude unreasonable or oppressive conduct.

II. THE ECJ'S PROHIBITION ON ANTI-SUIT INJUNCTIONS

A. *Gasser v MISAT*

Although unconcerned with anti-suit injunctions, the ECJ judgment in *Gasser v MISAT*[781] assists in setting the scene for what turned out to be a complete overhaul in approach to cross-border litigation for English lawyers. The case concerned the relationship between Article 17 of the Brussels Convention on exclusive jurisdiction agreements[782] and Articles 21 and 22 dealing with *lis alibi pendens*.[783]

The English Court of Appeal had already addressed the relationship between Articles 17, 21 and 22 of the Brussels Convention some ten years earlier in *Continental Bank NA v Aeakos Compania Naviera AS*.[784] The Court of Appeal in that matter held that if Article 17 applied (which the court held that it did on the facts before it), its provisions took precedence over the provisions of Articles 21 and 22. Steyn LJ commented that "the structure and logic of the Convention convincingly points to this conclusion" and the principle of party autonomy, as enshrined in Article 17, could not countenance the conclusion that Article 21 prevailed.[785] Steyn LJ's "critical point" was that there was nothing in the Brussels Convention that was inconsistent with the power of an English court to grant an anti-suit injunction, the objective of which was to secure the enforcement of an exclusive jurisdiction agreement.[786] The Court of Appeal held that this was a "paradigm case" for the granting

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[781] *Erich Gasser GmbH v MISAT Srl (C-116/02)* EU:C:2003:657; [2004] 1 Lloyd's Rep 222; [2005] QB 1 ('*Gasser v MISAT*').

[782] Brussels Convention, Art 17 refers to circumstances where parties have agreed for a court of a Contracting State to have exclusive jurisdiction over their disputes.

[783] Brussels Convention, Art 21 refers to situations where two courts in different Contracting States have been seised of a matter concerning the same cause of action and between the same parties. In such situations, the court second-seised is obliged to stay its proceedings until the court first-seised has determined whether or not it has jurisdiction. Brussels Convention, Art 22 refers to 'related actions', where the court second-seised has the option of staying its proceedings in favour of the court first-seised if it is expedient to hear the matters together.

[784] *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505; [1994] 1 WLR 588.

[785] *Ibid*. p 511. See further *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep 177; *IP Metal Ltd v Ruote Oz SpA (No 1)* [1993] 2 Lloyd's Rep 60; *Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA (The Filiatra Legacy) (No 2)* [1994] 1 Lloyd's Rep 513.

[786] *Continental Bank NA v Aeakos Compania Naviera SA*, p 511.

of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement.[787] Somewhat ironically, in rejecting a request for a reference to the ECJ for a preliminary ruling, the Court of Appeal stated "the more obvious the answer to a question is the less authority there sometimes is on it. We entertain no doubt about the answer to the proposed question".[788]

Reaching the opposite verdict in *Gasser v MISAT*, the ECJ controversially held that Article 21 required an EU Member State court that had been second seised, whose jurisdiction had been selected under a jurisdiction agreement, to nevertheless stay proceedings until the EU Member State court first seised had declared that it had no jurisdiction.[789] The ECJ also held that Article 21 could not be derogated from where the duration of proceedings before the EU Member State court first seised was excessively long.[790] The ECJ dismissed concerns outlined by the UK government in relation to proceedings brought in bad faith stating, "the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause, are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and purpose".[791]

Consequently, the ECJ judgment in *Gasser v MISAT* overruled the UK Court of Appeal judgment in *Continental Bank NA v Aeakos Compania Naviera AS* to the dissatisfaction of many. It was not only English courts and practitioners that were frustrated with the ECJ's judgment. Discontent was subsequently displayed by the Higher Regional Court of Innsbruck, Austria, in *Erich Gasser GmbH and MISAT Srl*.[792] The Higher Regional Court declared that the ECJ had "refused" to interpret Article 21 of the Brussels Convention narrowly and had instead postulated a broad interpretation of 'subject-

[787] *Ibid.* p 512.

[788] *Ibid*. p 512.

[789] *Gasser v MISAT*, [54].

[790] *Ibid*. [73].

[791] *Ibid*. [53]. The ECJ judgment has now been overturned by Recast Regulation, Arts 25 and 31(2). See further, Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (2016) (Jul/Aug) *STL* 1-4.

[792] *Erich Gasser GmbH and MISAT Srl (Case 4 r 41/02i)* [2003] ILPr 11 (Oberlandesgericht Innsbruck).

matter of the action' with reference to the concept of irreconcilability in Article 27(3) of the Convention.[793]

B. *Turner v Grovit*

If the full force of the ECJ's jurisprudence had not already been felt in the UK, the ECJ's judgment in *Turner v Grovit*[794] sent shockwaves that dramatically changed English law and the English courts' ability to grant anti-suit injunctions.

In *Turner v Grovit*, proceedings had been brought by Mr Turner before an employment tribunal in the UK for unfair dismissal. Objections to the tribunal's jurisdiction were dismissed and the tribunal upheld Mr Turner's claim, although a further appeal was made to the Court of Appeal. Proceedings were also commenced against Mr Turner by the second and third respondents in Spain for breach of his service agreement. The English Court of Appeal granted an anti-suit injunction restraining further steps being taken in the Spanish proceedings and requiring the respondents to discontinue those proceedings.[795] The anti-suit injunction was granted on two grounds, namely, (1) the Spanish proceedings were an abuse of the English proceedings; and, (2) the proceedings in both courts had the same cause of action, such that the English court was the court first seised and Article 21 of the Brussels Convention required the Spanish court to stay its proceedings.[796]

Subsequently, before the House of Lords,[797] it was argued that the power to grant anti-suit injunctions no longer existed in relation to proceedings in other Contracting States. Lord Hobhouse, with whom the other Law Lords agreed, forcefully opined that an English court's power to grant an

[793] *Ibid*. [14]. Brussels Convention, Art 27(3) provides "A judgment shall not be recognized […] if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought".

[794] *Turner v Grovit (C-159/02)* EU:C:2004:228; [2004] 2 Lloyd's Rep 169; [2005] 1 AC 101.

[795] *Turner v Grovit* [2000] QB 345 (CA).

[796] The House of Lords (*Turner v Grovit* [2001] UKHL 65; [2002] 1 WLR 107) held that the second ground put forward by the Court of Appeal was incompatible with the ECJ's judgment in *Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89)* EU:C:1991:279; [1992] 1 Lloyd's Rep 204; [1992] QB 434, where it was held that one Contracting State could not review the jurisdiction of another Contracting State.

[797] [2001] UKHL 65; [2002] 1 WLR 107.

anti-suit injunction was consistent with the scheme and objectives of the Brussels Convention.[798] Given the apparent uncertainty however, the House of Lords referred the question of compatibility to the ECJ.

The ECJ[799] firmly held that the Brussels Convention precluded a court of a Contracting State from granting an anti-suit injunction in order to restrain a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party was acting in bad faith with a view to frustrating the existing proceedings.[800] The Court relied on its earlier judgment in *Gasser v MISAT* and on the principle of mutual trust, which allegedly underpinned the Brussels Convention.[801] It held that anti-suit injunctions were incompatible with the Brussels Convention and impaired its effectiveness.[802] The fact that an injunction was addressed to the respondent and not directly to the foreign court was held to be irrelevant.[803]

Prior to the ECJ's judgment in *Turner v Grovit* being delivered, doubts were tentatively expressed in academic literature as to whether anti-suit injunctions remained compatible with the Brussels Convention and Jurisdiction Regulation.[804] Even so, the decisions in *Gasser v MISAT* and *Turner v Grovit* were not well-received in England, with one academic terming the Brussels Regime a "pitiless Stalinistic monoculture".[805] Another commented that the judgments had "robbed jurisdiction agreements of the presumption of enforceability and legalised forum shopping in the EU".[806] Another academic considered that the combined effect of the ECJ judgments in *The Atlantic Emperor*, *Gasser v MISAT* and *Turner v Grovit* afforded arbitration agreements a *greater*

[798] For a detailed analysis of Lord Hobhouse's judgment see Ambrose, C., 'Can anti-suit injunctions survive European Community law?' (2003) 52(2) *ICLQ* 401-424.

[799] *Turner v Grovit (C-159/02)* EU:C:2004:228; [2004] 2 Lloyd's Rep 169; [2005] 1 AC 101.

[800] *Ibid.* [31]. In the light of the ECJ decision, the anti-suit injunction imposed by the Court of Appeal was discharged by the House of Lords, *Turner v Grovit* (2004) unreported, 21 October 2004.

[801] *Turner v Grovit*, [24].

[802] *Ibid*. [25]-[29].

[803] *Ibid*. [28].

[804] Ambrose, C., 'Can anti-suit injunctions survive European Community law?' (op cit).

[805] Briggs, A., 'The impact of recent judgments of the European Court on English procedural law and practice' (2005) II 124 *Zeitschrift fur Scweizerisches Recht* 231.

[806] Nurmela, I., 'Sanctity of dispute resolution clauses: Strategic coherence of the Brussels system' (op cit), p 118.

presumption of enforceability than jurisdiction clauses.[807] The ECJ's judgment in *West Tankers* soon put a stop to such outlandish thinking.

C. Decisions of the English courts

Prior to the judgments in *Gasser v MISAT* and *Turner v Grovit*, there were a number of cases before the English courts where English judges attempted to establish whether applications for anti-suit injunctions fell within the arbitration exclusion.

For example, in *Toepfer v Molino Boschi*,[808] Mance J was faced with conflicting proceedings before the English and Italian courts. Even so, Mance J held that an application for an anti-suit injunction did not have the same object or cause of action[809] as a claim for damages pursuant to Article 21 of the Brussels Convention,[810] so the English court was not required to stay its proceedings. Notably, Mance J was of the opinion that an injunction "would itself appear likely to be entitled to recognition abroad under [the Brussels Convention]" and that if the English court were to determine whether the Italian claims were arbitral, i.e. whether the arbitration agreement was binding, the Italian court would be bound by the English court's decision.[811]

Adopting a similar approach in *The Ivan Zagubanski*,[812] Aikens J held that "the object of the claim for an "anti-suit" injunction (assuming the arbitration agreements are valid and binding) is to make the Defendants adhere to their contractual agreement to resolve disputes by arbitration in London by using the English Court's powers to grant injunctive relief. The principal focus or essential subject matter of that claim is therefore also arbitration, because the claim is for relief to enforce the

[807] Nurmela, I., 'Sanctity of dispute resolution clauses: Strategic coherence of the Brussels system' (op cit).

[808] See the earlier discussion of this case at Chapter 3, pp 108 *et ff*.

[809] Referring to the ECJ's preliminary ruling in *The Tatry*. The preliminary ruling on Brussels Convention, Arts 21 and 22 was requested by the UK Court of Appeal, *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj* [1992] 2 Lloyd's Rep 552.

[810] Mance J considered that the Italian proceedings required an examination of the terms and performance of the contract, whereas the proceedings in England were seeking to stop any such examination taking place.

[811] *Toepfer v Molino Boschi*, [12]. See further Chapter 3, pp 108 *et ff* and Chapter 5, pp 186 *et ff* on whether this position is correct under the Recast Regulation.

[812] See the earlier discussion of this case at Chapter 3, p 111.

arbitration agreement".[813] Accordingly, it was held that applications for injunctions fell within the arbitration exclusion.

Importantly, in *The Hari Bhum (No 1)*,[814] the Court of Appeal declined to stay its proceedings concluding that there was nothing in the Brussels Convention to prevent courts of a Contracting State from granting an injunction to restrain a claimant from commencing proceedings in another Contracting State in breach of an arbitration agreement. The Court of Appeal confirmed that the principles outlined in *The Angelic Grace* continued to apply where a claimant brought proceedings in courts of non-Contracting States to the Brussels Convention in breach of an arbitration agreement.[815] Regarding proceedings brought in a court of a Contracting State, the Court surmised "there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute would be referred to arbitration in England. The English Court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state".[816] Accordingly, the Court of Appeal rejected the submission of counsel that a court should not grant an anti-suit injunction.[817]

As mentioned in Chapter 3, in spite of the judgments in *Gasser v MISAT* and *Turner v Grovit*, the English courts continued to issue anti-suit injunctions in order to hold parties to their agreements to arbitrate, as arbitration was excluded from the Jurisdiction Regulation.[818] In particular, the English courts in the *West Tankers* litigation did not consider the prohibition to extend to arbitration.

[813] *The Ivan Zagubanski*, [100].

[814] See the earlier discussion of this case at Chapter 3, pp 111 *et ff.*

[815] *The Hari Bhum (No 1)*, [89].

[816] *The Hari Bhum (No 1)*, [91].

[817] *The Hari Bhum (No 1)*, [92]. However, having regard to all the circumstances of the case and the fact that New India was not a direct party to the arbitration agreement, as well as the reasoning underlying the approach in *Turner v Grovit*, the Court set aside the anti-suit injunction on the basis that it would not be 'just and convenient' to grant it, [97].

[818] See the cases cited at Chapter 3, footnote 526.

1. The Judgment of the English High Court in *West Tankers*

The High Court[819] was concerned with the insurers' application to set aside the interim anti-suit injunction.[820] Colman J opined that, although ERG's claim was confined to its uninsured losses, there was complete overlap between the arbitral proceedings and the Sicilian court proceedings, as the owners sought a declaration that they were under no liability for the damage caused by the collision. As the High Court was bound by the Court of Appeal decision in *The Hari Bhum (No 1)*, Colman J held that the reasoning of the ECJ in *Turner v Grovit* was inapplicable to anti-suit injunctions in respect of breaches of arbitration agreements, as they fell outside the scope of the Jurisdiction Regulation.[821]

As regards issuing an anti-suit injunction against the subrogated insurers, Colman J held that "where a subrogated insurer commences proceedings in a foreign court inconsistently with an agreement to arbitrate such a claim which is binding as between the assured and the debtor, the reasoning and approach to the grant of the anti−suit injunction in the *Angelic Grace* […] is as applicable to that insurer as it would have been to the assured had the foreign court proceedings been commenced by that assured. The fact that the subrogated insurer would not commit an actionable breach of contract vis-à-vis the debtor by commencing the court proceeding would in such circumstances be in principle irrelevant".[822] Colman J concluded that the proceedings were a "clear case" for an anti-suit injunction and substituted the interim anti-suit injunction for a permanent injunction.

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[819] *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240.

[820] Insurers argued that the proceedings concerned 'civil and commercial' matters falling within the scope of the Jurisdiction Regulation and that the anti-suit injunction was incompatible with the ECJ decision in *Turner v Grovit*. Alternatively, insurers argued that the court should not have exercised its discretion and granted the anti-suit injunction in the light of (1) the judgment in *Turner v Grovit*; (2) NYC, Art II; and, (3) the fact that issues of Italian law were said to arise. They also argued that, as subrogated insurers, they were not bound by the arbitration clause in the charterparty.

[821] *West Tankers* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240, [48].

[822] *Ibid.* [67]-[68]. Colman J held that the decision of the Court of Appeal in *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279, indicated "that it will normally be appropriate to grant an anti−suit injunction against a subrogated insurer who pursues a claim by court proceedings inconsistently with an arbitration agreement binding on its assured and notwithstanding that the insurer has not become liable for damages for breach of the agreement to arbitrate. Were it otherwise a debtor would be deprived by operation of subrogation of an accrued contractual entitlement to

2. The warning of the House of Lords

The matter came before the House of Lords[823] by way of 'leapfrog appeal'.[824] The main issue was whether an EU Member State court could grant an anti-suit injunction to prevent proceedings in breach of an arbitration agreement being commenced before another EU Member State court, where that court had jurisdiction to entertain the proceedings under the Jurisdiction Regulation.

Lord Hoffman opined that extending the application of the Jurisdiction Regulation to orders made in proceedings to which the Jurisdiction Regulation did not apply would go far beyond the reasoning in *Gasser v MISAT* and *Turner v Grovit*, and would ignore the practical realities of commerce.[825] The jurisdiction to restrain foreign proceedings was described as "an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration", which promoted legal certainty and reduced the possibility of conflict between the arbitration award and the judgment of an EU Member State court.[826]

Lord Hoffman expressed the view that "the courts are there to serve the business community rather than the other way round" and the existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement "clearly does not deter parties to commercial agreements". On the contrary, the ability to grant an anti-suit injunction was regarded as one of the advantages which the

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have a claim against him referred to arbitration, a result no less unjust than being deprived of that benefit by the opposite party to the agreement to arbitrate".

[823] *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794.

[824] As the question of whether an anti-suit injunction could be granted had been previously decided by the Court of Appeal, and the Court of Appeal is bound by its own decisions, Colman J certified that the case was suitable for appeal directly to the House of Lords under section 12 of the Administration of Justice Act 1969. The House of Lords agreed.

[825] *West Tankers* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794, [17]. Lord Hoffman emphasised the views of Professor Schlosser, who described the argument that an anti-suit injunction amounted to an indirect interference with a foreign jurisdiction as "divorced from reality".

[826] Referring again to Schlosser, it was noted that an injunction saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between too much involvement that will amount to a submission to the jurisdiction, which was the outcome in *The Atlantic Emperor*, as compared to too little involvement, which may lead to a default judgment. This outcome was "just the kind of thing" that the parties meant to avoid by having an arbitration agreement, [21].

chosen seat has to offer and if EU Member States wished to attract arbitration business, "they might do well to offer similar remedies". Referring to the principle of mutual trust underlined in *Gasser v MISAT* and in *Turner v Grovit*, Lord Hoffman thought it equally necessary that EU Member States should trust the arbitrators under the doctrine of competence-competence or the EU Member State court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.[827]

Lord Hoffman boldly warned the ECJ that "if the [EU Member States] are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will", referring to New York, Bermuda and Singapore, who all exercise the jurisdiction to grant anti-suit injunctions. He concluded "there seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction".[828]

Lord Mance[829] also commented that it was not uncommon for persons bound by arbitration agreements to seek to avoid its application and that anti-suit injunctions issued by the courts of the place of arbitration represented a carefully developed and carefully applied tool which had proved "a highly efficient means to give speedy effect to clearly applicable arbitration agreements".[830] He emphasised that "It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being − however clearly − disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid".[831]

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[827] *West Tankers* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794, [22].

[828] *Ibid*. [23].

[829] Lord Mance additionally noted that, at the time, English authority was against the view that the approach established in *Gasser* and *Turner* extended to the arbitral context, whereas European academic opinion existed both for and against the extension. He argued that the extension would be a "major step", which would affect the choice of venue and efficacy of international arbitration generally, *ibid*. [29]-[30].

[830] *West Tankers* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794, [31].

[831] *Ibid*. [32].

The House of Lords gave "the clearest possible steer to the ECJ, pointing out the considerable harm that could be done to arbitration within Europe if the English courts lost their power to grant anti-suit relief".[832]

3. Opinion of Advocate General Kokott

On 4 September 2008, Advocate General Kokott delivered her Opinion in *West Tankers*.[833] The Advocate General unhelpfully argued that proceedings before an EU Member State court outside the place of arbitration would "result only" if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In such a situation, it would be "unclear" whether there is consensus between the parties to submit their dispute to arbitration.[834] This is, of course, nonsense and there are many examples of parties breaching both jurisdiction and arbitration agreements in bad faith with a view to delaying or even frustrating the proceedings completely.

The Advocate General further argued that there was "no risk" of circumvention of arbitration where a national court has examined and found an arbitration agreement to be valid, as the court would be required to refer the parties to arbitration in accordance with the New York Convention. She considered the seising of a court to be no more than "an additional step in the proceedings", belittling the fact that such an action is also a breach of a party's contractual obligations.[835] The Advocate General also postulated that a party who takes the view that it is not bound by an arbitration agreement cannot be barred from access to courts that have jurisdiction pursuant to the rules in the Jurisdiction Regulation.[836]

As regards parallel proceedings, the Advocate General noted that irreconcilable decisions ought to be avoided but, as the *lis alibi pendens* provisions in the Jurisdiction Regulation did not apply to arbitration, that there was "no mechanism" to coordinate the jurisdiction of arbitral tribunals with the jurisdiction of the national courts.[837] Even so, she considered that a "unilateral" anti-suit

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[832] Merkin, R., 'Anti-suit injunctions: The future of anti-suit injunctions in Europe' (2009) (Apr) *ALM* 1-9, p.2.

[833] *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) (The Front Comor)* [2008] 2 Lloyd's Rep 661; [2009] ECR I-663.

[834] *Ibid*. [67].

[835] *Ibid*. [68].

[836] *Ibid*.

[837] *Ibid*. [71].

injunction was not a suitable measure to rectify the situation. While this assertion was clearly based on the fact that most other EU Member States do not grant anti-suit injunctions, she held that if those EU Member States introduced anti-suit injunctions, reciprocal injunctions would also ensue, i.e. the anti-anti-suit injunction and its counter *ad finitum*. On this basis, she held that, ultimately, the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.[838]

The Advocate General therefore concluded that instead of a solution by way of such coercive measures, a solution by way of law was called for. She suggested that arbitration be included in the Jurisdiction Regulation but until such a time, divergent decisions would have to be accepted.[839]

D. The ECJ judgment in *West Tankers*

The final nail in the coffin came on 10 February 2009, when the ECJ delivered its judgment in *West Tankers*.[840]

In its judgment, the ECJ opined that proceedings which led to the making of an anti-suit injunction may undermine the effectiveness of the Jurisdiction Regulation by preventing the attainment of its objectives.[841] The ECJ felt that this would be the result where such proceedings prevented a court of another EU Member State from exercising the jurisdiction conferred upon it by the Jurisdiction Regulation.[842] As discussed in Chapter 3, the ECJ therefore found it "appropriate" to consider whether the proceedings in Sicily fell within the scope of the Jurisdiction Regulation in order to "ascertain the effects" of the anti-suit injunction on those proceedings.[843] It found that where the subject matter of the dispute, i.e. the claim in tort, fell within the Jurisdiction Regulation, the validity of an arbitration agreement also fell within the Regulation.[844]

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[838] *Ibid*. [72].

[839] *Ibid*. [73].

[840] *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07)* EU:C:2009:69; [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138 ('*West Tankers*').

[841] *West Tankers*, [23]-[24].

[842] *Ibid.*

[843] *West Tankers*, [25].

[844] *West Tankers*, [26].

The ECJ therefore determined that it was "exclusively" for the Sicilian court to rule on the validity of the arbitration agreement and its own jurisdiction under Article 5(3) of the Jurisdiction Regulation. Further, that the use of an anti-suit injunction to prevent a court of a Member State, "which normally has jurisdiction" to resolve a dispute under Article 5(3), from ruling on the very applicability of the Regulation to a dispute brought before it "necessarily amounts to stripping that court of the power to rule on its own jurisdiction".[845]

The ECJ also held that an anti-suit injunction was contrary to the general principle which emerges from "the case law of the Court of Justice" on the Brussels Convention – note, not from the text of the Convention or Regulation – that every court seised itself determines whether it has jurisdiction.[846] The Court restated the principle that, apart from a few limited exceptions, the Jurisdiction Regulation does not authorise the jurisdiction of an EU Member State court to be reviewed by a court in another EU Member State[847] and that "in no case" is a court of one EU Member State in a better position to determine whether the court of another EU Member State has jurisdiction.[848] The ECJ failed to recognise that in reality, when the English court grants an anti-suit injunction, the court has reviewed no more than the contractual agreement to arbitrate and a foreign court's potential jurisdiction is immaterial.

Importantly, the ECJ held that an anti-suit injunction runs counter to the trust which the EU Member States accord to one another's legal systems and judicial institutions, and on which the jurisdiction under the Jurisdiction Regulation is based.[849] It held, "the decisive question is not whether the application for an anti-suit injunction—in this case, the proceedings before the English courts—falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed—the proceedings before the court in Syracuse—do so".[850]

Accordingly, the ECJ concluded that it was incompatible with the Jurisdiction Regulation for an EU Member State court to issue an anti-suit injunction to restrain a party from commencing or

[845] *West Tankers,* [27]-[28].

[846] *West Tankers*, [29] citing *Gasser v MISAT*, [48]-[49].

[847] *Ibid*. citing *Overseas Union Insurance Ltd v New Hampshire Insurance Co,* [24] and *Turner v Grovit*, [26].

[848] *Ibid*. citing *Overseas Union Insurance Ltd v New Hampshire Insurance Co*, [23] and *Gasser v MISAT*, [48].

[849] *West Tankers*, [30] citing *Turner v Grovit*, [24].

[850] *West Tankers*, [33].

continuing proceedings before the courts of another EU Member State on the grounds that such proceedings would be contrary to an arbitration agreement.[851]

While the judgment was not welcomed by English lawyers, it certainly did not come as a surprise.[852] Briggs remarked that "the court's analysis of the legal issues, examinations of authority, insertion of boilerplate paragraphs from previous judgments, assessment of principle and justification of conclusion [did] not quite stretch to two sorry sides of A4", even though it was a Grand Chamber judgment.[853]

III. HAS THE PROHIBITION BEEN REVERSED?

A. Recast Regulation

The Recast Regulation does not expressly prohibit anti-suit injunctions that aim to hold parties to their contractual agreement to litigate before a certain court or to resolve their disputes by way of arbitration, although it does not expressly permit them either.[854] Given the case law that came before it, had the draftsmen wanted to include a provision to this effect, they could easily have done so.

[851] *Ibid*. [32], [34]. The ECJ stated "Nor is it a prerequisite of infringement of the principle of mutual trust, on which the judgment in Turner v Grovit was substantially based, that both the application for an anti-suit injunction and the proceedings which would be barred by that injunction should fall within the scope of the Regulation. Rather, the principle of mutual trust can also be infringed by a decision of a court of a member state which does not fall within the scope of the Regulation obstructing the court of another member state from exercising its competence under the Regulation", [34].

[852] See Knight, C., 'Arbitration and Litigation after West Tankers' (op cit), commenting that the ECJ judgment "was almost tedious in its predictability", p 285; Briggs, A., 'Fear and Loathing in Syracuse and Luxembourg: *The Front Comor*' (2009) 2(May) *LMCLQ* 161-166, describing that the decision was "perfectly predictable", p 162.

[853] Briggs, A., 'Fear and Loathing in Syracuse and Luxembourg: *The Front Comor*' (op cit), p 162.

[854] This is unsurprising given the differing procedural laws of the EU Member States and the CJEU's distaste of anti-suit injunctions.

Further, as will be seen below,[855] anti-suit injunctions are not incompatible with a State's obligations under the New York Convention and may even assist in performance of those obligations. As the Recast Regulation is now expressly "without prejudice" to an EU Member State complying with such obligations, this provides an additional ground for arguing that anti-suit injunctions are once again permitted.

Notwithstanding the above, as will be discussed in Chapter 5, Recital 12 of the Recast Regulation provides that an EU Member State court judgment on the validity of an arbitration agreement is not subject to the rules on recognition and enforcement in the Recast Regulation, irrespective of whether this is decided as a principal issue or as an incidental question.[856] Further, as seen in Chapter 3, the Recast Regulation does not apply to arbitration or court proceedings in support of arbitration.[857] An anti-suit injunction issued in support of arbitration could easily fit nicely within the wide, non-exhaustive list found in the fourth paragraph of Recital 12.[858] It follows that proceedings granting anti-suit injunctions in support of arbitration and anti-suit injunctions themselves are not subject to the rules on recognition and enforcement in the Recast Regulation. In other words, EU Member State courts remain at liberty to ignore such injunctions, or, if an EU Member State court should be so bold, to issue or to uphold an injunction.

Clear binding authority for the proposition that the CJEU judgment in *West Tankers* is no longer good law in the light of the *Recast Regulation* has not yet been provided.

According to Dilworth,[859] "nothing in the legislative history of the Recast Regulation, which left the actual text of the regulation otherwise unchanged [referring to Recital 12], suggests that it was supposed to reverse the decision [in *West Tankers*]".[860] Auda also states that "it is clear that anti-suit injunctions are not permitted under the recast Regulation".[861]

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[855] See the discussion at Section IV(C) below.

[856] Arguably reversing the Court of Appeal judgment in *The Wadi Sudr* and part of the ECJ judgment in *West Tankers*. See further, Chapter 5, pp 186 *et ff*.

[857] Chapter 3, pp 118 *et ff*.

[858] See Chapter 3, p 124.

[859] Dilworth, N., 'Life set upon the Recast: the (recent) past and (near) future of questions of jurisdiction within the EU' (2016) 6 *JIBFL* 362.

[860] *Ibid*. p 363.

[861] Auda, A. G. R., 'The future of arbitration under the Brussels recast Regulation' (2016) 82(2) *Arbitration* 122-128, p 125.

As argued in Chapter 3,[862] arbitral tribunals (as opposed to EU Member State courts) continue to be able to make anti-suit awards, subject to national law, the applicable arbitration agreement and the application of an arbitral institution's rules (if any), and there is nothing in the Jurisdiction Regulation that precludes an EU Member State court from giving effect to such an award.[863] The position is the same under the Recast Regulation.[864]

B. *Gazprom*

In *Gazprom*, the CJEU held that the Jurisdiction Regulation was not applicable to the enforcement of an arbitral award by an EU Member State court, even where the award ordered court proceedings to be withdrawn.[865]

The CJEU made it very clear that concerns of mutual trust due between EU Member State courts do not arise in the context of arbitration. Does this mean that courts are at liberty to issue anti-arbitration injunctions where arbitration is commenced in breach of an exclusive jurisdiction clause? It would appear unlikely.[866]

Arbitral tribunals are able to make anti-suit awards/injunctions in support of arbitration, subject to national law granting such powers to tribunals. The real issue is whether such anti-suit injunctions or awards would be recognised in the EU Member State of enforcement.[867]

IV. SHOULD THE PROHIBITION ON ANTI-SUIT INJUNCTIONS BE LIFTED?

An anti-suit injunction is a flexible mechanism that, on any view, orders performance of the parties' contractual agreement to arbitrate. The arguments in favour of using anti-suit injunctions in support of arbitration are set out here.

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[862] See p 120 above.

[863] *Gazprom*, [35]-[38]. See also Dilworth (op cit), pp 362-36, commenting on *Gazprom*.

[864] See the discussion at Chapter 3, pp 123 *et ff* and Chapter 5 generally.

[865] *Gazprom*, [41].

[866] See Hjalmarsson, J., 'Case roundup – anti-suit injunctions' (2015) Sept *STL* 7-8.

[867] On this point, see Chapter 5.

Further, the English courts' discretion in granting anti-suit injunctions to preclude litigation in States outside the EU has not been affected by the judgments of the ECJ.[868] Accordingly, removal of the prohibition on anti-suit injunctions would bring the power of the English courts in respect of proceedings before EU Member State courts in breach of a jurisdiction or an arbitration agreement back in line with the powers that they have continued to exercise for proceedings outside the EU.

A. Arguments in favour of the use of anti-suit injunctions

1. The principle of competence-competence

As discussed in Chapter 1, courts, arbitrators and parties in various jurisdictions may reach differing conclusions on the validity and scope of an arbitration agreement.[869] In addition, it was seen that one of the most fundamental and widely accepted principles of international arbitration is that of competence-competence, which provides that it is for the nominated arbitral tribunal to rule upon its own jurisdiction.

In this regard, an anti-suit injunction aims to ensure that only one forum determines the validity and scope of an arbitration agreement, i.e. the arbitral tribunal itself. Courts are, of course, entitled to

[868] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889. Recent examples of courts granting injunctions include *Aline Tramp SA v Jordan International Insurance Co (The Flag Evi)* [2016] EWHC 1317 (Comm); [2017] 1 Lloyd's Rep 467 (in order to uphold an incorporated arbitration agreement in the face of national law provisions expressly conferring jurisdiction on local courts); *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366; [2015] 1 Lloyd's Rep 256; [2015] QB 366 (proceedings in Morocco in breach of a jurisdiction agreement); *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusef Cepnioglu)* [2015] EWHC 258 (Comm); [2015] 1 Lloyd's Rep 567; [2015] 1 All ER (Comm) 966 aff'd [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641 (proceedings in Turkey in breach of a London arbitration agreement); *Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo)* [2015] EWHC 1974 (Comm); [2015] 2 Lloyd's Rep 578 (proceedings in China in breach of a London arbitration agreement); *Petter v EMC Europe Ltd* [2015] EWCA Civ 828; [2015] CP Rep 47 (proceedings in the USA where there was an exclusive jurisdiction agreement in favour of the courts of Massachusetts but, as an employee, the claimant had a statutory right to be sued in England), *cf.* the lower court decision where Cooke J declined to issue the injunction [2015] EWHC 1498 (QB).

[869] See Chapter 1, pp 18 *et ff.*

examine whether a disputed arbitration agreement is null and void, inoperative or incapable of being performed in accordance with the New York Convention and/or national law,[870] before it sends the parties to arbitration.[871] A similar assessment will be undertaken before deciding whether or not to grant an anti-suit injunction. Accordingly, where an anti-suit injunction is granted, it is likely to assist in upholding the principle of competence-competence.

2. Prevention of vexatious behaviour and delaying tactics

Vexatious behaviour and delaying tactics are often used to put pressure on the other party to settle or to delay the resolution of the dispute for a number of years. Where proceedings are commenced in breach of an arbitration agreement, it is not a mere coincidence that courts in jurisdictions which are known to be 'slow' are seised. The court may take many years to consider the arbitration agreement, only to ultimately conclude that the agreement was perfectly valid all along.

In the meantime, the arbitral proceedings may have been stayed for a number of reasons, e.g. out of respect for the foreign court; for fear that any arbitral award would not be enforced; or, simply because the innocent party cannot afford to take part in two sets of proceedings. An anti-suit injunction is therefore a valuable tool that can be used to balance the playing field for the innocent party.

Moreover, an anti-suit injunction not only pressures the party in breach of the arbitration agreement to take part in the arbitral proceedings but also reassures the arbitral tribunal that they are right to continue with the proceedings.

3. *Lis alibi pendens* and conflicting decisions

Where an arbitral tribunal chooses to continue with its proceedings irrespective of a foreign court being seised, an anti-suit injunction can be used to avoid parallel litigation, unnecessary or duplicated costs and a race to a judgment or an award. As expressed by Cooke J in *Petter v EMC Europe Ltd*,[872] "Courts have a natural aversion to duplication of proceedings in more than one

[870] NYC, Art II(3).

[871] NYC, Art II(3); AA 1996, s 9(4). See further, Chapter 1, pp 19 *et ff.* The compatibility of anti-suit injunctions with NYC, Art II(3) is discussed further at pp 169 *et ff* below.

[872] *Petter v EMC Europe Ltd* [2015] EWHC 1498 (QB).

jurisdiction with the risk of inconsistent decisions or an ugly rush to judgment in the hope of establishing res judicata".[873]

The litigation in *West Tankers* provides a perfect example of the multiplicity of proceedings that can take place where an anti-suit injunction is not granted. While awaiting the ruling of the ECJ, litigation in England continued with the owner seeking an order under section 18(3) of the Arbitration Act 1996 on the constitution of the arbitral tribunal from the English High Court.[874] On 7 May 2008, Smith J ordered that the respondents were bound by the arbitration agreement and that the dispute between ERG, the owner and the respondents was to be determined as a single reference by the arbitral tribunal that had already been appointed. ERG fully participated in the proceedings, whereas the insurers did not. On 7 October 2008, the arbitral tribunal published its second final award, declaring that the owner was under no liability to ERG and ERG's claim was dismissed. On 12 November 2008, the tribunal published its third final award, declaring, *inter alia*, that the owner was under no liability to the insurers in respect of the collision. The owner swiftly issued proceedings on 20 February 2009 in Trieste, Italy, for the recognition and enforcement of the third award. In spite of the award, the insurers persisted with the proceedings before the Sicilian court.

Even after the ECJ judgment had been delivered, litigation in *West Tankers* continued. On 15 November 2010, Simon J granted leave to the claimant pursuant to section 66(1) of the Arbitration Act 1996 to enforce the award dated 12 November 2008 and judgment was entered against the insurers pursuant to section 66(2) of the 1996 Act.[875] Conversion of an arbitral award into a declaratory judgment was a remedy that had not been tried previously. On 6 April 2011, Field J dismissed the insurers' application for the order of Simon J to be set aside[876] and the Court of Appeal upheld his decision on 24 January 2012.[877]

In addition, on 14 April 2011, the arbitral tribunal issued a final partial award concerning, *inter alia*, the insurers' liability to pay the owner damages in respect of legal fees incurred in the Sicilian

[873] *Ibid*. [61]

[874] *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] EWHC 2184 (Comm).

[875] See Chapter 1, p 28 on AA 1996, s 66.

[876] *West Tankers Inc v Allianz SpA (The Front Comor)* [2011] EWHC 829 (Comm); [2011] 2 Lloyd's Rep 117; [2011] 2 All ER (Comm) 1.

[877] *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27; [2012] 1 Lloyd's Rep 398; [2012] 2 All ER (Comm) 113.

proceedings and to indemnify the owner against any award made against the owner in the Sicilian proceedings, which was greater than the liability of the owner as established in the arbitration. The tribunal concluded that the insurer would not be liable. The owner appealed pursuant to section 69 of the Arbitration Act 1996.[878] The issue before Flaux J was whether the arbitral tribunal was deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law.[879] Flaux J allowed the appeal, holding that the tribunal was not precluded from awarding equitable damages for breach of an arbitration agreement.[880] All of the above appears to have been carried out in an attempt to make any subsequent judgment of the Sicilian court unenforceable in the UK. In 2012, the proceedings were settled, prior to the Sicilian court handing down its judgment in the case.

All of the above could have been avoided if the anti-suit injunction had been upheld by the Sicilian court in the first place.

4. The principle of severability

In accordance with the doctrines of severability,[881] separability[882] and party autonomy,[883] an arbitration agreement survives a contract that may otherwise be found to be void or voidable.[884] The invalidity, termination or suspension of the contract in question is of no consequence to the parties' contractual obligation to arbitrate their dispute. It is only where the arbitration agreement itself is null and void, inoperative or incapable of being performed that a court in a Contracting State to the New York Convention is not obliged to refer the parties to arbitration in accordance with Article II(3) thereof. On this basis, anti-suit injunctions should be granted to uphold arbitration agreements even if the opponent party alleges the contract to be void or voidable.

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[878] See Chapter 1, p 29.

[879] *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103; [2012] 2 All ER (Comm) 395. See Chapter 5, pp 218 *et ff* on damages for breach of an arbitration agreement.

[880] *Ibid.* [78]. As to whether Flaux J's judgment was correct as a matter of English law, see Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, pp 411-414, 416.

[881] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455; [1993] QB 701; *Fiona Trust*. See Chapter 1, footnote 29.

[882] *Ibid*.

[883] AA 1996, s 1(b) discussed at Chapter 1, p 15.

[884] See further Chapter 1, pp 17-18.

5. Obligations under the New York Convention

In accordance with the Vienna Convention, a Contracting State (and a court as an organ of that State) must perform its international obligations in good faith.[885] Where a court orders an anti-suit injunction to preclude a party breaching an agreement to arbitrate before the courts of a foreign State, that court is arguably taking additional steps to ensure compliance with the New York Convention, where it has determined that the arbitration agreement is, at least *prima facie*, valid and binding.

This argument is not particularly persuasive in terms of public international law when the sovereignty of each State is considered. However, if a court of a Contracting State to the New York Convention refuses to issue upon request an injunction where there is a blatant breach of an arbitration agreement, the court's refusal to grant an injunction (if available under its national law) could be equated with 'turning a blind eye' to the breach and thereby conflict with a State's international obligations under the New York Convention.

B. Arguments against the use of anti-suit injunctions

In general, arbitration is supposed to be a private procedure, free from interference by courts. On this basis alone, arguments against the use of anti-suit injunctions issued by courts can be made. These arguments would be 'pro-arbitration'. However, arguments frequently made against the use of anti-suit injunctions in support of arbitration often focus exclusively on the effect of anti-suit injunctions and give no regard to their role in supporting arbitration.

1. The right of access to a court

One particular argument is that an anti-suit injunction denies a party of its right to access a court and, in turn, denies that party justice. On this basis, a court, regardless of what the parties have privately agreed between themselves, should protect the interests of the parties above all else. As expressed by Lévy, "Jurisdiction is something that is declared, not something that can be ordered.

[885] VCLT, Art 26.

Declaring jurisdiction enables the arbitrator to rule on the merits of the dispute before him but does not comprise the power to exclude the jurisdiction of others".[886]

Contrary to this argument, parties continue to have recourse to the courts, as arbitral awards can be appealed and parties can request that the courts of enforcement refuse to recognise and enforce an award. As stated in Chapter 1, it is accepted in England that arbitration agreements cannot completely oust the jurisdiction of the courts.

2. Interference with international comity

As discussed above,[887] notwithstanding their popularity with litigants before the UK courts, anti-suit injunctions were rarely welcomed in other EU Member States, which are, in the main, civil law jurisdictions. This is irrespective of the fact that anti-suit injunctions bind only the party to whom they are addressed and not the courts of another EU Member State, as anti-suit injunctions are seen to pre-empt the decision of a foreign court as to its own jurisdiction and to interfere with principles of international comity.[888] In this respect, it is argued that a court in one EU Member State should not interfere directly or indirectly with another EU Member State's legal system or courts.

3. Anti-suit injunctions are ineffective

Some commentators argue that anti-suit injunctions are of no use or their effect is "relatively limited".[889] Courts, tribunals and litigants may simply ignore them.

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[886] Lévy, L., 'Anti-suit injunctions issued by arbitrators' in Gaillard, E., (ed), (op cit), p 120, cf. *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm); [2008] 1 Lloyd's Rep 230; [2008] 1 All ER (Comm) 593.

[887] See pp 143 *et ff* above.

[888] *Cf*. *In Zone Brands International Inc v In Beverage International* (op cit), where the French Cour de Cassation rejected arguments that anti-suit injunctions interfered with judicial sovereignty or a party's right of access to a court. The concept of 'comity' in this thesis is used in general terms to refer to the mutual courtesy and respect each nation owes to another and the sovereignty of each State, its legal system and its courts. The recognition of foreign judgments and awards also fall within the notion of comity – these issues are addressed in Chapters 1, 2 and 5. For a fuller explanation of the concept of 'comity' in public and private international law, see Raphael, T., *The Anti-suit Injunction*, [1.11] *et ff*; Raphael, T., 'Do as you would be done by? System-transcendent justification and anti-suit injunctions' (2016) 2(May) *LMCLQ* 256-274.

[889] Harris, J., 'Restraint of foreign proceedings – The view from the other side of the fence' (1997) *CJQ* 283.

In *PASF v Bamberger*,[890] the German court refused to uphold an anti-suit injunction issued by the English High Court, arguing that the injunction violated German sovereignty.[891] Nevertheless, the arbitral tribunal in London continued with the proceedings and issued an award on the merits resulting in conflicting judgments in Germany and England. The award of the London tribunal subsequently served as a basis to refuse recognition of the German judgment as the matter was *res judicata*.[892]

Equally, as arbitral tribunals are not organs of a State and are not bound by judgments of foreign courts, a tribunal could similarly disregard an anti-suit or anti-arbitration injunction issued by a foreign court and continue with the proceedings. Presumably, the foreign court would have determined that a disputed arbitration agreement was invalid in order to issue an anti-arbitration injunction. This suggests that the question of whether the arbitration agreement is valid is *res judicata*. However, English law provides a statutory defence to issue estoppel if a judgment is given in breach of an arbitration agreement.[893]

The ramifications for breach of an anti-suit injunction are only really relevant if the party in breach intends to travel to the State where the injunction was issued or if there are assets in that State. If the penalties for breach are of no consequence to the relevant party, the injunction has no teeth.[894]

4. Anti-suit injunctions are unnecessary

Another argument against the use of anti-suit injunctions is that the same purpose can be achieved by courts legitimately refusing to enforce judgments obtained in breach of an arbitration agreement.[895] A court's ability to decline recognition and enforcement of judgments and arbitral awards renders the use of anti-suit injunctions superfluous. That being said, as discussed in Chapters 1 and 2, there are only limited circumstances under the New York Convention and the Recast

[890] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1997] ILPr 73.

[891] *Phillip Alexander Securities & Futures Ltd v Bamberger* (1997) 22 YBCA 872-873.

[892] The next Chapter considers whether the result would be the same under the Recast Regulation; see Chapter 5, pp 197 *et ff*.

[893] CJJA, s 32(4). This principle is discussed further at Chapter 5, pp 199 *et ff.*

[894] See further, Tan, D., 'Damages for breach of forum selection clauses, principled remedies, and control of international civil litigation' (2005) 40 *Tex Int L J* 623.

[895] C*f*. Raphael, T., *The Anti-Suit Injunction*, where arguments to the contrary are provided at [1.02], footnote 3.

Regulation where judgments and awards can be denied recognition and enforcement. Such recognition and enforcement is otherwise mandatory.

In addition, anti-suit injunctions are rarely utilised with a view to settle the dispute in question but merely as tools at a lawyer's disposal to protect their clients' interests. There may be many cases where the use of an injunction is wholly without merit.

Further, it has been noted that "Zurich, Geneva, Stockholm and Paris have all flourished as arbitration centres without their courts granting anti-suit injunctions as a matter of course".[896] By implication, London should be able to prosper as a renowned arbitral centre in spite of the ECJ's prohibition on anti-suit injunctions.

Moreover, following the ECJ judgment in *West Tankers*, numerous 'devices' were developed or used in a new manner in an attempt to avoid the effect of the judgment. These devices included anti-suit injunctions issued by arbitral tribunals; declaratory relief; arbitral awards on the jurisdiction of the tribunal; registering the arbitral award under the New York Convention; and, in addition to these devices, the English courts now appear more willing than they were previously to award damages for breach of the contractual agreement to arbitrate.[897] Each of these devices and the willingness of the courts to award damages are examined in the light of the Recast Regulation in the next Chapter.[898] If one or a combination of these devices provides the required mechanism to prevent a party from breaching its obligation to arbitrate, then there is arguably no longer a need for anti-suit injunctions.

C. Anti-suit injunctions and Article II(3) of the New York Convention

There has been some debate as to whether anti-suit injunctions are inconsistent with Article II(3)[899] of the New York Convention. Article II(3) can be interpreted as requiring the court seised – and only that court – to assess whether the arbitration agreement is null and void, inoperative or incapable of being performed. Accordingly, the issuing of an anti-suit injunction by another court would preclude the court seised from performing its obligations under Article II(3). Conversely, there is no mention

[896] Clifford, P., & Browne, O., 'Lost at sea or a storm in a teacup? Anti-suit injunctions after West Tankers' (2009) 12(2) *IntALR* 19-22, p 21.

[897] See Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424.

[898] See Chapter 5, pp 211 *et ff.*

[899] See Chapter 1, pp 34-36.

in Article II(3), and therefore no prohibition either, of another court's ability to issue an anti-suit injunction.[900] Such an injunction may be issued because the court has already ruled on the validity of the arbitration agreement[901] or in order to allow an arbitral tribunal to rule on its own jurisdiction.

The interface between anti-suit injunctions issued by an English court and Article II(3) was addressed by the Court of Appeal in *Toepfer v Société Cargill*,[902] where Phillips LJ observed

> "It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the Court of a country subject to the New York Convention were left to seek a stay of the proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign Courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti−suit injunctions such as that sought in the present case. In The Angelic Grace, […] the Court of Appeal gave its approval to this practice".[903]

At first instance in *West Tankers*,[904] Colman J reiterated the view of Phillips LJ in *Toepfer v Société Cargill*, holding that, under English private international law rules, Article II(3) of the New York Convention does not provide a ground for refusal of an anti-suit injunction. Colman J noted that whereas the Article "identifies the duty which rests on the court seised of court proceedings to stay those proceedings and to refer the parties to arbitration, it contains nothing which vests in that court exclusive jurisdiction to enforce that arbitration agreement".[905] Colman J's view was subsequently endorsed by the House of Lords in the same case.[906]

The ECJ in *West Tankers* commented that its conclusion was supported by Article II(3) of the New York Convention, as it was for the court seised to refer the parties to arbitration unless it found the arbitration agreement in question to be null and void, inoperative or incapable of being performed.[907] Briggs describes the ECJ's suggestion that anti-suit injunctions are incompatible with

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[900] *The Angelic Grace* [1995] 1 Lloyd's Rep 87.

[901] See AA 1996, s 32.

[902] *Alfred C Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379.

[903] *Ibid.* p 386.

[904] *The Front Comor* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257; [2005] 2 All ER (Comm) 240.

[905] *Ibid*. [53]-[58].

[906] *The Front Comor* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391; [2007] 1 All ER (Comm) 794.

[907] *West Tankers,* [33].

Article II(3) of the New York Convention as "complete and utter nonsense".[908] It is clear from their decision in *KBC v Pertamina*[909] that the US Court of Appeals is of the same view.

Following the ECJ judgment in *West Tankers*, arguments once again arose regarding the inconsistency of anti-suit injunctions and Article II(3) of the New York Convention, although they were swiftly extinguished. Cooke J in *Shashoua v Sharma*[910] confirmed that anti-suit injunctions were not inconsistent with Article II(3) and that the effect of Article II(3) was to prevent a court from asserting jurisdiction contrary to a valid arbitration agreement.[911] Later, in *Midgulf International Ltd v Groupe Chimique Tunisien*,[912] the English Court of Appeal was clearly unimpressed by the same arguments being raised once again.[913]

Accordingly, the suggestion that anti-suit injunctions are incompatible with the New York Convention cannot be sustained.

V. CONCLUSION

An effective mechanism to do away with the need for anti-suit injunctions in support of arbitration would have been a parallel provision to the new Article 31(2) of the Recast Regulation. This Article qualifies the court-first seised principle where the court second seised is nominated in an exclusive jurisdiction agreement between the parties. A new article could have been added to the Recast Regulation requiring courts to stay their proceedings until the nominated arbitral tribunal has

[908] Briggs, A., 'Fear and Loathing in Syracuse and Luxembourg: *The Front Comor*' (op cit), p 162.

[909] *Karaha Bodas Company LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 18 June 2003 (335 F3d 357 (5th Cir 203)) (United States Court of Appeals, Fifth Circuit). In relation to anti-anti-suit injunctions, the Court stated that "there is nothing in the [New York] Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction" and that the Convention did not "divest the district court of its inherent authority to issue an anti-suit injunction", p 365. See further Schneider, M.E., 'Court Actions in Defence Against Anti-Suit Injunctions' in Gaillard, E., (ed), (op cit), pp 48-49.

[910] *Shashoua v Sharma* [2009] EWHC 957 (Comm); [2009] 2 Lloyd's Rep 376; [2009] 2 All ER (Comm) 477.

[911] *Ibid*. pp 382-383.

[912] *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66; [2010] 2 Lloyd's Rep 543.

[913] *Ibid*. Tomlinson LJ confirmed the compatibility of anti-suit injunctions with NYC, Art II(3) and declared that the ECJ judgment in *West Tankers* did not change this position, [67]-[68].

pronounced on its jurisdiction. Such a provision would not bring arbitration within the scope of the Recast Regulation, nor would it require parties to arbitrate. Only when a party seeks to rely on the arbitration agreement would a tribunal be constituted. If neither party wished to arbitrate, they could choose to submit to the jurisdiction of a court. As no similar provision was included, the risk of parallel court and arbitral proceedings remains a significant risk under the Recast Regulation.

CHAPTER 5 – RECOGNITION AND ENFORCEMENT

The recognition and enforcement of court judgments is of particular importance to parties contemplating or taking part in arbitral proceedings if there is a risk that a competing judgment will effectively cancel out any arbitral award that is obtained. This Chapter will focus on how judgments handed down by courts in EU and EFTA Member States may affect the recognition and enforcement of arbitral awards, and *vice versa*.

This Chapter confirms that judgments on the validity of arbitration agreements and of arbitral awards are not subject to the rules on recognition and enforcement in the Recast Regulation. However, where an arbitration agreement is found to be invalid by an EU Member State court and that court gives judgment on the merits of a dispute, the judgment on the merits *is* subject to the rules on recognition and enforcement in the Recast Regulation.

It will be seen that difficulties arise where there are conflicting court judgments and arbitral awards on the same subject matter between the same parties. It is argued that, as the New York Convention should take precedence over the Recast Regulation and the Recast Regulation itself states that it shall not affect the application of the New York Convention, foreign arbitral awards should be given priority over court judgments.

There should not be any difference in treatment by EU Member State courts between arbitral awards granted in another EU Member State and arbitral awards granted in third States, so long as the foreign award is deemed to be a New York Convention award.[914] Whether or not priority will be given to foreign arbitral awards over EU Member State court judgments will ultimately depend upon the national law of the EU Member State of enforcement.

A further clash may arise where the court of enforcement is faced with an EU Member State court judgment and a conflicting domestic arbitral award i.e. an arbitral award that would not fall to be recognised pursuant to the New York Convention. The priority to be given to the domestic arbitral award will depend on national law, as the enforcement of arbitral awards is outside the scope of the Recast Regulation. If the EU Member State of enforcement is pro-arbitration, it is hoped that the domestic arbitral award will be upheld in spite of a conflicting EU Member State court judgment. Surprisingly however, in spite of the encouragement of and the support given to arbitration in

[914] See Chapter 1, footnotes 142 and 159 on the definition of a 'New York Convention award'.

England,[915] it appears that ambiguous statutory provisions could result in a domestic arbitral award being rendered worthless where there is a conflicting EU Member State court judgment. If that is correct, national law needs to be amended as a matter of urgency.

I. RECOGNITION AND ENFORCEMENT SCENARIOS

There are eleven relevant scenarios to be considered.

A. Court judgments

Parties should, in theory, comply voluntarily with court judgments. Where a 'losing' party does not abide by a judgment, the enforcing party can apply to have the judgment enforced, subject generally to any rights of appeal or exceptions to recognition and enforcement.

Scenario 1: English court judgment being enforced in England (no conflict)

Where a debtor refuses to comply with an English court judgment and their assets are in England, the enforcing party can apply to have the judgment enforced,[916] subject to any rights of appeal. Where all avenues of appeal have been exhausted and where there is no competing judgment, this should be relatively straightforward.

Scenario 2: English court judgment being enforced in a foreign non-EU State

In many cases, the debtors' assets will be abroad. Where an English court judgment needs to be enforced in a State outside the EU, such as Singapore, reference will need to be made to the private international law rules of the State of enforcement in order to determine if and how the English court judgment can be enforced there.

[915] See Chapter 1, pp 32 et ff.

[916] Reference should be made to CPR Parts 70-73 and 89, and Practice Direction 70.

Scenario 3: English court judgment being enforced in another EU Member State

If the assets are in an EU Member State and the dispute concerns a civil and commercial matter, an English court judgment should be recognised and enforced in accordance with the Brussels Regime. For example, an English court judgment on the merits of a dispute must be recognised and enforced in France in accordance with the Recast Regulation subject to the limited exceptions therein, which are set out in Chapter 2.[917]

It is worth reiterating here that two of the exceptions discussed in Chapter 2 allowed an EU Member State court judgment to be refused recognition on the basis of irreconcilability. The first concerned irreconcilability with a judgment given between the same parties in the EU Member State of enforcement and the second dealt with irreconcilability with a judgment given in another EU Member State or in a third State.[918] The need to rely on these exceptions in so far as EU Member State court judgments are concerned should be limited. This is because of the *lis alibi pendens* provisions in the Brussels Regime.[919] These provisions allow the court first seised to determine whether it has jurisdiction and if so, to determine the merits of the dispute. In almost all situations,[920] courts other than the court first seised must stay their proceedings until jurisdiction is determined.[921] If the court first seised finds that it has jurisdiction, all other EU Member State courts must decline jurisdiction.[922] In addition, where a court second seised has been seised of a "related action", it has discretion to stay its proceedings in favour of the court first seised.[923] Consequently, where parties do not agree on which court should deal with their dispute, there will inevitably be a 'race to court'. As unsatisfactory as this race may be, it should preclude conflicting court judgments on the same matter between the same parties being given, which could effectively cancel each other out.

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[917] See Chapter 2, pp 72 *et ff.*

[918] See Chapter 2, pp 75 *et ff.*

[919] See Recast Regulation, Arts 29-34.

[920] There are exceptions based on exclusive jurisdiction in Recast Regulation, Arts 24, 25 and 31(2).

[921] Recast Regulation, Art 29(1).

[922] Recast Regulation, Art 29(3).

[923] Recast Regulation, Art 30(1). Recast Regulation, Art 30(3) provides "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". See e.g. *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep 665; [2005] 2 All ER (Comm) 764.

As this thesis is concerned with arbitration, no more will be said on the enforcement of court judgments, save where they may conflict with an arbitral award.

B. Arbitral awards

It is often the case that parties will voluntarily comply with arbitral awards, given that arbitration is a consensual process. If the losing party does not comply, the 'winning' party can seek court assistance to enforce the award.

Scenario 4: Domestic arbitral award being enforced in England (no conflict)

Where an arbitral award is granted by a tribunal with its seat in London and the debtors' assets are in England, the winning party can apply to the English court to enforce the award in the same manner as a court judgment[924] or to have judgment entered in the terms of the award,[925] as discussed in Chapter 1.[926] This is subject to the rights of appeal also set out in Chapter 1.[927] Where there is no conflicting court judgment, enforcement should be straightforward.

Scenario 5: London arbitral award being enforced as a New York Convention award in another State (no conflict)

Alternatively, an arbitral award granted by a tribunal with its seat in London may have to be enforced abroad. Where the State of enforcement is a Contracting State to the New York Convention, in most cases, the London award will be treated as a foreign award and enforced in accordance with the New York Convention.[928] As explained in Chapter 1, there are limited discretionary exceptions to enforcement.[929] Where there are no relevant exceptions and no competing arbitral award or court judgment, the London award should be enforced in the same manner in States both within and outside the EU.

[924] AA 1996, s 66(1).

[925] AA 1996, s 66(2).

[926] See Chapter 1, p 28.

[927] See Chapter 1, pp 28 *et ff*.

[928] See Chapter 1, pp 34 *et ff*.

[929] See Chapter 1, pp 40 *et ff*.

Difficulties arise where an arbitral award requires enforcement but there is a conflicting court judgment. Regrettably, such conflicts may be unavoidable, as parties and courts in different States may reach different conclusions on the validity of an arbitration agreement in accordance with their national law. Further, the only supranational *lis alibi pendens* provisions that deal with parallel arbitral and court proceedings are found in the 1961 European Convention,[930] which is not widely ratified.[931] Even within those provisions, there is scope for both sets of proceedings to continue, as litigation may continue unless there are "good and substantial reasons" to the contrary.[932] The New York Convention does not contain any provisions that deal with parallel proceedings and the *lis alibi pendens* provisions in the Recast Regulation only apply to parallel proceedings before EU Member State courts. The conflicts that consequently may arise are set out in this Chapter.

Some of the below scenarios are mirror images of the other[933] but it is worth setting out how a London award may be treated in an EU Member State and how foreign and domestic awards are likely to be treated by the English courts when faced with a conflicting EU Member State court judgment.

Scenario 6: London arbitral award being enforced in another EU Member State vs a conflicting local court judgment

An arbitral award granted by a tribunal with its seat in London may need to be enforced in France. As mentioned in scenario 5, the London award will most likely be treated as a foreign award and should be recognised and enforced under the New York Convention. However, the foreign London award in this scenario is faced with a conflicting judgment on the same matter and between the same parties that has been given by a French court. The Recast Regulation does not assist, as it is concerned with the recognition and enforcement (in this scenario in France) of court judgments from *other* EU Member States. Accordingly, the question of priority must be determined by national law, taking into account the State's obligations under the New York Convention. Presumably, where the French court judgment has already been given, the foreign London award will not be enforced. For example, the French court may have previously held that the arbitration agreement was invalid

[930] See Chapter 2, pp 59 *et ff*.

[931] See Chapter 2, footnote 288.

[932] See Chapter 2, pp 60 *et ff.*

[933] Specifically, scenarios 6 & 7 and scenarios 8 & 9.

and consequently determined the merits of the dispute. This is not clear and the outcome may differ between States.

Scenario 7: Foreign arbitral award being enforced in England vs a conflicting English court judgment

On the other hand, the English court may have been asked to enforce a foreign arbitral award under the New York Convention, e.g. an ICC award granted by a tribunal with its seat in Paris. If the foreign arbitral award dealt with a dispute where the English court had already determined that the disputed arbitration agreement was invalid and had pronounced on the merits, it is likely that the matter would be considered *res judicata* and that the foreign arbitral award would be denied recognition.[934] Even if the English court had only determined that the arbitration agreement was invalid and had not dealt with the merits, it seems unlikely that the foreign arbitral award would be enforced.

Scenario 8: London arbitral award being enforced in another EU Member State vs a conflicting court judgment of another EU Member State

Alternatively, an EU Member State court may be faced with a foreign award and an *incoming* court judgment from another EU Member State. For instance, a French court may be asked to enforce an arbitral award granted by a tribunal with its seat in London and, at the same time, a judgment of a German court on the same matter and between the same parties. It will be seen in this Chapter that the Recast Regulation does not concretely clarify whether the foreign London award or the German court judgment should be given priority. Rather, Recital 12 provides that the Recast Regulation is "without prejudice" to EU Member State courts being able to recognise, in accordance with their national law, either the foreign arbitral award or the EU Member State court judgment. The Recast Regulation also provides that the New York Convention takes precedence over the Recast Regulation. As a result, it is arguable that priority should be given to the foreign arbitral award, although it seems that this outcome wholly depends on the national law in the EU Member State of enforcement being pro-arbitration.

[934] For a discussion of *res judicata*, see pp 199 *et ff* below.

Scenario 9: Foreign arbitral award being enforced in England vs a conflicting court judgment of another EU Member State

This is the same scenario as that in scenario 8, although the court of enforcement is the English court, i.e. the English court is asked to enforce a New York Convention award at the same time that it is requested to enforce a conflicting EU Member State court judgment. As mentioned in scenario 8, the Recast Regulation is "without prejudice" to EU Member State courts being able to recognise, in accordance with their national law, either the foreign award or the EU Member State court judgment.

Turning to national law, section 32(1) of the Civil Jurisdiction and Judgments Act 1982 provides that a court judgment of another State that is given contrary to an arbitration agreement is not binding on UK courts.[935] This suggests that the English court can examine the disputed arbitration agreement and if it finds it to be valid, the arbitral award must be enforced in preference to the conflicting court judgment. However, section 32(4) of the Civil Jurisdiction and Judgments Act 1982 provides that section 32(1) does not affect the recognition and enforcement in the UK of a judgment which is *required* to be recognised or enforced under the Brussels Convention or the 2007 Lugano Convention. This rule also applies to the Recast Regulation, as the Recast Regulation is directly applicable and binding in the UK. This rule suggests that the conflicting EU Member State court judgment must be recognised instead of the foreign arbitral award if none of the exceptions in the Recast Regulation apply. As discussed in Chapter 2, there is no exception to recognition and enforcement in the Recast Regulation on the basis that the EU Member State court judgment is irreconcilable with an arbitral award.[936]

Notwithstanding the above, it is arguable that the EU Member State court judgment is no longer "required" to be recognised and enforced under the Recast Regulation, on the basis of Recital 12. Consequently, when section 32(4) of the Civil Jurisdiction and Judgments Act 1982 is read in the light of Recital 12, it appears to allow the English court to give priority to a foreign arbitral award in spite of the otherwise enforceable EU Member State court judgment. It is submitted that section 32(4) should be amended to confirm this position, so that there is no ambiguity as to whether foreign arbitral awards can be given priority over EU Member State court judgments.

[935] This section provides a statutory defence to issue estoppel, Joseph, [15.27]. See further on issue estoppel and *res judicata* at pp 199 *et ff* below.

[936] See Chapter 2, pp 73 *et ff*.

The clash of the Recast Regulation and the New York Convention is examined further in Part IV of this Chapter.

Scenario 10: London arbitral award being enforced in England vs a conflicting court judgment of another non-EU State

Where the English court is faced with the enforcement of a domestic award, i.e. one given by an arbitral tribunal with its seat in London, and a competing non-EU court judgment, reference must again be made to national law. In such a scenario, the arbitration agreement or the jurisdiction of the London tribunal may have been disputed at the outset of the arbitral proceedings. The English court may have granted declaratory relief and held the agreement to be valid and binding, or a stay under section 9(4) of the Arbitration Act 1996 may have been ordered so that the tribunal could pronounce on its own jurisdiction.[937] Alternatively, one of the parties may be challenging the award on the basis that the tribunal lacked substantive jurisdiction.[938] The English court may have also granted an anti-suit injunction.

Either way, if the English court has held that the arbitration agreement and/or the arbitration award (and by implication the arbitration agreement) is binding before one of the parties applies for a foreign non-EU court judgment to be enforced, the English court can decline to enforce the court judgment. The matter is *res judicata*.[939] Also, as mentioned above, section 32(1) of the Civil Jurisdiction and Judgments Act 1982 does not require the English court to recognise a foreign non-EU court judgment if it has been given contrary to an arbitration agreement.

Scenario 11: London arbitral award being enforced in England vs a conflicting court judgment of another EU Member State

There is a further grey area where the local London award, which is to be enforced in England, is faced with a conflicting judgment of an EU Member State court. As mentioned above, EU Member State court judgments must be recognised in England. This may be the case even if the EU Member

[937] See Chapter 1, pp 19 *et ff.*

[938] See Chapter 1, p 28.

[939] See the discussion of *res judicata* at pp 199 *et ff* below.

State court judgment was obtained in breach of an arbitration agreement.[940] Recital 12 is without prejudice to EU Member State courts being able to enforce foreign arbitral awards in accordance with the New York Convention, which takes precedence over the Recast Regulation. Even so, the local London award in this scenario is not a New York Convention award, as it is not a foreign award. Accordingly, the arguments raised in scenario 9 concerning section 32(4) of the Civil Jurisdiction and Judgments Act 1982 being read together with Recital 12 in order to give priority to foreign arbitral awards would not be relevant. Therefore, the Recast Regulation must prevail, unless national law provides otherwise. Even though the London arbitral award should render the matter *res judicata*, so that the English court can deny recognition of the conflicting EU Member State court judgment, section 32(4) arguably provides a statutory defence to the issue estoppel and requires the English court to recognise the EU Member State court judgment. The London award, if it has not already been enforced, will be worthless.

Previous case law of the English courts will be discussed in the next Part of this Chapter in an attempt to determine how the English courts will resolve any of the aforementioned conflicts in the light of Recital 12 of the Recast Regulation.

II. JURISPRUDENCE ON RECOGNITION AND ENFORCEMENT

In a similar vein to the judgments examined in the previous Chapters, the English courts also struggled to adopt a consistent approach to recognition and enforcement of EU Member State court judgments allegedly obtained in breach of an agreement to arbitrate.

As discussed in Chapter 3,[941] Diamond QC in *The Heidberg (No 2)* held that it was "beyond doubt" that a judgment of a foreign Contracting State to the Brussels Convention on the substance of a dispute, even if given in breach of a valid arbitration agreement, had to be recognised by the English Court.[942]

[940] See CJJA 1982, s 32(4).

[941] See Chapter 3, pp 104 *et ff.*

[942] *The Heidberg (No 2)*, p 301.

In *ABCI v Banque Franco-Tunisienne*,[943] the High Court was required to determine whether proceedings to register in England a French judgment that was derived from an ICC award fell within the scope of the Brussels Convention or within the arbitration exclusion. Waller J referred to Advocate General Darmon's rejection "in trenchant terms" of Schlosser's expert opinion in *The Atlantic Emperor*. Waller J held that there were "cogent reasons" why parties to the Brussels Convention would choose to exclude disputes between parties that were subject to arbitration and to exclude enforcement of arbitral awards resulting from such proceedings from enforceability under the Brussels Convention.[944] The High Court also found that there was no duty of disclosure in respect of adverse decisions in other courts, as these were not *ex parte* proceedings. Rather, when considering the enforceability of a French award in England, the English court must be the *forum conveniens*. This conclusion undoubtedly remains correct under the Recast Regulation.

Later, in *PASF v Bamberger*,[945] an application was made to the English High Court for declarations that the arbitration agreements in question were valid and that judgments already obtained on the merits in Germany should not be recognised in the UK. An injunction was also sought against a party who had not yet obtained a judgment on the merits in Germany. In the proceedings, Waller J had to

[943] *Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485. ABCI alleged that they had agreed to buy 50 per cent of shares in the Bank and that the Bank failed to transfer the shares, as required under the share purchase agreement. ABCI consequently commenced arbitration proceedings in Paris claiming the difference in value of the share price with interest. An award was obtained in favour of ABCI and judgment was entered in the terms of the award by the French court. The judgment was initially registered in England under the CJJA 1982. The Bank applied to the High Court to have the registration of the judgment set aside. At the same time, ABCI applied separately to register the ICC award directly under the NYC. The order giving permission to enforce the award was set aside and registration of the judgment under the CJJA 1982 was refused.

[944] *Ibid.* pp 488-489. The High Court judgment was affirmed on appeal, *Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne* [1997] 1 Lloyd's Rep 531.

[945] *Philip Alexander Securities & Futures Ltd v Bamberger* [1996] (unreported) (Independent, July 8, 1996). The dispute involved PASF, a financial institution based in London, and customers based in Germany. The customers had incurred various losses under trading futures and options. The German court had found arbitration clauses in the customer agreements to be invalid or inapplicable under German law. Each of the arbitration clauses in question provided for arbitration in London and PASF had argued that the German court had no jurisdiction. One of the arbitration agreements was determined to have no application by the German court, as the dispute involved claims over £50,000. The other arbitration agreements, along with express choices of English law, were found to be invalid on multiple grounds pursuant to mandatory rules of consumer protection in Germany.

consider whether the English court could refuse to recognise judgments of another EU Member State court on the basis that the judgments were given in breach of arbitration agreements that the English court would have held to be valid.

Ultimately, Waller J dismissed the applications on the basis that arbitration clauses which discriminated on grounds of nationality without objective justification could not be enforced under EU law. Waller J approached the issue of recognition by asking first, whether the judgment on the substance of the dispute was a Brussels Convention judgment; second, whether the judgment of the German court on the validity of the arbitration agreement was a Brussels Convention judgment; and, if the answer to either question was affirmative, whether that judgment must be recognised under the Brussels Convention.[946] Waller J remarked with uncertainty that the judgment on the substance of the dispute would most likely be a Brussels Convention judgment and therefore entitled to recognition, subject to a public policy defence based on the judgment being given in breach of an arbitration agreement.[947]

The Court of Appeal[948] also found the arbitration agreements in question to be not binding or invalid. Moreover, the Court of Appeal stated that, had it been necessary to determine whether the English court was required to recognise German judgments holding arbitration agreements to be invalid (when the English court would have decided otherwise), it would have referred the matter to the ECJ.[949] The Court of Appeal commented *obiter* that, in a situation where the English court had granted an anti-suit injunction to restrain court proceedings in breach of an arbitration agreement, any court judgment subsequently given could be refused recognition and enforcement in England on the basis of the public policy exception in Article 27(1) of the Brussels Convention, as the judgment had been obtained in breach of the injunction.[950]

The Wadi Sudr[951] concerned the same conundrum. In the dispute, the Spanish court had ruled that the arbitration agreement in question had not been validly incorporated into the relevant bill of

[946] *Ibid*. [91].

[947] *Ibid*. [99]-[115].

[948] *Phillip Alexander Securities & Futures Ltd v Bamberger* [1997] ILPr 73.

[949] *Ibid*. p 115.

[950] *Ibid*. This is because the judgment would have been obtained in contempt of the English court order.

[951] The dispute was between Owners of the Vessel and cargo interests. The Vessel was engaged to carry the cargo from Indonesia to Ferrol, Spain. The Vessel damaged her rudder *en route* and the cargo had to be offloaded short of discharge at Carboneras, Spain. The relevant bill of lading incorporated the law and

lading under Spanish law. It also held that the claimant had waived any right to rely on the arbitration agreement, as it had commenced court proceedings before the High Court in London. Nonetheless, the Spanish court stayed its proceedings in favour of the English court, as the English court was first seised, albeit on the same day as the Spanish court.[952]

At first instance,[953] Gloster J defiantly held that the arbitration agreement was validly incorporated into the bill of lading under English law and therefore that the English court did not have jurisdiction on the merits.[954] Even so, Gloster J held that the Commercial Court retained jurisdiction to grant a declaration that the arbitration agreement was binding (which she granted), on the basis that the English court was not required to recognise the judgments of the Spanish court. Gloster J

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arbitration clause of an unspecified charterparty. There were three separate charterparties that the reference could have related to: a head charter, a sub-time charter and a sub-voyage charter. Despite repeated requests for disclosure, the charters were not disclosed. Owners were told that the voyage charter provided for English law and London arbitration. On 23 January 2008, cargo interests applied to arrest the Vessel in Spain. The same day, Owners applied to the English court for a declaration of non-liability. The Spanish court granted the arrest warrant and was seised of the substantive dispute by cargo interests. Owners challenged the jurisdiction of the Spanish court on the basis of the London arbitration clause. Cargo interests in turn disputed the jurisdiction of the English court. Owners applied to the Spanish court for a stay of the proceedings as the English court had been first seised. At this point, the voyage charter had still not been disclosed. Owners requested that the English court order disclosure of the charter. It was ultimately disclosed some eight months after the initial request for disclosure. Owners also commenced arbitration in London.

[952] On the matter of whether the Spanish court should have decided anything at all, given that it was second seised, see Baatz, Y., 'A jurisdiction race in the dark' (2010) 3(Aug), *LMCLQ* 364-375, pp 369-370. Baatz' arguments that the Spanish court should not have reviewed the validity of the arbitration agreement as it was second seised remain correct although Recast Regulation, Recital 12 now confirms that proceedings concerned with the validity of an arbitration agreement fall outside the scope of the Recast Regulation, with the result that the *lis alibi pendens* provisions would not be applicable and any court second seised is not prohibited from reviewing/reconsidering the validity of an arbitration agreement, at least under the Recast Regulation. Further, neither court would be bound to recognise a judgment of the other under the Recast Regulation where it deals only with the validity of an arbitration agreement. See pp 186 *et ff* below.

[953] *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWHC 196 (Comm); [2009] 1 Lloyd's Rep 666.

[954] Both the head and voyage charter provided for London arbitration. It is a general rule of thumb that where it is unclear which charter is referred to by the bill of lading, the head charter, to which the shipowner is party, is the charter to be incorporated, Baatz, Y., 'Incorporation of a charterparty arbitration clause into a bill of lading and its effect on third parties' (op cit), [7.08].

determined that the Spanish judgments fell within the scope of the Jurisdiction Regulation but held that she was not obliged to recognise them, as the proceedings were not themselves proceedings within the Jurisdiction Regulation pursuant to Article 33(1).[955] Alternatively, Gloster J stated *obiter* that she could decline to recognise the judgments on the basis of Article 34(3) of the Jurisdiction Regulation, as they were manifestly contrary to public policy in the UK having been obtained in breach of an arbitration agreement found to be valid by its proper law.[956]

The Court of Appeal[957] agreed that the judgments fell within the scope of the Jurisdiction Regulation and were therefore subject to the recognition and enforcement provisions therein. On the basis that such judgments were binding, the Court of Appeal held that Gloster J should not have granted a declaration of validity. The Court of Appeal also rejected Gloster J's view that the Spanish judgments were manifestly contrary to public policy, given that the English court was bound to recognise the judgments of the Spanish court and that the English court could not re-examine whether an arbitration agreement had been validly incorporated once this issue had been decided by another EU Member State court.[958] The Court of Appeal determined the issues in this manner, as it felt bound to do so in the light of the ECJ judgment in *West Tankers*.[959] The Court of Appeal's decision was also made on the basis that the Spanish court's judgment was given *before* the English court had declared the arbitration agreement to be valid.

Whether any of these judgments remain correct in the light of the Recast Regulation will be examined below.

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[955] Jurisdiction Regulation, Art 33(1) provides "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required".

[956] *The Wadi Sudr* [2009] EWHC 196 (Comm); [2009] 1 Lloyd's Rep 666, [101]-[102].

[957] *The Wadi Sudr* [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193; [2010] 2 All ER (Comm) 1243.

[958] *Ibid*. [66], [113]. This view follows that of Tomlinson J in *DHL GBS (UK) Limited v Fallimento Finmatica SpA* [2009] EWHC 291 (Comm); [2009] 1 Lloyd's Rep 430.

[959] Ozdel argues that the enforcement of arbitration agreements was "significantly undermined" by the ECJ decision in *West Tankers* and the Court of Appeal decision in *The Wadi Sudr*, Ozdel, M., 'Is the devil in the detail? A maritime perspective on incorporating charterparty arbitration clauses: the fifth annual CIArb Roebuck Lecture 2015' (2015) 81(4) *Arbitration* 389-397 ('Ozdel (2015)'), p 394.

III. ARBITRATION AGREEMENTS AND AWARDS UNDER THE RECAST REGULATION

A. Judgments on the validity of arbitration agreements are not subject to the rules on recognition and enforcement in the Recast Regulation

Recital 12 confirms that an EU Member State court judgment holding that an arbitration agreement is valid does not have to be recognised and enforced in accordance with the rules on recognition and enforcement provided by the Recast Regulation. Equally, an EU Member State court judgment holding that an arbitration agreement is null and void, inoperative or incapable of being performed would not have to be recognised and enforced under the Regulation. Recital 12 states

> "*A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question*".[960]

The Recast Regulation requires assessment of the judgment to be enforced in order to determine whether the provisions of the Regulation should apply. Reference does not need to be made to the subject matter of the underlying dispute. This paragraph reverses in part the ECJ judgment in *West Tankers*.[961]

Concerns have been raised in case law[962] and in the academic literature[963] that, if decisions on the validity of arbitration agreements are not binding, there would be nothing to prevent a disappointed party from seeking to obtain a different and more favourable judgment in another EU Member State, thereby resulting in a race to an award or judgment on the merits. This seems to be the outcome of the clarifications in Recital 12, which is likely to result in further clashes of EU Member State court judgments and arbitral awards at the enforcement stage.

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[960] Recast Regulation, Recital 12, para 2.

[961] Specifically, *West Tankers*, [26]. See further Auda, A. G. R., 'The future of arbitration under the Brussels recast Regulation' (2016) 82(2) *Arbitration* 122-128, p 126. *The Heidberg (No 2)* and *Toepfer v Molino Boschi* appear to be incorrect in the light of this part of Recital 12.

[962] *The Heidberg (No 2)*, pp 300-301; *The Wadi Sudr*, [41], per Waller LJ.

[963] Seriki, H., 'Litigating in breach of arbitration: what exactly does Article 1(4) of the Brussels Convention cover?' (op cit), p 52; Auda, A. G. R., 'The future of arbitration under the Brussels recast Regulation' (2016) 82(2) *Arbitration* 122-128, p 126.

As discussed in Chapter 3, Jenard, in his capacity as an expert witness in *The Atlantic Emperor*, argued that a decision as to the validity or existence of an arbitration agreement given by a court with jurisdiction under the Brussels Convention in the course of deciding the main dispute must be recognised.[964] His argument was based on the fact that during the negotiations leading up to the 1978 Accession Convention, it was the view of all representatives, with the exception of the UK, that the arbitration exclusion applied only when arbitration was itself the main issue of the litigation; the exclusion therefore did not apply when arbitration was a subsidiary or incidental issue.[965] Jenard's declaration is not as persuasive as the statements in the explanatory Jenard Report. In any event, Recital 12 now clarifies that this position is incorrect. That being said, if the court of origin is dealing with the main dispute and a judgment on the merits is given, the court of enforcement will be bound indirectly by the court of origin's finding on the invalidity of the arbitration agreement, subject to any available defences to recognition on this basis.[966]

Further, Recital 12 now makes it clear that it matters not whether the validity of the arbitration agreement is the sole matter in dispute or whether it is incidental to the underlying relationship between the parties. This approach is welcomed given the confusion that resulted from the inconsistent use of terms such as 'preliminary proceedings', 'subsidiary proceedings', 'ancillary proceedings', 'principal issue', 'principal subject matter', 'main issue' and 'incidental question' in court judgments and in the explanatory reports. These terms are not defined in any of the instruments that make up the Brussels Regime, nor are they defined in any of the explanatory reports. Those guilty of using such terms include Jenard,[967] Schlosser,[968] Advocate General Darmon[969]

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[964] See Chapter 3, p 92. See also Seriki, H., 'Litigating in breach of arbitration: what exactly does Article 1(4) of the Brussels Convention cover?' (op cit), p 52.

[965] *Ibid*.

[966] See further pp 190 *et ff* below.

[967] "Matters falling outside the Convention do so only if they constitute the principal subject-matter of the proceedings. They are thus not excluded when they come before the court as a subsidiary matter either in the main proceedings or in preliminary proceedings", Jenard Report, p 59/10 (emphasis added).

[968] "It is contended that the literal meaning of the word 'arbitration' itself implies that it cannot extend to every dispute affected by an arbitration agreement; that 'arbitration' refers only to arbitration proceedings. Proceedings before national courts would therefore be affected by [the arbitration exclusion] only if they dealt with arbitration as a main issue and did not have to, consider the validity of an arbitration agreement merely as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction", Schlosser Report, p 59/93, [62] (emphasis added).

and the ECJ in *The Atlantic Emperor*[970] and in *West Tankers*,[971] to name but a few. English judges also adopted such phraseology when trying to apply the principles outlined in these sources.

Academics also tried to grapple with these expressions. For example, Seriki has previously submitted that the issue of the validity of an arbitration agreement is too important to be merely referred to as "incidental" in relation to the substantive dispute. Seriki argued that "the validity issue may be preliminary to the dispute, but it contains the very power to rule on the substantive dispute".[972] The author agrees with Seriki's sentiments. Nevertheless, as Recital 12 does not adopt these unhelpful and ambiguous terms, Seriki's submissions on this point are now moot.

The Schlosser Report set out the position now advocated by Recital 12 as far back as 1979. The Schlosser Report states that "a judgment determining whether an arbitration agreement is valid or not, or because it is invalid ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention".[973]

Wathelet also confirmed in his Opinion in *Gazprom* that the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of the Recast Regulation, "since if that were not so the rules on recognition and enforcement in that Regulation would be applicable to

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[969] "Under the scheme of the Convention, where a Court is seised of a principal issue not falling within the scope of the Convention its jurisdiction to deal with a preliminary issue is in no case governed by the Convention but is a matter for the lex fori, and that is so even if the preliminary matter falls within the scope of the Convention", *The Atlantic Emperor*, [AG31] (emphasis added).

[970] "In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention", *The Atlantic Emperor*, [26] (emphasis added).

[971] "[…] the court finds, as noted by the Advocate General in paras 53 and 54 of her opinion, that if, because of the subject matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application", *West Tankers*, [26].

[972] Seriki, H., 'Litigating in breach of arbitration: what exactly does Article 1(4) of the Brussels Convention cover?' (op cit), pp 52-53.

[973] Schlosser Report, p 59/93, [64].

decisions of the national courts concerning the validity of an arbitration agreement".[974] The Advocate General felt that this interpretation was the opposite of the conclusion reached by the ECJ in *West Tankers* and, therefore, the judgment did not remain impervious to the recasting of the Jurisdiction Regulation.[975]

Accordingly, any court judgments that have held that judgments on the validity of an arbitration agreement fall to be recognised in accordance with the relevant Brussels Regime instrument should no longer be considered as good law.

Advocate General Wathelet went even further and inferred from the legislative history that the EU legislature "intended to correct the boundary which the Court had traced between the application of the [Jurisdiction Regulation] and arbitration".[976] He argued that Recital 12 and Article 73(2) of the Recast Regulation corresponded with the second option in the European Commission's Impact Assessment that suggested reform of the Jurisdiction Regulation by way of an extension of the arbitration exclusion to any proceedings related to arbitration and, in particular, to proceedings where the validity of an arbitration agreement was contested.[977] The arbitration exclusion certainly seems to apply to such proceedings, but the consequences are unlikely to be welcomed.

One academic has commented that the clarification brought about by Recital 12 should be understood as an attempt to "counter-balance" the absence of anti-suit injunctions within the Brussels Regime.[978] Wilhelmsen also argues that Recital 12 seeks "to level the playing field in regard to the parties' options when a dispute arises as to the validity and existence of an arbitration agreement".[979] Further, Ozdel argues that "the barriers to enforcement of arbitration agreements

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[974] *Gazprom*, [AG127].

[975] *Gazprom*, [AG128]-[AG130]. Contrarily, the Lithuanian and German Governments and the European Commission were of the view that the ECJ's judgment in *West Tankers* was unaffected.

[976] *Gazprom*, [AG132].

[977] *Gazprom*, [AG117], [AG124]-[AG125].

[978] Comment by von Hein, J., 'The Protection of Arbitration Agreements within the EU after *West Tankers*, *Gazprom* and the Brussels I Recast" (17/07/2015), www.conflictoflaws.net (accessed 01/02/2017). He argued, "This is not only a welcome step towards the legal certainty that the difficult relationship between the Regulation and the Convention indubitably requires but should also be understood as an attempt to counter-balance the absence of anti-suit injunctions".

[979] *Ibid*. p 185.

under the [Jurisdiction] Regulation have now been removed".[980] None of these propositions stand up to scrutiny however, as litigants are able to seise as many courts within the EU that would have substantive jurisdiction under the Recast Regulation and obtain multiple judgments on the validity of an arbitration agreement, none of which would require recognition and enforcement under the Recast Regulation (although a court of another EU Member State may recognise an earlier EU Member State court judgment on the validity of an arbitration agreement in accordance with its national law). There is currently little to no deterrent against commencing abusive litigation in breach of an arbitration agreement.

Wilhelmsen suggests that Recital 12 allows a party relying on an arbitration agreement to request a declaratory judgment on its validity and to pursue enforcement of an arbitral award, even if a court in another EU Member State has already determined that the arbitration agreement is invalid.[981] Regrettably, this seems to be a possibility. While a declaratory judgment may be allowed, it is clear from Recital 12 and the CJEU judgment in *Gazprom* that such a judgment will not fall to be recognised within the scope of the Regulation. The worth of declaratory judgments, discussed further below,[982] remains to be seen.

It is worth noting that the position is completely different for jurisdiction clauses. Once an EU Member State court has determined that a jurisdiction agreement is valid in accordance with the rules in the Recast Regulation, that judgment must be recognised and enforced by all EU Member State courts. This is the case even where the court first seised has declined jurisdiction on the basis that there is a valid jurisdiction agreement in favour of another EU Member State court.[983]

B. Where an arbitration agreement is found to be invalid, judgments on the merits of the dispute are subject to the rules on recognition and enforcement in the Recast Regulation

The third paragraph of Recital 12 explains what happens where an EU Member State court has determined that an arbitration agreement is invalid and has continued to determine the dispute on its merits. The third paragraph provides

[980] Ozdel (2015), p 396.

[981] Wilhelmsen, L., 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arbitration Int* 169-185, p 183.

[982] See pp 213 *et ff* below.

[983] *Gothaer Allgemeine Versicherung AG v Samskip GmbH (C-456/11)* EU:C:2012:719; [2013] QB 548.

"*On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation*".[984]

In such circumstances, the substantive judgment must be recognised and enforced in accordance with the rules in the Recast Regulation. These rules and the exceptions to them are set out in Chapter 2.[985] It will be recalled that there is no new exception based on the existence of an arbitral award on the same subject matter between the same parties.

On many occasions a court will determine that an arbitration agreement is invalid and then decide the matter itself. The instances in which a court will find that an arbitration agreement is invalid and do nothing further are likely to be few and far between. On this basis, it is hard to see how a single judgment, which determines the invalidity of an arbitration agreement and the merits of the dispute, will be delineated in practice. Will the parts of the judgment dealing with the validity of the arbitration agreement be considered *obiter dictum*? Should courts now give separate judgments on the validity of arbitration agreements and on the merits of a dispute as a matter of course? Presumably, EU Member State courts are only required to recognise and enforce the part of the judgment that deals with the merits of the dispute i.e. the court's "judgment on the substance of the matter". In *The Wadi Sudr*, it was argued, pursuant to Article 48 of the Jurisdiction Regulation,[986] that court judgments were severable and this would allow other EU Member State courts to not recognise and enforce parts of a judgment that fell outside the scope of the Jurisdiction Regulation,

[984] Recast Regulation, Recital 12, para 3.

[985] See Chapter 2, pp 72 et ff.

[986] Jurisdiction Regulation, Art 48 provides "1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them. 2. An applicant may request a declaration of enforceability limited to parts of a judgment".

such as a decision on the validity of an arbitration agreement. There is no equivalent provision to Article 48 in the Recast Regulation, so it is unlikely that such an argument can be sustained.

In reality, by virtue of the obligation to recognise and enforce the judgment on the merits, the court of enforcement will be bound indirectly by the court of origin's decision on the invalidity of the disputed arbitration agreement, unless parallel court or arbitral proceedings were also commenced in the EU Member State where enforcement of the court judgment is sought. Alternatively, can an EU Member State court that has been asked to enforce a judgment of another EU Member State court consider, of its own volition, the validity of a disputed arbitration agreement and decline to recognise the court judgment if it deems the arbitration agreement to be valid? This issue will be discussed further below.[987]

In any event, the language used in Recital 12 is not mandatory, as this rule is expressly "without prejudice" to the competence of EU Member State courts to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention. The Recital further confirms that the New York Convention "takes precedence" over the Recast Regulation.[988]

Consequently, the Court of Appeal judgment in *The Wadi Sudr* is no longer good law in the light of Recital 12.[989] If the same issue arose under the Recast Regulation, neither court (Spanish or English) would be bound to recognise the judgment of the other on the validity of the arbitral agreement. Declarations on the validity of an arbitration agreement, such as that granted by Gloster J, could be given by courts. In addition, enforcement of the Spanish judgment on the merits would be without prejudice to the application of the New York Convention. That being said, *The Wadi Sudr* concerned an award given by a tribunal with its seat in London and such awards would not be considered as 'New York Convention awards' where England is also the State of enforcement.[990] Accordingly, the English court cannot rely on the New York Convention in order to refuse recognition of an EU Member State court judgment in such circumstances.

As far as New York Convention awards are concerned, a foreign arbitral award on the same matter between the same parties can be given priority over a conflicting judgment of an EU Member State

[987] See pp 204 *et ff* below.

[988] Recast Regulation, Recital 12, para 3.

[989] Ozdel (2015), p 395; Joseph, [15.27]. See the discussion of *The Wadi Sudr* at pp 183 *et ff* above.

[990] See scenario 11 at pp 180-181 above.

court[991] without breaching the Recast Regulation, albeit depending on the national law of the EU Member State of enforcement. This issue is discussed further in Part IV of this Chapter.

C. Judgments on the validity of arbitral awards are not subject to the rules on recognition and enforcement in the Recast Regulation

Paragraph four of Recital 12 also clarifies that court actions and judgments on the recognition and enforcement of arbitral awards fall outside the scope of the Recast Regulation. It continues

> "*This Regulation should not apply* […] *to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award*".[992]

It has always been understood that the recognition and enforcement of arbitral awards fell outside the rules on recognition and enforcement provided in the Brussels Regime. This position is also set out in the Jenard Report,[993] Schlosser Report[994] and Evrigenis & Kerameus Report.[995] This part of Recital 12 clearly reflects the understanding of the arbitration exclusion as it stood some 40 years ago. On that basis, there is merit to Wathelet's postulation that the Recast Regulation simply clarifies how the arbitration exclusion should always have been interpreted.[996]

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[991] See scenarios 8 & 9 at pp 178-180 above.

[992] Recast Regulation, Recital 12, para 4.

[993] The Jenard Report states that the Brussels Convention "does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings", p 59/13. The latter part of this extract is reflected by Recital 12, para 2. See further, Jenard Report, p 59/43.

[994] The Schlosser Report also provides that the Brussels Convention does not "cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards – a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 Convention is applicable", p 59/93, [65].

[995] The Evrigenis & Kerameus Report states that "Proceedings which are directly concerned with arbitration as the principal issue, e.g. cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of an arbitration award, are not covered by the Convention", p 298/10.

[996] *Gazprom*, [AG91].

Recital 12 further endorses the fact that court proceedings and judgments concerning the recognition and/or enforcement of an arbitral award also fall outside the scope of the Recast Regulation.

Hartley submits that, although paragraph 4 of Recital 12 of the Recast Regulation does not expressly apply to rulings on the applicability of an arbitration agreement, e.g. whether the dispute falls within the scope of the agreement or whether the agreement binds third parties, "there is little doubt that this too is covered".[997] It is indisputably correct that such proceedings fall within the arbitration exclusion.

The perhaps surprising outcome of Recital 12 is that, although not expressly set out in Recital 12, such court proceedings would not trigger the application of the *lis alibi pendens* provisions in the Recast Regulation.[998]

Further, while it may be the correct position under the Recast Regulation, it would seem that, where judgment is entered in the terms of an arbitral award, such judgments would not fall to be recognised under the Recast Regulation by other EU Member State courts. As such, parties may find it easier to enforce a foreign award in accordance with the New York Convention (as opposed to a judgment entered in the terms of the award) in another EU Member State. This is not clear.

IV. CONFLICTING JUDGMENTS AND AWARDS: RECAST REGULATION VS NEW YORK CONVENTION

As arbitral awards on the validity of arbitration agreements and arbitral awards on the merits of a dispute are equally enforceable under the New York Convention[999] and are equally excluded from the scope of the Recast Regulation, the term 'New York Convention award' is used to refer to both types of award interchangeably in this Part of the Chapter. Considerations in respect of 'domestic awards' are dealt with separately in Part V.

[997] Hartley (2014), p 860.

[998] Hartley (2014), p 861.

[999] See Chapter 1, footnotes 142 and 159.

A. The New York Convention takes precedence over the Recast Regulation

As mentioned above, Recital 12 expressly provides that the enforcement of judgments on the merits of a dispute under the Recast Regulation is "without prejudice" to the enforcement of foreign arbitral awards in accordance with the New York Convention, which takes precedence over the Recast Regulation.[1000] This suggests that EU Member State courts can enforce New York Convention awards irrespective of a conflicting judgment on the same matter and between the same parties handed down by a court in another EU Member State.[1001] That being said, there is no additional ground for refusal of recognition of an EU Member State court judgment in Article 45 of the Recast Regulation on the basis that it was given in breach of a valid arbitration agreement or on the basis that the judgment is irreconcilable with a foreign arbitral award.[1002]

Clarification will need to be given as to whether an EU Member State court can refuse recognition of a judgment of another EU Member State court if that judgment was handed down *before* a New York Convention award was given but the relevant party did not request that the court of enforcement recognise the court judgment until *after* the relevant award was registered. Is the crucial step asking the court of enforcement to recognise and enforce the judgment or the award, irrespective of which came first?

Alternatively, can the court of enforcement simply choose which decision is to be enforced on a case by case basis, especially if the plaintiff and the respondent both turn up waving paper at the court at the same time? This certainly seems to be allowed as the Recast Regulation is "without prejudice" to the New York Convention. However, this approach will leave parties in an even more uncertain position than they were before and arguably breach a State's obligations under the New York Convention. It would certainly amend the 'race to an award or judgment' to a 'race **to enforce** an award or judgment'.

[1000] Recast Regulation, Recital 12, para 3.

[1001] Ozdel (2015), pp 395-396; Auda, A. G. R., 'The future of arbitration under the Brussels recast Regulation' (op cit), p 127.

[1002] It was on this basis *vis-à-vis* the Brussels Convention that Diamond QC held judgments given in breach of an arbitration agreement to be binding on the EU Member State court of enforcement in *The Heidberg (No 2)*. See Chapter 3, pp 104 *et ff*.

Wilhelmsen argues that Recital 12 does not extend the grounds for denying recognition and enforcement of a judgment under the Recast Regulation, noting that it "merely entails that a court will be able to apply the rules of the New York Convention on recognition and enforcement of an arbitral award without looking to the fact that a judgment falling within the scope of the [Recast Regulation] has been rendered".[1003] In other words, giving priority to a New York Convention award in spite of the existence of an EU Member State court judgment that falls within the scope of the Recast Regulation will not breach an EU Member State's obligations under the Recast Regulation.[1004] No additional exception to recognition and enforcement is necessary.

Wilhelmsen qualifies this position by submitting that recognition of an award may be denied if a court judgment on the matter already exists. As discussed above, the CJEU will need to give guidance on whether this is a matter of timing and if so, what triggers will allow EU Member State courts to deny recognition and enforcement e.g. the publication or the registration of an arbitral award.

B. The Recast Regulation shall not affect the application of the New York Convention

This clarification in the Recast Regulation is slightly different to those set out above. The new Article 73(2) reaffirms what is set out in Recital 12 by providing that the Recast Regulation "shall not", presumably adversely,[1005] affect the application of the New York Convention and accordingly strengthens the position of the New York Convention *vis-à-vis* the Recast Regulation. The language used is mandatory and it is clear that the New York Convention takes precedence. This is a welcome clarification, as it would be rather "unsatisfactory" for the Recast Regulation to interfere with a scheme that has been organised on a worldwide, and not just a European, basis.[1006]

The New York Convention is left to govern the recognition and enforcement of foreign arbitral awards. Accordingly, the enforcement of a foreign arbitral award in an EU Member State where there is no conflicting court judgment remains straightforward and subject to the obligatory

[1003] Wilhelmsen, L., 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arbitration Int* 169-185, pp 183-184.

[1004] *Ibid*.

[1005] Briggs, *Private International Law in English Courts*, [4.77].

[1006] *Ibid*. [4.78].

requirements and limited discretionary exceptions in the New York Convention.[1007] The Recast Regulation is simply irrelevant.

Briggs argues that new Article 73(2) provides another avenue for judgments on the merits given by EU Member State courts to be refused. He submits that "if the New York Convention requires an English court to give effect to an arbitration agreement by dismissing proceedings brought before an English court which disregard [the agreement], and by giving effect to an award made by a tribunal to which the Convention applies, it would not be difficult to argue that for the court to recognise and treat as res judicata a judgment, which would contradict an award by the tribunal which had been agreed to, is not consistent with the New York Convention".[1008] While Article 73(2) does not provide an express exception to recognition and enforcement, it is reassuring that the interface between the Recast Regulation and the New York is clarified in an Article of the Recast Regulation and not simply in Recital 12, which is not an operative part of the Recast Regulation.[1009]

V. CONFLICTING JUDGMENTS AND AWARDS: RECAST REGULATION VS NATIONAL LAW

As explained in Part I of this Chapter, pursuant to section 32 of the Civil Jurisdiction and Judgments Act 1982, a judgment of another State that is given contrary to an arbitration agreement is *prima facie* not binding on UK courts.[1010] However, this section does not affect a judgment which is required to be recognised or enforced pursuant to the Brussels Regime instruments.[1011] This provision needs to be amended given that the Recast Regulation confirms that the New York Convention "takes precedence" over it.

Even if it is correct to state that New York Convention awards have priority over judgments that must be recognised and enforced under the Recast Regulation, until section 32 is updated, the English courts may remain bound to enforce EU Member State court judgments that require

[1007] See scenario 5 at p 176 above.

[1008] Briggs, *Civil Jurisdiction and Judgments*, p 685.

[1009] See Chapter 2, pp 64-65.

[1010] See e.g. *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360; [2016] 1 WLR 2231 and *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647; [2011] 2 Lloyd's Rep 233; [2012] 1 WLR 920, where Rix LJ held that CJJA 1982, s 32(1) was mandatory and did not merely give the English court a discretion to refuse recognition or enforcement.

[1011] CJJA 1982, s 32(4)(a).

recognition and enforcement under the Recast Regulation, in spite of the changes made by the Recast Regulation *vis-à-vis* New York Convention awards.[1012] Clarification by Parliament is needed immediately.

In any event, this Part is concerned with the enforcement of *domestic* arbitral awards.

A. Can an EU Member State court judgment be denied recognition where there is a competing domestic arbitral award?

An arbitral award given by a tribunal with its seat in London does not necessarily provide a shield to a conflicting EU Member State court judgment, as the award would not be a 'New York Convention award' but a domestic award.[1013] As explained in Chapter 1, it is only foreign arbitral awards that must be recognised by English courts in accordance with the New York Convention.[1014] Accordingly, enforcement of a foreign arbitral award by the English courts may justify refusal of recognition of an EU Member State court judgment in accordance with Recital 12 and Article 73(2). Presumably however, an EU Member State court judgment will take priority over a conflicting domestic arbitral award (subject to national law), as there is no mention in Recital 12 of the separate competence of EU Member State courts to decide on the recognition and enforcement of domestic arbitral awards in accordance with their national laws. Further, the Civil Jurisdiction and Judgments Act 1982 appears to give precedence to the Recast Regulation.[1015] This is a major concern.

There is no rule of law that requires an arbitral tribunal to stay its proceedings in favour of litigation before an EU Member State court between the same parties on the same or related issues. Consequently, if a party seises an EU Member State court in breach of a London arbitration agreement, there is nothing to prevent the innocent party from instituting arbitral proceedings as per the agreement. Unfortunately, this leads to parallel proceedings, duplicated costs, a race to an award or judgment, and the possibility of non-recognition of any award.

As a result, there may be disputes where an EU Member State court is faced with the recognition of an arbitral award that was issued by a tribunal in that State and a competing EU Member State court

[1012] See e.g. scenario 9 at pp 179-180 above.

[1013] See scenario 11 at pp 180-181 above.

[1014] See Chapter 1, footnote 142.

[1015] See CJJA 1982, s 32(4).

judgment. For example, the English High Court may be asked to enforce an award granted by a tribunal with its seat in London by one party and to recognise a conflicting German court judgment by the opposing party.[1016]

The English court does not seem able to refuse recognition and enforcement of the German court judgment on the basis of the irreconcilability exceptions in Article 45(1)(c)[1017] or Article 45(1)(d)[1018] of the Recast Regulation. As mentioned in Chapter 2, an arbitral award is not a "judgment" for the purposes of the Recast Regulation.[1019]

Then again, the English court may be justified in refusing to recognise the German court judgment simply on the basis of *res judicata*, as long as the domestic arbitral award is obtained prior to the German court judgment, but even this is uncertain.

Res judicata is a principle of English public policy, and issue estoppel can be considered as a form of *res judicata*.[1020] Accordingly, it would be against English public policy to recognise a foreign judgment where it is inconsistent with an earlier judgment of the English court in a dispute concerning the same matter and between the same parties.[1021] An arbitral award can also create an issue estoppel.[1022] Simply put, parties are not allowed to have two bites at the cherry. The doctrines of *res*

[1016] See scenario 11 at pp 180-181 above.

[1017] Recast Regulation, Art 45(1)(c), "[…] the recognition of a judgment shall be refused: if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed".

[1018] Recast Regulation, Art 45(1)(d), "[…] the recognition of a judgment shall be refused: if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed".

[1019] See Chapter 2, p 71.

[1020] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853. See generally, Spencer, Bower and Handley, *Res Judicata* (LexisNexis Butterworths, 4th edn, 2009); Joseph, Chapter 15.

[1021] *Vervaeke v Smith* [1983] 1 AC 145; *ED&F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429.

[1022] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 223; [1966] 1 QB 630; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 WLR 1041.

judicata and issue estoppel aim to prevent a matter that has already been litigated in one jurisdiction, being litigated again in another jurisdiction.[1023]

As recently summarised by the Court of Appeal,[1024] in order for there to be an issue estoppel, four conditions[1025] must be satisfied:

1. the judgment must be given by a foreign Court of competent jurisdiction;
2. the judgment must be final[1026] and conclusive and on the merits[1027];
3. there must be identity of parties; and,
4. there must be identity of subject matter.[1028]

There are additional considerations that are worth mentioning here. For instance, a decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning.[1029] The issue must be fundamental and form the basis for the judgment.[1030] However, the courts must be cautious before concluding that the foreign court made a clear decision on the

[1023] If an English court is faced with two conflicting decisions from two different courts, effect should be given to the judgment that is earliest in time, *ED&F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429; Joseph, [15.14].

[1024] *Good Challenger Navegante SA v Metalexportimport SA (The Good Challenger)* [2003] EWCA Civ 1668; [2004] 1 Lloyd's Rep 67. See also *Nouvion v Freeman* (1889) 15 App Cas 1.

[1025] There are many facets of these four conditions but a detailed review is outside the scope of this thesis.

[1026] The possibility of an appeal does not preclude a judgment giving rise to an issue estoppel if the other conditions are met, *Nouvion v Freeman*, p 10, per Hobhouse LJ. See further, Joseph, [15.06]-[15.07].

[1027] Interim or interlocutory orders of the English court are not "final", as only a provisional assessment is made.

[1028] *Nouvion v Freeman*, [50]; *The Good Challenger*, [50]. An issue estoppel only applies if an issue in the second proceedings is the same as one decided in or covered by the first, Spencer Bower and Handley (op cit), [8.19]-[8.20]. The determinations which will found an issue estoppel may be of law, fact or mixed law and fact, Spencer, Bower and Handley (op cit), [8.04].

[1029] Spencer, Bower and Handley (op cit), [8.01]-[8.02]. In *The Good Challenger*, the Court of Appeal further stated that the decision of the court must be "necessary" for it to give judgment, [62]-[74]. Only determinations which are necessary for the decision, and fundamental to it, will create an issue estoppel. Findings of matters of law or fact which are subsidiary or collateral are not covered by issue estoppel. Findings which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. The question is whether the determination was so fundamental that the decision cannot stand without it, Spencer, Bower and Handley (op cit), [8.23]-[8.24].

[1030] *Ibid*.

relevant issue because the procedures of the foreign court may be different and it may not be easy to determine the precise identity of the issues being determined.[1031] Further, it is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.[1032] Importantly, the application of the conditions of issue estoppel is subject to the *overriding* consideration that the estoppel must work justice and not injustice.[1033]

Where the above four conditions are satisfied, a party may rely on a judgment or an arbitral award as a defence to a further claim between the same parties on the same subject matter.[1034] Accordingly, it seems that an EU Member State court judgment on the invalidity of an arbitration agreement could create an issue estoppel that could in turn preclude the English court from reconsidering whether the arbitration agreement was valid. There is also a general statutory control against re-litigation of an issue in section 34 of the Civil Jurisdiction and Judgments Act 1982.[1035] However, as mentioned above, section 32(1) of the Civil Jurisdiction and Judgments Act 1982 provides a statutory defence to issue estoppel where a judgment is obtained in breach of an arbitration agreement.[1036]

Conversely, a party cannot rely on section 32(1) if it has submitted to the jurisdiction of the foreign court.[1037] Nor does the section apply if the arbitration agreement is illegal, void, unenforceable or

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[1031] *The Good Challenger*, [58]-[61].

[1032] *Nouvion v Freeman,* [54]; *The Good Challenger*, [55]-[57].

[1033] *Nouvion v Freeman*, [54]; *The Good Challenger*, [75]-[79].

[1034] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853. Subrogated insurers and/or assignees would also be bound by earlier judgments on the same subject matter if their assured/the assignor had been so bound, *Peoples Insurance Co of China v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617.

[1035] See *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1998] 1 Lloyd's Rep 1; [2006] RPC 21. A similar result is obtained with the exceptions to recognition based on irreconcilability found in the Recast Regulation. See also *De Wolf v Harry Cox BV (Case 42/76)* EU:C:1976:168; [1976] ECR 1759 on the similar provisions in the Brussels Convention.

[1036] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647; [2011] 2 Lloyd's Rep 233; [2012] 1 WLR 920. The Court of Appeal judgment was affirmed by the Supreme Court [2013] UKSC 35; [2013] 2 Lloyd's Rep 281, although this particular issue was not considered by the Supreme Court.

[1037] CJJA 1982, s 32(1)(a)-(c). A party is not deemed to submit to the jurisdiction if it appears to contest jurisdiction, to seek a stay or to seek the release of property from seizure or threatened seizure, CJJA 1982, s

incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which judgment was given.[1038] The English court is not bound by the findings of the foreign court on these issues.[1039]

Notwithstanding the above, section 32(4) of the Civil Jurisdiction and Judgments Act 1982 provides that section 32(1) does not apply to judgments that are required to be recognised and enforced in accordance with the Brussels Convention and 2007 Lugano Convention. The same rule applies to the Recast Regulation, as it is directly applicable and binding in the UK.[1040] Where a judgment is given by an EU Member State court in breach of an exclusive jurisdiction agreement, if the judgment falls for recognition under the relevant provisions of the Recast Regulation, it appears that the English court must recognise the judgment. It is unclear whether the changes made in respect of jurisdiction agreements in the Recast Regulation will change this position.[1041]

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33. *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647; [2011] 2 Lloyd's Rep 233; [2012] 1 WLR 920 aff'd [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889; *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm); [2015] 2 Lloyd's Rep 123; [2016] 1 All ER (Comm) 1034. See also *Ecobank Transnational Inc v Tanoh* [2015] EWHC 1874 (Comm) aff'd [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360; [2016] 1 WLR 2231; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); [2011] 2 Lloyd's Rep 289; [2012] 1 All ER (Comm) 933; *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd* [2015] EWHC 3158 (Comm); [2016] 1 Lloyd's Rep 239; *Certain Underwriters at Lloyd's London v Syrian Arab Republic* [2018] EWHC 385 (Comm).

[1038] CJJA 1982, s 32(2). It is the arbitration agreement that must be found to be illegal etc. and not the underlying contract.

[1039] CJJA 1982, s 32(3). See further, *Toyota Tsusho Sugar Trading Ltd v Prolat Srl* [2014] EWHC 3649 (Comm); [2015] 1 Lloyd's Rep 344; Joseph, [15.44]-[15.52].

[1040] The same principle applies to the Jurisdiction Regulation. As the Regulations are directly effective, the CJJA 1982 does not need to be amended, Joseph, [15.53].

[1041] See further Joseph, [15.54]-[15.55]. For example, Recast Regulation, Art 31(2) requires that the EU Member State court nominated in an exclusive jurisdiction agreement must first determine whether the agreement is valid, even if it is not first seised, and all other EU Member State courts must stay their proceedings until the nominated court has done so. Joseph states that it is "an open question" whether a judgment of an EU Member State court on the merits that is given before the nominated court in a jurisdiction agreement declines jurisdiction is required to be recognised under the Recast Regulation, and consequently, under the CJJA 1982, [15.54]. It should be noted that there is no equivalent provision to Art 31(2) in the Jurisdiction Regulation or in the 2007 Lugano Convention.

It is evident that arbitration is excluded from the Recast Regulation but an EU Member State court judgment on the merits of a dispute is likely to fall within the scope of the Recast Regulation. As EU Member State court judgments on the validity of an arbitration agreement do not fall to be recognised under the Recast Regulation, then the statutory defence to issue estoppel should be available.[1042] So, even where an EU Member State court has pronounced on the validity of an arbitration agreement, the same issues between the same parties can be re-examined before the English courts and/or in arbitral proceedings. It is only where the EU Member State court hands down its judgment on the merits that an issue estoppel may arise. It would be wise for litigants to obtain an arbitral award or an English judgment on the validity of an arbitration agreement as quickly as possible and before any substantive judgment on the merits is given.

It is unclear whether a domestic arbitral award on the validity of an arbitration agreement and/or on the merits would need to be converted into a judgment beforehand in order for the English court to refuse recognition of a conflicting EU Member State court judgment. Even if the domestic award was converted into a judgment, it is likely to be considered as a judgment concerning arbitration as referred to in Recital 12 and therefore outside the scope of the Recast Regulation (and the rules on recognition and enforcement therein). While an award that satisfies the four conditions mentioned above would no doubt create an issue estoppel in respect of foreign non-EU court judgments, it is arguable that section 32(4) of the Civil Jurisdiction and Judgments Act 1982 could render the award worthless insofar as domestic awards are concerned. Section 32 needs to be amended by Parliament immediately.

Alternatively, the ECJ judgment in *Hoffmann v Krieg*[1043] may be relied upon in order to refuse recognition of a conflicting EU Member State court judgment. The ECJ confirmed that a German court judgment no longer had to be enforced in the Netherlands when enforcement could no longer take place for reasons which fell outside the scope of the Brussels Convention.[1044] Applying this reasoning to arbitration, which lies outside the scope of the Recast Regulation, an EU Member State court judgment may not be enforced or may no longer be enforced where a domestic award has been/is given that is irreconcilable with that judgment. The English courts and/or the CJEU need to give a ruling to this effect for parties to have the requisite certainty.

[1042] *Cf. PASF v Bamberger*.

[1043] *Hoffmann v Krieg (Case 145/86)* EU:C:1988:61; [1988] ECR 645.

[1044] *Ibid*. [32]-[34].

Prior to the adoption of the Recast Regulation, Baatz, in relation to the judgment in *The Wadi Sudr*, commented "It is totally unsatisfactory that a claimant in London arbitration proceedings, where there is clearly a London arbitration clause under English law, should face such an uncertain outcome, even if it proceeds with the arbitration at pace and obtains a London arbitration award in its favour and subsequent English judgment, if the respondent at the same time pursues court proceedings in another Member State".[1045] Regrettably, it appears that the position under the Recast Regulation is even less favourable.

B. Can an EU Member State court judgment be denied recognition where there is no competing domestic arbitral award but the English courts would have held the disputed arbitration agreement to be valid?

There may be cases where there is no competing domestic or foreign arbitral award. Instead, one of the parties argues, or perhaps the court of its own volition determines, that the EU Member State court judgment to be enforced was obtained in breach of an arbitration agreement that would have been held to be valid under English law. In such situations, can the English court refuse to recognise the EU Member State court judgment?

Briggs argues that the recognition and enforcement of an EU Member State court judgment on the merits may be refused pursuant to Article 45(1)(a) of the Recast Regulation on the basis that recognition and enforcement of a judgment obtained by a party in breach of an arbitration agreement would be manifestly contrary to English public policy.[1046] A similar submission was rejected by the Court of Appeal in *The Wadi Sudr*,[1047] as regards the parallel provision in the Jurisdiction Regulation. Even so, Briggs argues that the nature of the issue which has to be decided concerns the content of English public policy, not the meaning of public policy in the Recast Regulation, and the issue should be revisited. It is hard to see how the public policy exception can be relied upon given section 32(4) of the Civil Jurisdiction and Judgments Act 1982.

In this regard, Hartley argues that Recital 12 establishes that the view expressed by the UK at the time of the negotiations for the UK's accession to the Brussels Convention (set out below) is not

[1045] See Baatz, Y., 'A jurisdiction race in the dark' (op cit), p 372.

[1046] Briggs, *Civil Jurisdiction and Judgments*, pp 684-685. *Cf*. *Bamberski v Krombach*.

[1047] See pp 183 *et ff* above.

correct.[1048] Hartley states, "The fact that the court of origin took jurisdiction after deciding that an arbitration agreement was invalid or inapplicable does not disentitle the resulting judgment from recognition and enforcement under the Regulation".[1049] This line of thinking would not allow the English court to decline recognition of an EU Member State court judgment on the basis that the English court would have held the arbitration agreement to be valid.

The abovementioned opinion of the UK on the arbitration exclusion was that it covered "all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration",[1050] clearly being in favour of a wide interpretation of the exclusion. Contrarily, the original EEC Member States argued that proceedings before national courts were only to be regarded as part of 'arbitration' "if they refer to arbitration proceedings, whether concluded, in progress or to be started".[1051] The original EEC Member States were clearly aiming for a narrower interpretation.

The Schlosser Report suggested that the above difference in opinion would only lead to a different result in practice in one particular instance (neglecting the risk of parallel proceedings, which are extremely problematic) and asked the following question

> "If a national court adjudicates on the subject matter of a dispute, because it overlooked an arbitration agreement or considered it inapplicable, can recognition and enforcement of that judgment be refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore pursuant to [the arbitration exclusion], the judgment falls outside the scope of the 1968 Convention?"[1052]

The Schlosser Report concluded that only the UK's opinion would lead to an affirmative answer.[1053] In support of the view that this would be the correct course, it was argued that "since a court in the

[1048] Hartley (2014), p 861.

[1049] *Ibid*. This is now the position set out in Recast Regulation, Recital 12.

[1050] Schlosser Report, p 59/92 [61].

[1051] Schlosser Report, p 59/92 [61]. In spite of differences in opinion between the UK and the original EEC Member States as regards the interpretation of the arbitration exclusion, it was agreed that no amendment should be made to the text of the 1968 Convention. The issue of interpretation was instead left for the new Member States to consider in their implementing legislation. All of the Member States of the Community at that time save Luxembourg and Ireland, had become Contracting States to the New York Convention.

[1052] Schlosser Report, p 59/92, [62].

[1053] *Ibid*.

State addressed is free, contrary to the view of the court in the State of origin, to regard a dispute as affecting the status of an individual, or the law of succession, or as falling outside the scope of civil law, and therefore as being outside the scope of the 1968 Convention, it must in the same way be free to take the opposite view to that taken by the court of origin and to reject the applicability of the 1968 Convention because arbitration is involved".[1054] Conversely, it was argued that the "literal" meaning of the word 'arbitration' itself implied that it could not extend to every dispute affected by an arbitration agreement; rather, that 'arbitration' refers only to arbitration proceedings.[1055]

It was at this juncture in the Schlosser Report that it was concluded that proceedings before national courts would be affected by the arbitration exclusion *only* if they dealt with arbitration as a main issue and did not have to consider the validity of an arbitration agreement *merely* as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction.[1056] It was further contended that the court of enforcement could no longer re-open the issue of classification; if the court of origin, in assuming jurisdiction, has taken a certain view to the applicability of the 1968 Convention, this becomes binding on the court in the State of enforcement.[1057]

While English lawyers may prefer to review the validity of the disputed arbitration agreement at the enforcement stage,[1058] there is no express statement in the Brussels Convention, Jurisdiction Regulation or Recast Regulation that allows Contracting/Member States to refuse recognition of a court judgment on the basis that the English court would have found the disputed arbitration agreement to be valid.[1059]

[1054] *Ibid*. p 59/93, [62].

[1055] *Ibid*.

[1056] *Ibid*.

[1057] *Ibid*.

[1058] See the first instance judgment in *The Wadi Sudr*, where Gloster J attempted to deny recognition of a judgment of the Spanish court on the basis that it was given in breach of an arbitration agreement that the English court would have held to be valid. The Court of Appeal reversed the lower court's judgment, as the Spanish court had already held that the arbitration clause was not valid before it assessed the merits of the dispute. The Court of Appeal's judgment is no longer good law in the light of the Recast Regulation.

[1059] Brussels Convention, Arts 27-28; Jurisdiction Regulation, Arts 33-34; and, Recast Regulation, Arts 45-46 set out the limited circumstances in which a judgment of another court need not be recognised. Non-recognition on the basis that a judgment was obtained in breach of an arbitration award is not included in any of these provisions. The limited exceptions in the Recast Regulation are discussed in Chapter 2, pp 72 *et ff.*

Further, in *Hendrikman v Magenta Druck & Verlag GmbH*,[1060] the ECJ held that the exceptions to recognition and enforcement were exhaustively set out in Articles 27 and 28 of the Brussels Convention and that "procedural irregularities" may constitute an exception to recognition and enforcement *only* if they fall within those Articles.[1061] A judgment given in breach of an arbitration agreement that the English court would have held to be valid could be construed as a 'procedural irregularity'. On that basis, as there is no mention of irreconcilability with arbitral awards in the exceptions to recognition and enforcement in the Recast Regulation, it follows from the ECJ judgment in *Hendrikman* that EU Member States courts cannot refuse recognition simply because they would have found the disputed arbitration agreement to be valid.

For the sake of argument, if EU Member State courts are free to decline recognition of EU Member State court judgments on the basis that they would have found the arbitration agreement to be valid, how will this work in practice? Does a party have to raise the disputed arbitration agreement or can the court review it of its own volition? What if a party has inadvertently submitted to the jurisdiction of the EU Member State court? Does the validity of a disputed arbitration agreement have to be reviewed before a judgment can be enforced? Such an outcome would clearly go against the objectives of the Recast Regulation and of the wider Brussels Regime.

Hartley frustratingly notes that the ECJ in *The Atlantic Emperor* did not answer this "controversial question"[1062] as put forward in the Schlosser Report.[1063] To his mind, at the time, a possible solution to the problem of enforcement of EU Member State court judgments that were given in breach of an arbitration agreement was to rely on Article 27(3) of the Brussels Convention. This provision allows judgments not to be recognised by the court of enforcement if the judgment is irreconcilable with a judgment previously given in the same dispute between the same parties in that State. Interestingly, Hartley pre-empted that an arbitral award would not be considered a 'judgment' within the Brussels Convention. Yet, he submitted that an earlier court judgment appointing an arbitrator, and thereby

[1060] *Hendrikman v Magenta Druck & Verlag GmbH (C-78/95)* EU:C:1996:380; [1997] QB 426.

[1061] *Ibid*. [54].

[1062] The controversial question being whether the Brussels Convention obliges a Contracting State to recognise a judgment if, in the eyes of that State, it was given contrary to an arbitration agreement. The UK considered that such a judgment would be outside the Brussels Convention as it concerned arbitration. The other Contracting States disagreed. See Hartley, T., 'The scope of the Convention: proceedings for the appointment of an arbitrator' (1991) 16(6) *ELRev* 529-533 ('Hartley (1991'), p 532.

[1063] Hartley (1991), pp 531-532.

determining the validity of an arbitration agreement, or similar, could be so regarded.[1064] Hartley relied upon *Hoffman v Krieg*[1065] as allowing a judgment that was unenforceable for reasons which lie outside the scope of the Convention to be considered as a 'judgment' for the purposes of Article 27(3).

Hartley's suggested solution does not appear to be viable in the light of Recital 12 of the Recast Regulation, as only an EU Member State court judgment on the merits of a dispute requires recognition thereunder. While declaratory relief in respect of arbitration agreements and awards appears to be permitted, such orders/judgments do not fall to be recognised by the rules on recognition and enforcement in the Recast Regulation. The same can be said for anti-suit injunctions or arbitral awards having the same effect as anti-suit injunctions.[1066] Declaratory relief is discussed further in Part VII.[1067]

Ultimately, it appears that all of the jurisprudence from both the ECJ/CJEU and national courts in respect of the ability of an English court to refuse recognition of an EU Member State court judgment on the basis that there is a conflicting *domestic* award or on the basis that the English court would have held the disputed arbitration agreement to be valid may not have been affected by the changes made in the Recast Regulation. Seemingly, this is a matter that is purely for national law. If so, as was indicated *obiter* by Waller and Moore-Bick LJJ in *The Wadi Sudr*, ordinary principles of English law may preclude both arbitrators and judges from refusing to recognise an EU Member State court judgment on the (in)validity of an arbitration agreement, if it gave rise to an issue estoppel.[1068]

Briggs argues that under the Recast Regulation, "once a court in a Member State has – rightly or wrongly – adjudicated the merits of the dispute as it sees them, a line has been crossed".[1069] This sentiment appears to be correct where enforcement of a domestic award is faced with a competing judgment of an EU Member State court. Recital 12 of the Recast Regulation appears only to give a

[1064] *Ibid*. pp 532-533.

[1065] *Hoffmann v Krieg (Case 145/86)* EU:C:1988:61; [1988] ECR 645.

[1066] *Gazprom*, [41]. See further, Ozdel (2015), p 396.

[1067] See pp 213 *et ff* below.

[1068] *The Wadi Sudr*, [56], [118]. *Cf*. *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm); [2009] 1 Lloyd's Rep 213; [2009] 1 All ER (Comm) 568.

[1069] Briggs, *Private International Law in English Courts*, [14.27].

lifeline to EU Member State courts that are requested to enforce a New York Convention award in preference to an EU Member State court judgment.

A quick word on Brexit, which is dealt with more fully in Chapter 6. The above arguments concerning domestic arbitral awards may become moot if, upon the UK's exit, there is no UK-EU agreement in place to continue the application of the Recast Regulation and/or the UK has not acceded to the 2007 Lugano Convention. The primacy given to EU Member State court judgments in section 32(4) of the Civil Jurisdiction and Judgments Act 1982 would presumably be rendered nugatory, as English courts would no longer be bound to recognise such judgments. This is because the UK would no longer be a Contracting State to the 2007 Lugano Convention and the remaining EU Member States either did not accede to the Brussels Convention or are no longer bound by it because, for them, it has been superseded by the Jurisdiction Regulation, which in turn has been superseded by the Recast Regulation for proceedings commenced from 10 January 2015.[1070]

VI. CONFLICTING JUDGMENTS AND AWARDS: JURISDICTION REGULATION & 2007 LUGANO CONVENTION

There is no equivalent Recital 12 or Article 73(2) in the Jurisdiction Regulation or in the 2007 Lugano Convention. The changes or clarifications assessed in this thesis in the Recast Regulation are not therefore, *prime facie*, applicable to judgments subject to the rules on recognition and enforcement in the Jurisdiction Regulation or in the 2007 Lugano Convention. Courts in EFTA Member States are also not affected by Recital 12.

That being said, Hartley[1071] argues that Article 71(1) of the Jurisdiction Regulation[1072] might be regarded as having the same effect as Article 73(2) of the Recast Regulation.[1073] The CJEU in

[1070] See further Chapter 6, section III(B). See generally Aikens, R., & Dinsmore, A., 'Jurisdiction, enforcement and the Conflict of Laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (2016) 27 *EBLR* 903-920; Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (2016) 33(7) *J Intl Arbit* 483-500; Dickinson, A., 'Back to future: the UK's EU exit and the conflict of laws' (2016) 12(2) *J Priv Int L* 195-210.

[1071] Hartley, T., 'The Brussels I Regulation and arbitration' (2014) 63(4) *ICLQ* 843-866 ('Hartley (2014)'), p 858.

[1072] Jurisdiction Regulation, Art 71(1) provides "This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments".

Gazprom has confirmed that, as the New York Convention governs a field excluded from the scope of the Jurisdiction Regulation, it does not relate to a "particular matter" within the meaning of Article 71(1).[1074] Article 71 governs only the interface between the Jurisdiction Regulation and conventions falling under the particular matters that come within the scope of the Jurisdiction Regulation.[1075]

It also appears from the case law concerning the Brussels Convention, Jurisdiction Regulation and the Lugano Conventions that irreconcilability with an arbitral award would not suffice as an exception to the rules on recognition and enforcement of court judgments provided therein. As discussed above,[1076] the ECJ in *Hendrikman v Magenta Druck & Verlag GmbH* held that the exceptions to recognition and enforcement in the Brussels Convention were exhaustively set out in Articles 27 and 28 with the result that "procedural irregularities" may constitute an exception to recognition and enforcement *only* if they fall within those Articles. Further, in *Prism Investments BV v van der Meer*,[1077] the ECJ ruled that Article 45 of the Jurisdiction Regulation precluded an EU Member State court from refusing to uphold a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 of the Jurisdiction Regulation.[1078] The need to obtain a declaration of enforceability was abolished by the Recast Regulation.

In addition, in *Republique du Congo v Societe Groupe Antoine Tabet*,[1079] the French Supreme Court held that decisions delivered in arbitration matters were excluded from the scope of the 1988 Lugano Convention and were therefore neither capable of benefiting from the system of simplified recognition set up by the 1988 Lugano Convention, nor of being an obstacle to the recognition of court judgments delivered in another EU or EFTA Member State.[1080]

[1073] Hartley 2014, p 858. Hartley suggested that the New York Convention does govern 'jurisdiction', as courts are required to refer parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. Further, the New York Convention affects the recognition and enforcement of court judgments, as it requires foreign arbitral awards to be recognised and enforced subject to limited exceptions, which necessarily precludes recognition and enforcement of court judgments.

[1074] *Gazprom*, [43].

[1075] *TNT Express Nederland BV v AXA Versicherung AG (C-533/08)* EU:C:2010:243, [48]-[51].

[1076] See p 207 above.

[1077] *Prism Investments BV v van der Meer (C-139/10)* EU:C:2011:653; [2011] ECR I-9511.

[1078] *Ibid*. [43].

[1079] *Republique du Congo v Societe Groupe Antoine Tabet* [2008] ILPr 39 (Cour De Cassation).

[1080] *Ibid*. [11].

VII. DEVICES TO AVOID NON-RECOGNITION OF AN AWARD

The unwelcome decision in *West Tankers* led litigants and courts to develop or to use alternative 'devices' to hold parties to their contractual agreements to arbitrate. In addition to anti-suit injunctions issued by arbitral tribunals, the devices developed to avoid the effects of the *West Tankers* judgment include declaratory relief; arbitral awards on the jurisdiction of the tribunal; and, registering an arbitral award under the New York Convention. Damages awarded in respect of breach of the contractual agreement to arbitrate have also come under the spotlight, even though damages were previously considered either inappropriate and/or inadequate relief for the 'innocent' party to the arbitration agreement.[1081]

These devices are further necessitated by issues that remain unanswered under the Recast Regulation. Most importantly, these include the question of the correct approach (1) where there are parallel proceedings between a court and an arbitral tribunal; and, (2) where a judgment given by an EU Member State court needs to be enforced in another EU Member State but the courts in the latter EU Member State would have found the breached arbitration agreement to be valid and binding. The second question is further complicated if arbitral proceedings are ongoing in the EU Member State of enforcement at the time that the court judgment is given in another EU Member State.

It is unclear whether any or all of these devices are permitted or precluded by the Recast Regulation. The devices may be considered as ancillary to arbitration and therefore within the arbitration exclusion. However, as discussed in Chapter 4, the same can be said of anti-suit injunctions but the ECJ held such injunctions to be incompatible with the Jurisdiction Regulation.[1082] Also, some of the tactics have not yet been tested, so it is unclear which of the devices, if any, will be the most

[1081] *Bristol Corp v John Aird & Co* [1913] AC 241; *Heyman v Darwins Ltd* (1942) 72 Ll L Rep 65; [1942] AC 356; *The Angelic Grace*. See further Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, pp 405-407.

[1082] *West Tankers*. Presumably, anti-enforcement injunctions in support of arbitration agreements, which are granted to restrain the enforcement of foreign judgments, are also precluded as regards EU Member State court judgments. The Court of Appeal has confirmed that the necessary jurisdiction to grant such injunctions exists in limited circumstances, *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360; [2016] 1 WLR 2231. However, if it had been open for the applicant to restrain their opponent's participation in foreign proceedings, rather than to await their outcome and then to seek to restrain enforcement, the delay involved may defeat the application.

effective. Nonetheless, until the revival of court-granted anti-suit injunctions under the Recast Regulation is confirmed by way of binding authority, the below devices may continue to be employed. It remains to been seen whether any of these devices infringe the objectives of the Recast Regulation and the principle of mutual trust to an equal or greater extent than anti-suit injunctions issued by EU Member State courts.

A. Anti-suit injunctions issued by arbitral tribunals

Under English law, section 48(5)(a) of the Arbitration Act 1996, which is a non-mandatory provision, empowers an arbitral tribunal to issue an anti-suit injunction.[1083]

Irrespective of the fact that the CJEU in *Gazprom* held that it was concerned with the recognition of an arbitral *award*, as opposed to an arbitral anti-suit *injunction*, the principles enumerated in the judgment should apply equally to arbitral anti-suit injunctions. Namely, arbitral tribunals are not bound by the Jurisdiction Regulation, the Recast Regulation or the principles that have developed under these instruments, such as the principle of mutual trust. Accordingly, regardless of whether the *West Tankers* judgment remains good law in the light of the Recast Regulation, there is currently no rule in the Recast Regulation or in ECJ/CJEU case law that prohibits an arbitral tribunal from issuing an anti-suit injunction in respect of proceedings before EU Member State courts in breach of an arbitration agreement. The CJEU's judgment in *Gazprom* can also be interpreted as confirmation from the CJEU that there is no rule in the Jurisdiction Regulation that *precludes* arbitral anti-suit injunction being recognised and enforced in accordance with national law or the New York Convention. The same conclusion can be reached in the light of Recital 12 of the Recast Regulation. [1084] Whether an EU Member State court would uphold such an injunction is another matter.

One commentator has argued that, after *Gazprom*, arbitrators in Europe "have greater anti-suit powers than judges".[1085] However, an anti-suit injunction issued by an arbitral tribunal may not have the same deterrent effect as an anti-suit injunction issued by the English court, as parties in breach

[1083] See also *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm); [2008] 1 Lloyd's Rep 230; [2008] 1 All ER (Comm) 593.

[1084] See further comment at Chapter 3, p 120 above.

[1085] Kajkowska, E., 'Anti-suit injunctions in arbitral awards: enforcement in Europe' (2015) 74(3) *CLJ* 412-415, p 415.

of arbitral anti-suit injunctions would not necessarily be held in contempt and be subject to the consequences thereof.[1086]

B. Declaratory relief

The English courts have a broad and inherent power to grant declaratory relief,[1087] although this power is discretionary. Declaratory relief can be granted whether or not any other remedy is claimed.[1088] The courts may also, if the interests of justice require it, grant interim declarations.[1089] Declaratory judgments that are final and conclusive will generally give rise to issue estoppel.[1090]

When granting such relief, the courts must take account of all of the circumstances, the requirements of justice and whether the grant of a declaration would serve a useful purpose in serving the ends of justice. Greater caution must be taken where negative declaratory relief is sought.[1091] Negative declaratory relief can include declarations that no contract or no substantive claim thereunder exists[1092] or that a jurisdiction or arbitration agreement is invalid or not binding upon a party.[1093]

In support of arbitral proceedings for instance, a litigant can apply to the English courts for a declaratory judgment in respect of the jurisdiction of the arbitral tribunal.[1094] The English courts can

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[1086] See Chapter 4, p 139. That being said, a failure to adhere to an anti-suit injunction/award issued by an arbitral tribunal could result in a court order being issued in the same terms under AA 1996, s 66, which would then carry with it the possibility of proceedings for contempt.

[1087] *Barnard v National Dock Labour Board* [1953] 1 Lloyd's Rep 371; [1953] 2 QB 18. See further, Joseph, [13.02]-[13.37].

[1088] CPR r 40.20.

[1089] CPR r 25.1(b).

[1090] Joseph, [15.03].

[1091] Joseph, [13.02], [13.05]-[13.08].

[1092] See e.g. *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd* [2004] EWHC 1704 (Comm); [2004] Lloyd's Rep IR 846, where it was held that nothing was owed under the substantive contract.

[1093] *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510; *Alfred C Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379.

[1094] AA 1996, s 32, discussed in Chapter 1, p 22.

also grant declaratory relief in respect of the validity of an arbitration agreement,[1095] including whether the parties are obliged to arbitrate.[1096] Equally, the court can declare that no valid arbitration agreement has been concluded.[1097]

The arbitrators' substantive jurisdiction

An application for a declaration on the arbitrators' substantive jurisdiction[1098] can only be brought by and against the original parties to the arbitration agreement,[1099] deemed parties[1100] or assignees.[1101] The application must also be brought by a party to existing arbitral proceedings.[1102] In addition, the applicant must have written agreement from all other parties to the arbitral proceedings or have the permission of the tribunal, and if the latter, the court must be satisfied that its determination of the issue will result in substantial costs savings, that the application was made without delay and that there is a good reason why the court should pronounce on the issue.[1103] If these hurdles are overcome and a declaratory judgment is given, section 32(6) of the Arbitration Act 1996 confirms that such judgments would have *res judicata* effect.[1104]

[1095] *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No 2)* [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep 509.

[1096] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; [2005] 1 All ER (Comm) 715; *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc* [2008] EWHC 914 (Comm); [2008] 2 Lloyd's Rep 269.

[1097] AA 1996, s 72(1)(a). See the corresponding text to Chapter 4, footnote 757.

[1098] See Joseph, [13.14]-[13.15] for the relevant procedure for such applications. For an example of such an application, see *Hashwani v OMV Maurice Energy Ltd* [2015] EWCA Civ 1171; [2015] 2 CLC 800.

[1099] *Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 Lloyd's Rep 1; [2000] 2 All ER (Comm) 70; *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm); [2015] 1 Lloyd's Rep 191; [2015] 1 All ER (Comm) 305.

[1100] E.g. pursuant to the Contracts (Rights of Third Parties) Act 1999, s 8(1).

[1101] Joseph, [13.16].

[1102] A party to an arbitration agreement who has not commenced arbitral proceedings could not therefore make such an application, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889.

[1103] AA 1996, s 32(2)(a). See further, Joseph, [13.17]-[13.20].

[1104] AA 1996, s 32(6) provides "The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal".

Validity of arbitration agreements and their binding effect

Claims for declaratory relief concerning the validity of an arbitration agreement and its binding effect are not subject to the additional restrictions set out in section 32 of the Arbitration Act 1996.[1105] In particular, arbitral proceedings need not be commenced as the applicant simply requires a declaration that its counter-party must arbitrate and not litigate any disputes.

Conversely, a party may wish to apply for declaratory relief confirming that no arbitration agreement has been concluded[1106]; that the tribunal has not been properly constituted[1107]; or, that claims have not been submitted to arbitration in accordance with the arbitration agreement.[1108] The applicant must take care not to participate in the arbitral proceedings.[1109] It will do so if it participates in a challenge to the arbitrators' jurisdiction or in relation to the substantive merits.[1110]

Notwithstanding the above, Recital 12 of the Recast Regulation now confirms that a judgment on the validity of an arbitration agreement would not fall within the scope of the Recast Regulation.[1111] As such, courts in other EU Member States are not bound to recognise any declaratory judgment on the validity of an arbitration agreement or on the substantive jurisdiction of an arbitral tribunal in accordance with the provisions on recognition and enforcement in the Recast Regulation. Of course,

[1105] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889; Joseph, [13.31].

[1106] AA 1996, s 72(1)(a). See also *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep 267; [2007] 1 All ER (Comm) 891. This point was not reviewed by the House of Lords.

[1107] AA 1996, s 72(1)(b).

[1108] AA 1996, s 72(1)(c).

[1109] If a party wishes to take part in the arbitration but to challenge jurisdiction, that party should raise their objection in accordance with AA 1996, s 31. See further, Joseph, [13.44]-[13.45].

[1110] *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100; [2011] 1 Lloyd's Rep 243; [2011] 2 All ER (Comm) 327. Participating in parallel arbitration proceedings does not amount to taking part, *Frontier Agriculture Ltd v Bratt Bros (A Firm)* [2015] EWCA Civ 611; [2015] 2 Lloyd's Rep 500; Joseph, [13.34].

[1111] Recast Regulation, Recital 12, para 2. The Recast Regulation therefore reverses the Court of Appeal judgment in *The Wadi Sudr* on this point. See Baatz, Y., 'A jurisdiction race in the dark' (op cit). The correctness of the Court of Appeal's decision from an ECJ perspective is discussed in Lavelle, J., 'The availability of declaratory relief' (2010) 10(4) *ALM* 1-3.

EU Member State courts may recognise such declaratory judgments in accordance with their national law.

As discussed in Part V above, it remains unclear whether the English court could refuse to recognise an EU Member State court judgment on the merits solely on the basis that it had previously given a declaratory judgment on the tribunal's jurisdiction and/or on the validity of an arbitration agreement.[1112] The opposing EU Member State court judgment would likely be irreconcilable with the declaratory judgment of the English court.

C. Arbitral awards on the jurisdiction of the tribunal

Another alternative is to proceed with the arbitration and to obtain an award from the tribunal on its substantive jurisdiction. As set out in Chapter 1, unless otherwise agreed by the parties,[1113] the tribunal may rule on its own substantive jurisdiction as to whether there is a valid arbitration agreement; the tribunal is properly constituted; and, the matters in dispute have been submitted to arbitration in accordance with the arbitration agreement.[1114] The tribunal does not have the final word however and an opposing party can challenge such an award before the English courts,[1115]

[1112] In *The Wadi Sudr*, Waller LJ commented *obiter* that there would be no need to rely on the public policy exception to refuse recognition and enforcement of an EU Member State court judgment that had been given after the English court had already granted a declaration that an arbitration agreement was validly incorporated into a bill of lading, as the irreconcilably exception could instead be relied upon, [63]. In respect of Waller LJ's comment, Baatz submits that any arbitral award would need to be registered as an English judgment before enforcement of an opposing EU Member State court judgment is sought, see Baatz, Y., 'A jurisdiction race in the dark' (op cit), p 371. Whether this is correct under the Recast Regulation remains to be seen.

[1113] The parties are entitled to agree that arbitrators do not have power to rule on their own jurisdiction.

[1114] AA 1996, s 30(1). See Chapter 1, p 19. See further, Joseph, [13.39]-[13.42].

[1115] See AA 1996, ss 30, 31, 67 and 70-73. To challenge an arbitrator's ruling on its jurisdiction, there must be a ruling on jurisdiction; an award on the merits does not suffice, *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192; [2005] 1 All ER (Comm) 303. For the possibilities open to a party wanting to challenge the arbitrators' jurisdiction either before or following an award on the same, see Joseph, [13.42]-[13.53].

unless the right to object is lost.[1116] Even so, the tribunal can continue with the merits of the dispute while the challenge is outstanding.

If an arbitral award on jurisdiction is obtained before an EU Member State court judgment on the same matter and between the same parties, the arbitral award may have the desired *res judicata* effect in so far as the English court is concerned.[1117] It may be wise for a litigant to also seek to enter judgment in the terms of the award pursuant to section 66(2) of the Arbitration Act 1996. This allows the judgment rather than the award to be enforced. It is common that applications to enforce awards and applications to enter judgment in the terms of the award are made together.[1118]

Even if the litigant did so, it appears that such a judgment would fall outside the scope of the Recast Regulation in the light of Recital 12, as the judgment would concern the validity of an arbitration agreement.[1119] Even if that is incorrect, there is no authority to confirm that entering judgment in the terms of the award would be effective in shielding a litigant from an opposing judgment of

[1116] AA 1996, s 73. This is a mandatory provision. The challenge must be brought within 28 days from the date of the award or appeal and notice must be given to the parties and the tribunal. If a challenge is not brought, the award on jurisdiction will be final and bind the parties. It also precludes any party from challenging the award on jurisdiction as a ground of challenge to the award on the merits, *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm); [2015] 2 Lloyd's Rep 487; [2016] 1 All ER (Comm) 517. The court has a discretion to extend the 28 day period, AA 1996, s 80(5); *Peoples Insurance Co of China v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617.

[1117] Merkin & Flannery, p 192, footnote 148. *People's Insurance Co of China v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617.

[1118] See e.g. *West Tankers Inc v Allianz SpA (The Front Comor)* [2011] EWHC 829 (Comm); [2011] 2 Lloyd's Rep 117; [2011] 2 All ER (Comm) 1, aff'd [2012] EWCA Civ 27; [2012] 1 Lloyd's Rep 398; [2012] 2 All ER (Comm) 113. At first instance, Field J held "Where […] the victorious party's objective in obtaining an order under s 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award", [28]. The Court of Appeal instead questioned whether the phrase "enforced in the same manner as a judgment to the same effect" was confined to enforcement by one of the normal forms of execution of a judgment which are provided under the [CPR] or whether it may include other means of giving judicial force to the award on the same footing as a judgment. In giving the lead judgment, Toulson LJ (as he then was) expressed preference for the broader interpretation, [35]-[38]. See also *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm); [2011] 2 Lloyd's Rep 531.

[1119] Recast Regulation, Recital 12, para 2.

another EU Member State court,[1120] i.e. under Article 45(1)(c) of the Recast Regulation, on the basis that the opposing judgment would be irreconcilable with a judgment given between the same parties in the EU Member State of enforcement.

D. Registering an arbitral award under the New York Convention

Where an arbitral award needs to be enforced in another EU Member State, then it would be considered as a 'New York Convention award' and will hopefully be given priority over any conflicting EU Member State court judgment as permitted by Recital 12 of the Recast Regulation. The relevant party should therefore apply for the foreign arbitral award to be registered under the New York Convention. In spite of the apparent priority that is now able to be given to foreign arbitral awards, it is likely that an EU Member State court will refuse to enforce a foreign arbitral award if a conflicting court judgment has already been enforced in that State. Litigants are therefore advised to register their arbitral awards as soon as possible. Also, even where the foreign arbitral award has been registered, this is unlikely to provide a shield against any court judgments or arbitral awards obtained by third parties who were not party to the original arbitration agreement.[1121]

E. Damages

Last but certainly by no means least, damages may be awarded for breach of an arbitration agreement.[1122] Damages are not a 'device' *per se*, although the intention of deterring a party from breaching their agreement to arbitrate (if that is indeed the English court's intention in the cases that have followed *West Tankers*) is the same as the devices discussed above.

[1120] This was the approach taken by the claimants in *West Tankers*. However, as the parties have now settled, the effectiveness of this tactic was not tested.

[1121] Merkin & Flannery, p 193, footnote 151.

[1122] *Doleman & Sons v Ossett Corp* [1912] 3 KB 257. See further, Merkin & Flannery, p 193; Briggs, *Private International Law in English Courts*, [4.428], [14.69]-[14.72]; Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424. It is outside the scope of this thesis to consider the difference between equitable damages in lieu of an anti-suit injunction and common law damages.

The 'breach' is the contractual breach of the promise not to commence court proceedings in respect of disputes that were agreed to be determined by way of arbitration.[1123] Alternatively, damages can be awarded for the tort of procuring a breach of contract.[1124]

An award may be given that would indemnify the 'innocent' party for 100 per cent of any future costs incurred in proceedings before, or liability imposed by, an EU Member State court.[1125] In accordance with general contract law principles, the calculation of damages under English law is usually based on the desire to put the claimant in the position that they would have been if the contract had not been breached, i.e. if the court proceedings had not been commenced and no judgment had resulted from them.[1126] However, the calculation of the appropriate damages award is difficult and substantial damages may be impossible to prove depending on the relevant facts of the dispute.[1127]

It should be noted that the right to damages can be excluded by agreement between the parties. In addition, the right is likely to be lost if the innocent party has submitted to the court proceedings and has defended the claim on its merits, as such an action is deemed to vary the contractual agreement to arbitrate.

[1123] *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103; [2012] 2 All ER (Comm) 395; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, where Lord Mance discusses the positive and negative aspects of the agreement to arbitrate disputes; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889; *Golden Endurance Shipping SA v RMA Watanya SA* [2014] EWHC 3917 (Comm); [2015] 1 Lloyd's Rep 266; [2015] 2 All ER (Comm) 435.

[1124] *Horn Linie GmbH & Co v Panamericana Formas e Impresos SA (The Hornbay)* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep 44; [2006] 2 All ER (Comm) 924; *Kallang Shipping SA Panama v AXA Assurances Senegal (The Kallang)* [2008] EWHC 2761 (Comm); [2009] 1 Lloyd's Rep 124, where damages of US$130,350 were awarded against the cargo underwriters.

[1125] This tactic was also used by the shipowners in *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103; [2012] 2 All ER (Comm) 395.

[1126] See further, Briggs, *Private International Law in English Courts*, [14.69]-[14.72].

[1127] See Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, pp 405-407.

A claim for damages for breach of an arbitration or jurisdiction agreement is not the same cause of action as the substantive claims brought before an EU Member State court allegedly in breach of such an arbitration/jurisdiction agreement.[1128]

How such an award sits with the principle of mutual trust is hard to discern, although it has been held by the UK Supreme Court that proceedings for damages for breach of a dispute resolution agreement do not interfere with a judgment given by the court of another EU Member State.[1129] This submission is not entirely convincing, as damages clearly undermine the effectiveness of the Brussels Regime instruments.[1130] Prior to the Supreme Court's judgment, the High Court held that "to award damages against a party for having improperly invoked the process of a foreign court is an indirect interference with that foreign court".[1131]

As mentioned above, damages were previously considered to not be an adequate remedy for the innocent party.[1132] Moreover, there are still situations where an anti-suit injunction is not only preferable to damages, but necessary in order to give effect to a deemed weaker party's statutory rights.[1133]

[1128] *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70; [2014] 1 Lloyd's Rep 223; [2014] 1 All ER 590; Joseph, [13.11].

[1129] See *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T)* [2013] UKSC 70; [2014] 1 Lloyd's Rep 223; [2014] 1 All ER 590 and *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544. See further, Briggs, *Private International Law in English Courts*, [14.32]. See further the discussion in Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, where Todd argues that the courts have not paid proper regard to principle when awarding damages in such cases, with the reasoning often being clouded by other considerations i.e. the effective enforcement of arbitration agreements. Todd also argues that equitable damages in lieu of an anti-suit injunction cannot be awarded under English law, p 416.

[1130] Dickinson, A., 'Once bitten – mutual distrust in European private international law' (2015) 131(Apr) *LQR* 186-192, pp 190-192

[1131] *Research in Motion UK Ltd v Visto Corp* [2007] EWHC 900 (Ch), [28].

[1132] *Bristol Corp v John Aird & Co* [1913] AC 241; *Heyman v Darwins Ltd* (1942) 72 Ll L Rep 65; [1942] AC 356; *The Angelic Grace.*.

[1133] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723; [2007] 2 All ER (Comm) 813 (an anti-suit injunction was granted as it was the only way to give effect to the claimants' statutory right to be sued in England); *Petter v EMC Europe Ltd* [2015] EWCA Civ 828; [2015] CP Rep 47 (proceedings in the USA where there was an exclusive jurisdiction agreement in favour of the courts of Massachusetts but, as an employee, the claimant had a statutory right to be sued in England).

It appears that an arbitral tribunal can also order the party in breach of an arbitration agreement to pay damages to the innocent party.[1134] As tribunals are not bound by the principle of mutual trust, there would be no infringement of that principle.[1135]

F. Settlement

While settlement by the parties of the matter in dispute is not in itself a tactic similar to those described above, the law appears to be in such a state of confusion that settlement seems to be inevitable. This is the case even if the parties start out by employing the tactics mentioned above. Litigation may become so protracted that the parties end up in deadlock. If this occurs, parties would be better advised to cut their losses and settle the dispute on a commercial basis.[1136]

VIII. CONCLUSION

Recital 12 makes it clear that a judgment given by an EU Member State court as to whether or not an arbitration agreement is valid or otherwise is not subject to the rules on recognition and enforcement in the Recast Regulation. This is irrespective of whether the court decided the matter

[1134] *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375; *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm); [2009] 1 Lloyd's Rep 213; [2009] 1 All ER (Comm) 568; *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103; [2012] 2 All ER (Comm) 395. *Cf*. Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, p 416.

[1135] *Gazprom*. *Cf*. Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424, pp 414, 416.

[1136] See e.g. the *Starlight Shipping* litigation that occurred before and *after* the Supreme Court's ruling on whether matters in proceedings in England and in Greece were *lis alibi pendens*: *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162; [2012] 2 All ER (Comm) 608 (HC); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2012] EWCA Civ 1714; [2013] 1 Lloyd's Rep 217; [2013] 1 All ER (Comm) 1297 (CA); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70; [2014] 1 Lloyd's Rep 223; [2014] 1 All ER 590 (SC); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544 (CA); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep 579; [2015] 2 All ER (Comm) 747 (HC).

as a principal issue or an incidental question. Such court judgments may still be recognisable and enforceable in the EU Member States pursuant to each State's national law.

It also appears that a party seeking to enforce a New York Convention award is in a much better position than their opponent, even if the opponent has a judgment from an EU Member State court.

Regrettably, the overall result of Recital 12 is that no priority is given to the courts at the seat of arbitration. Also, the *lis alibi pendens* provisions in the Recast Regulation would not be triggered where more than one court is requested to determine the validity of an arbitration agreement. As a result, multiple judgments on the validity of an agreement may be obtained from courts with substantive jurisdiction under the Regulation, albeit with little effect until a judgment on the merits is given by a court.

Recognition of a foreign arbitral award undoubtedly undermines the effectiveness of the Recast Regulation in much the same way as an anti-suit injunction. However, as the recognition and enforcement of foreign arbitral awards is regulated by the New York Convention, and the Recast Regulation is without prejudice thereto, it must be correct that a court can enforce a New York Convention award irrespective of a conflicting judgment from an EU Member State court that would otherwise fall to be recognised and enforced pursuant to the Recast Regulation. On this basis, it is not necessary to find an express exception to recognition and enforcement in the Recast Regulation where the New York Convention is applicable.

Until the CJEU pronounces on the 'new' arbitration exclusion in the Recast Regulation, the two major areas of concern are (1) concurrent arbitration and judicial proceedings, and the lack of any *lis alibi pendens* rules; and, (2) the enforcement of domestic arbitral awards and arbitration-related judgments when faced with a competing judgment of an EU Member State court on the same matter and between the same parties. It appears that the feared discriminatory treatment of foreign arbitral awards that the New York Convention seeks to avoid as compared to the treatment of local awards is no longer a fundamental concern. Rather, in the EU Member States, the Recast Regulation may result in local awards being treated less favourably, as they do not benefit from the protection provided by the New York Convention.

It is questionable whether the EU should regulate these two issues at a supranational level to achieve uniformity and consistency across the EU Member States in respect of both arbitral awards

and judgments.[1137] Given the resounding "no" to the extension of the Brussels Regime to arbitration at the time that the Recast Regulation was being drafted,[1138] it appears highly unlikely that even these two discrete issues will ever be regulated by EU law.

[1137] See Gaffney, J., 'Should the European Union regulate commercial arbitration' (2017) 33(1) *Arbitration Int* 81-98.

[1138] See Chapter 2, pp 66 *et ff.*

CHAPTER 6 - THE IMPACT OF BREXIT ON ARBITRATION IN THE UK

I. BREXIT – NO LONGER BUSINESS AS USUAL

At the time of writing, it appears to be a foregone conclusion that the UK will no longer be one of the EU Member States at some point in early 2019.[1139] Following the announcement of the 'United Kingdom European Union membership' referendum result on 24 June 2016,[1140] questions that are no longer academic in nature have been raised regarding if and how EU law will apply to the UK once the latter has left the EU. The current UK Parliament has set out its plans regarding 'Brexit' and EU law on a general level.

This Chapter briefly reviews the options available in order to keep the Brussels Regime, or some element of it, in place following the UK's exit.[1141] In particular, this Chapter examines whether the exclusion of arbitration from the Brussels Regime will be affected by Brexit for better or worse. Currently, the only certainty is that the landscape is changing.

II. UK NOTIFIES EU OF ITS EXIT FROM THE EU

On 13 March 2017, the European Union (Notification of Withdrawal) Bill was passed by Parliament, receiving Royal Assent three days later.[1142] Consequently, on 29 March 2017, by way of a letter[1143] addressed to Mr Donald Tusk, President of the European Council, the new UK Prime Minister, Ms Theresa May, officially notified the European Council of the UK's intention to withdraw from the EU in accordance with Article 50(2) of TEU. Ms May's letter triggered a two-year period for withdrawal discussions, which has now been extended to 31 December 2020.[1144] Presently, the European

[1139] The original 'exit' date was 29 March 2019. A transition period has now been agreed which will last from 29 March 2019 to 31 December 2020.

[1140] Of those who voted, 51.9% of the British electorate voted in favour of leaving the EU.

[1141] Namely, TFEU, Title V, Chapter 3, Judicial cooperation in civil matters.

[1142] European Union (Notification of Withdrawal) Act 2017.

[1143] ('Ms May's letter'). A copy of the letter is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf (accessed 02/04/2017).

[1144] TEU, Art 50(3). After the expiry of the negotiation period or the entry into force of a withdrawal agreement between the UK and EU, the TEU and TFEU will cease to apply to the UK.

Communities Act 1972, which gives effect to EU law in the UK, will be repealed[1145] and the UK will become a 'third State' on the 'withdrawal date'.[1146]

While a proportion of EU law is already embodied in English law either by way of primary or secondary legislation,[1147] a significant amount of EU law is not provided for anywhere in the statute book. Accordingly, in order to deal with EU law that is at present directly applicable and binding on the UK, a two-stage process has been announced. First, a new Act of Parliament, currently the European Union (Withdrawal) Bill,[1148] will "wherever practical and appropriate" convert the body of existing EU law, known as the 'acquis', into English law.[1149] According to Ms May's letter, this approach will provide certainty for UK citizens and for anybody from the EU who does business in or with the UK.[1150] The legislation will not come into effect until the UK's departure from the EU. Thereafter, through normal parliamentary processes, the gargantuan body of EU law that has been

[1145] As an automatic consequence, the Recast Regulation, Rome I, Rome II, 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements 2005, 44 ILM 1294 ('2005 Hague Convention'), along with other EU instruments, will no longer have any force in the UK. The 2007 Lugano Convention and the 2005 Hague Convention bind the UK indirectly through its EU treaty obligations, TFEU, Art 316(2). See further Dickinson, A., 'Back to future: the UK's EU exit and the conflict of laws' (2016) 12(2) *J Priv Int L* 195-210 ("Dickinson (2016)"), pp 197-198.

[1146] For the purposes of this thesis, this date being 31 December 2020. Repeal of ECA 1972 should not, in theory, affect the Brussels Convention, Rome Convention or 1988 Lugano Convention, as these are international treaties, as opposed to acts of the EU, and the UK ratified or acceded to each convention itself. That being said, there are conflicting views in the academic literature in respect of the continued application and/or revival of each of these conventions. See further, pp 228 *et ff* below on the Rome Convention and pp 241 *et ff* below on the Brussels Convention and 1988 Lugano Convention.

[1147] It is estimated that approximately 14.3% of UK Acts enacted between 1980 and 2009 have incorporated EU provisions, 'The Brexit Papers: Third Edition', Paper 9: CJEU Jurisprudence, June 2017, p 2.

[1148] Introduced by UK Government on 13 July 2017. Formerly dubbed 'the Great Repeal Bill'.

[1149] Ms May's letter, p 2. This includes some 12,000 Regulations, 7,900 Directives and a number of self-standing rights in EU Treaties, 'The Brexit Papers: Third Edition', Paper 9: CJEU Jurisprudence, June 2017, p 2.

[1150] *Ibid*. Ms May's letter reflects the sentiments expressed in Ms May's speech at Lancaster House on 17 January 2017, where it was stated:

> "As we repeal the European Communities Act, we will convert the 'acquis' – the body of existing EU law – into British law. This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate".

transposed into English law will be sifted (presumably) by Parliament with decisions taken as to which laws will be retained, amended or replaced.[1151]

While the mechanical act of converting all EU law into English law will provide continuity in some fields, the above steps do not take into account areas of law that require reciprocal arrangements being put in place in the remaining EU Member States. For example, the steps overlook the requisite mutual obligations concerning the free movement of judgments between the remaining EU Member States and the UK. Additionally, exactly how the recognition and enforcement of judgments will be catered for is likely to be unclear for some time, as Ms May's letter specifically provides that the UK will not seek membership of the Single Market.[1152] Rather, a "bold and ambitious" free trade agreement between the UK and EU is proposed.[1153]

Ms May's letter states that such an agreement "will require detailed technical talks, but as the UK is an existing EU member state, both sides have regulatory frameworks and standards that already match". The UK and EU should therefore prioritise "the evolution of our regulatory frameworks to maintain a fair and open trading environment, and how we resolve disputes".[1154] Even if prioritised, it seems unlikely that the necessary arrangements will be put in place before the two-year period is up. Ms May's letter did not address Parliament's plans to end the applicability of the jurisdiction of the CJEU to the UK.[1155] While the European Council is well aware of the UK's stance towards the CJEU, this may prove to be quite the sticking point. Further, the current Brussels Regime is the result of some 50 years' worth of negotiations and refinement, so it seems naïve to assume that a parallel or similar regime can be agreed in a mere two years.

[1151] UK Government, *The United Kingdom's exit from and new partnership with the European Union*, paras [1.1]-[1.2].

[1152] Ms May's letter, p 4. See Tynes, D. S., & Haugsdal, E. L., 'In, out or in-between? The UK as a contracting party to the Agreement on the European Economic Area' (2016) 41(5) *ELRev* 753-765, for a discussion on whether, post-Brexit, the UK *can* remain a contracting party to the *Agreement on the European Economic Area 1992* [1994] OJ L1/3.

[1153] Ms May's letter, p 5. If the UK leaves the EU without an agreement, the default position is that the UK and the remaining EU Member States would trade on World Trade Organization (WTO) terms.

[1154] Ms May's letter, p 5.

[1155] Once ECA 1972 is repealed, and in the absence of any other agreement, national courts should no longer be obliged to take judicial notice of the acts of EU institutions or to afford supremacy to the judgments of the CJEU, as they are currently so obliged under ECA 1972, s 3(2).

III. BREXIT AND THE BRUSSELS REGIME

A. Choice of law

Following Brexit, Rome I and Rome II could very easily[1156] be transplanted into English law by the EU Withdrawal Bill (by way of new statutes) and/or by amending the Contracts (Applicable Law) Act 1990[1157] and the Private International Law (Miscellaneous Provisions) Act 1995.[1158] The latter statutes would need to be amended to remove inconsistencies with the approach taken in Rome I and Rome II,[1159] and also to remove any undesirable provisions of the common law rules.[1160] If/once

[1156] The UK would need to remove references to the reserved application of European law on particular issues in Rome I, Art 23 and Rome II, Art 27, see Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (2017) Lecture to the Commercial Bar Association, 24 January 2017, p 6, available at https://www.blackstonechambers.com/news/secession-european-union-and-private-international-law-cloud-silver-lining/ (accessed 30/01/2018). See also Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, pp 107-108.

[1157] The Rome Convention was given force of law in the UK by the Contracts (Applicable Law) Act 1990, s 2(1), which provides that, with the exception of Rome Convention, Arts 7(1) and 10(1)(e), the Rome Convention "shall have force of law" in the UK.

[1158] These statutes have sections that disapply certain rules where Rome I and Rome II are applicable. For contractual obligations, see Contracts (Applicable Law) Act 1990, ss 4A and 4B (s 4A was inserted by the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations, SI 2009/3064, Reg 2, and the Law Applicable to Contractual Obligations (Scotland) Regulations, SSI 2009/410, Reg 2). For non-contractual obligations, see Private International Law (Miscellaneous Provisions) Act 1995, ss 15A and 15B (the latter sections were inserted by the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations, SI 2008/2986, Reg 2, and the Law Applicable to Non-Contractual Obligations (Scotland) Regulations, SSI 2008/404, Reg 2). Once Rome I and Rome II cease to have effect, i.e. when ECA 1972 is repealed (see footnote 1145 above), the original sections of the statutes should apply to all disputes no matter where the defendant is domiciled/habitually resident. See further Aikens, R., & Dinsmore, A., 'Jurisdiction, enforcement and the Conflict of Laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (2016) 27 *EBLR* 903-920.; Dickinson (2016), pp 198-199.

[1159] For example, the common law draws a distinction between substance and procedure when assessing damages, whereas Rome I and Rome II do not. See Rome I, Art 15 and Rome II, Art 12. For further examples of inconsistencies in the various regimes, see Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, p110.

[1160] For a detailed review of the problems with the common law rules, see Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit).

these statutes have been drafted/updated, there would no longer be any need for Rome I or Rome II to provide the current choice of law rules in order for the rules to be applicable in the UK.

The current national law provisions on causes of action not covered by Rome I or Rome II, such as claims for defamation, would need to be reviewed and any gaps in the legislation would need to be filled, or recourse can be made to common law rules where appropriate. In this regard, it should be noted that Rome I does not apply to arbitration agreements,[1161] although it does apply to determine the governing law of a contract that contains an arbitration agreement.

In the unlikely event that the UK does not adopt the rules of Rome I and Rome II, the rules of the Rome Convention could[1162] apply to most contractual disputes, save for some insurance contracts, which are catered for separately.[1163] The status of the Rome Convention under international and EU law is questionable,[1164] given that Rome I provides that it shall replace the Rome Convention in the EU Member States,[1165] save for in certain overseas territories.[1166] That aside, the Rome Convention should continue to apply in the UK after Brexit, as the UK became a Contracting State to the Rome Convention in its own right, prior to the EU having exclusive competence in this area, and the Rome Convention has force of law in the UK.[1167]

It is also arguable that, by way of the Contracts (Applicable Law) Act 1990, the provisions of the Rome Convention will revive (to the extent that Rome I no longer directly applies in the UK) and become applicable in the UK as a matter of UK national law, given the relevant implementing legislation that UK courts would be bound to follow, irrespective of the status of the Convention

[1161] Rome I, Art 1(2)(e).

[1162] Whether the Rome Convention would simply apply once again in the UK once ECA 1972 has been repealed (with the consequence that Rome I will no longer apply in the UK) is a matter of some debate, see e.g. Dickinson (2016), pp 201-202. See Wahab, M., S., A., 'Brexit's chilling effect on choice of law and arbitration in the United Kingdom: Practical reflections between aggravation and alleviation' (2016) 33(7) *J Intl Arbit* 463-482 for a discussion of the likely choice of law regime post-Brexit.

[1163] Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635.

[1164] See Dickinson (2016), pp 203-204.

[1165] Rome I, Art 24.

[1166] The territories are discussed at footnote 323 above.

[1167] See footnote 1157 above.

under public international law.[1168] This would also be the position even if the UK unilaterally adopted the provisions of Rome I by way of statue, as the UK would once again be bound to apply the Rome Convention in accordance with public international law rules and could not simply choose to replace that Convention with national provisions reflecting Rome I without first denounincg the Rome Convention.[1169] This outcome depends on whether the Rome Convention would 'revive' post-Brexit, which is not clear, and it is likely that a ruling from the CJEU would be required to confirm the matter once and for all.

As the remaining EU Member States have agreed that the Rome Convention should continue to apply to the overseas territories, it is arguable that they could (if they are willing) also agree to the Rome Convention being applied in the UK following Brexit, when the UK is no longer an EU Member State.[1170]It is worth noting that the Rome Convention is a unilateral convention that does not require reciprocity with another State in order for it to be functional, so the remaining EU Member States' "agreement" is not strictly necessary for the Rome Convention to have effective application in the UK.

Courts in the remaining EU Member States would presumably continue to be bound to apply Rome I (and Rome II), as Rome I has 'universal application' i.e. it applies to all matters with a foreign element and not simply those matters that involve an EU or an EFTA Member State.[1171] This could result in forum shopping if it is perceived that the rules under Rome I are more favourable to a party than those under the Rome Convention.

The more fundamental change as regards choice of law rules (as is currently understood) would be that the UK could no longer request a preliminary reference from the CJEU, nor would any future CJEU judgments on the interpretation of Rome I or Rome II be binding on the UK. Current CJEU

[1168] Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, p 108.

[1169] *Ibid*. p 124.

[1170] The remaining EU Member States could rely on Rome Convention, Art 20, to give precedence to Rome I, although the UK could not; Dickinson (2016), p 204.

[1171] Rome I, Art 2. Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, p 108. Although, the position *vis-à-vis* Denmark is less clear and this situation may arise in respect of the UK post-Brexit, see Ruhl, pp 108-109.

judgments on Rome I[1172] or Rome II[1173] are binding but future CJEU judgments may not even provide persuasive authority. There is a possibility that post-Brexit, CJEU judgments will have a similar status in the UK as they currently do in Denmark and the EFTA Member States that subscribe to the 2007 Lugano Convention, i.e. English courts will have to "take due account of" CJEU rulings,[1174] if the UK agrees so as part of a free trade agreement. Either way, the prospect of CJEU judgments having zero application in the UK is incomprehensible at this time.

In addition, amendments to Rome I and Rome II made post-Brexit, e.g. if the Regulations were ever 'recast', would no longer be directly applicable and binding. The UK would need to enact the new versions into national law to give effect to them, as desired. This would not be difficult; statutory instruments to amend the relevant national statutes could be passed with each update to Rome I and Rome II.

Notwithstanding the above, it may be argued that the UK should take this opportunity to amend, either wholesale or piecemeal, its choice of law rules.[1175] Reversion could be made, certainly in part, to the common law rules instead.[1176] The main issues with this approach are the limited time factor and the need for certainty on the withdrawal date.

Whatever option is chosen, clarification, preferably by way of statute or statutory instrument, is also needed as to which regime will apply on the withdrawal date. This issue should not be left for determination by the English courts. For example, would any updated versions of the Contracts (Applicable Law) Act 1990 and/or the Private International Law (Miscellaneous Provisions) Act 1995

[1172] *Verein fur Konsumenteninformation v Amazon EU Sarl (C-191/15)* EU:C:2016:612; [2017] QB 252; *Greece v Nikiforidis (C-135/15)* EU:C:2016:774; [2017] CEC 658; *ERGO Insurance SE v If P&C Insurance AS and Gjensidige Baltic AAS v PZU Lietuva UAB DK (Joined Cases C-359/14 and C-475/14)* EU:C:2016:40; [2016] Lloyd's Rep IR 299; [2016] RTR 14.

[1173] *Ibid*.; *Lazar v Allianz SpA (C-350/14)* EU:C:2015:802; [2016] 1 WLR 835; *Pruller-Frey v Brodnig (C-240/14)* EU:C:2015:567; [2015] 2 Lloyd's Rep 645; [2015] 1 WLR 5031; *Homawoo v GMF Assurances SA (C-412/10)* EU:C:2011:747; [2011] ECR I-11603.

[1174] See Chapter 2, pp 86 *et ff.*

[1175] See further Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), pp 4-5, 6-13.

[1176] Although the common law rules have been described as "so dreadful that they are simply unfit for purpose", see Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), p 7. On the common law rules, see further pp 247 *et ff* below.

apply with immediate effect on the withdrawal date or would e.g. Rome I continue to govern contracts entered into before the withdrawl date? Given the length of some commercial contracts, this option could see Rome I being applied by UK courts for many years to come. Alternatively, would the relevant event giving rise to the contractual or non-contractual dispute be the relevant benchmark for determination of the applicable choice of law rules? It is arguably preferable that an event occurring after the UK has left the EU that gives rise to a dispute should be governed in accordance with whatever body of rules the UK has adopted following Brexit. A further trigger could be the date that legal proceedings are commenced.

The UK government currently appears to favour Rome I applying to contracts concluded before the withdrawal date and Rome II applying to events which occurred before the withdrawal date.[1177] If this issue is not confirmed in further detail and by way of binding authority, commercial parties will be left in tremendous uncertainty for some time and litigation will inevitably result.

B. Jurisdiction and judgments

Adopting the harmonised rules on court jurisdiction and the recognition and enforcement of judgments is much more complicated. The main possibilities currently being debated include (1) the UK legislating so that the Recast Regulation is enacted by way of a statutory instrument; (2) the UK acceding to the 2007 Lugano Convention; and/or (3) the UK entering into a bilateral agreement with the EU similar to the parallel agreement between Denmark and the EU.[1178] Other options include (4) the revival of the Brussels Convention and/or the 1988 Lugano Convention; (5) the revival of bilateral conventions on private international law that predate the Brussels Regime; or, (6) the UK reverting to its previous common law rules.[1179] These options are discussed further in this section.

[1177] UK government, 'Providing a cross-border civil judicial cooperation framework: a future partnership paper' published 22 August 2017, p 10, available at https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper (accessed 04/10/2018).

[1178] EU-Denmark Agreement. See also *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2013] OJ L79/4.

[1179] See CPR, rr 6.36-6.37 and Practice Direction 6B. The common law rules on allocation of jurisdiction to the appropriate forum are discussed in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460 and, more recently, *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 1 Lloyd's Rep 466; [2013] 2 AC 337.

Again, irrespective of what option is chosen (if any), advance confirmation, preferably by way of statute or statutory instrument, will be needed as to when that option will apply. For example, will a pre-Brexit judgment of another EU Member State court that requires recognition and enforcement in the UK post-Brexit remain subject to the applicable rules in the Recast Regulation or would e.g. the UK's common law rules apply? The UK government has suggested that

1. the existing EU rules governing jurisdiction to determine disputes should continue to apply to all legal proceedings instituted before the withdrawal date;
2. where a choice of court has been made prior to the withdrawal date, the existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date; and,
3. the existing EU rules governing recognition and enforcement of judicial decisions should continue to apply to judicial decisions given before the withdrawal date, and to judicial decisions given after the withdrawal date in proceedings which were instituted before that date.[1180]

While the above suggestions appear to be uncontroversial, unambiguous binding authority on the matter must be given before the withdrawal date.

1. Enacting the Recast Regulation into English law

The Civil Jurisdiction and Judgments Act 1982 already enacts certain Brussels Regime instruments into English law, namely the Brussels and Lugano Conventions. The Recast Regulation applies to the UK separately, as it is directly applicable and binding. Once the UK exits the EU, the Recast Regulation will cease to apply; there is no "fallback position" in respect of the Recast Regulation.[1181]

Parliament could simply amend the 1982 Act (or pass a new statute) to incorporate the provisions of the Recast Regulation into national law. However, any unilateral extension of the Brussels Regime to the UK while it is no longer an EU Member State is doomed to failure, unless the remaining 27 EU

[1180] UK government, 'Providing a cross-border civil judicial cooperation framework: a future partnership paper' published 22 August 2017, p 11.

[1181] Hjalmarsson, J., 'A dog's Brexit' (2017) Sept *STL* 1-2, p 1.

Member States agree to parallel obligations.[1182] If the EU Member States did not so agree, there would be no requirement for their courts to reciprocate and the UK, in the absence of any negotiated solution, may find itself in a vacuum.[1183] Accordingly, EU Member State courts would be free to ignore proceedings before the English courts between the same parties concerning the same dispute even if an English court had been seised first, for example.[1184]

Rejection of the CJEU's jurisdiction would further complicate matters where the UK's understanding of a provision or phrase in the Recast Regulation newly transplanted into statute conflicts with the interpretation by an EU Member State court or with a post-Brexit CJEU judgment. It does not seem feasible that the autonomous meanings given to terms in the Brussels Regime instruments will be transplanted into national law by way of statute or statutory instrument. Accordingly, without any national or supranational requirement on UK courts to follow CJEU judgments, fragmentation in terms of application of the Recast Regulation would be inevitable.

Further, this option sees the UK retaining the text of the Recast Regulation while casting aside the spirit and objectives of the Brussels Regime and the wider Single Market. It has been described as "wishful thinking" by one commentator that the remaining EU Member States will accept the UK indirectly cherry picking parts of EU law that will be retained as parallel domestic law.[1185]

One of the most oft-repeated arguments postulated by the ECJ/CJEU is the "mutual trust" that exists (or should exist) between the EU Member States in order for the free movement of court judgments

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[1182] For a similar debate on the reflexive effect of English courts applying the common law doctrine of *forum non conveniens* while other EU Member State courts are not obliged to do so under the Brussels Regime (and are in fact precluded from doing so following the ECJ ruling in *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02)* EU:C:2005:120; [2005] 1 Lloyd's Rep 452; [2005] QB 801), see Peel, E., 'Forum non conveniens and European ideals' (2005) 3(Aug) *LMCLQ* 363-377 and the reply by Briggs, A., 'Forum non conveniens and ideal Europeans' (2005) 3(Aug) *LMCLQ* 378-382.

[1183] Hjalmarsson, J., 'A dog's Brexit' (op cit), p 1.

[1184] Currently, any EU Member State court other than the EU Member State court first seised must of its own motion stay its proceedings until the jurisdiction of the court first seised is established in accordance with Recast Regulation, Art 29(1). Recast Regulation, Arts 33 and 34 concerning *lis alibi pendens* and related actions with a third State and an EU Member State would be applicable to the UK if/once it leaves the EU and it becomes a third State (in the absence of any other agreement between the EU and the UK).

[1185] Comment by Hess, B., on von Hein, J., '"And as the fog gets clearer…" (17/01/2017) – May on Brexit', www.conflictoflaws.net (accessed 01/02/2017).

to become a reality. Whether or not this mutual trust ever existed between the original EEC Member States and later between the EU Member States is a matter of personal opinion. Assuming that mutual trust does exist between the UK and the other EU Member States, it is unlikely to remain in place once the UK has left the EU. It is worth noting that prior to its decisions in *Gasser v MISAT* and *Turner v Grovit*, the ECJ had not referred to the concept of mutual trust as a justification for its assertions.[1186]

In Ms May's letter, it is stated "We start from a unique position in these discussions – close regulatory alignment, **trust in one another's institutions**, and a spirit of cooperation stretching back decades".[1187] Post-Brexit, the UK's rules on international jurisdiction may no longer be harmonised with the rules of the remaining EU Member States, which is likely to result in the trust placed in one another's systems soon being in short supply.

2. Accession by the UK to the 2007 Lugano Convention

The second option of acceding to the 2007 Lugano Convention and its three Protocols[1188] is not without difficulty either, although it appears to be the intention of the UK government to accede to the Convention.[1189]

As discussed in Chapter 2, the 2007 Lugano Convention provides a similar but not identical regime to that provided by the Recast Regulation between the EU, Denmark Iceland, Norway and Switzerland. The UK is currently bound by the 2007 Lugano Convention as an EU Member State[1190]; but it is not, itself, a Contracting State. Post-Brexit, the UK will no longer be bound by the 2007 Lugano Convention.[1191]

[1186] Blobel, F., & Spath, P., 'The tale of multilateral trust and the European law of civil procedure' (2005) 30(4), *ELRev* 528-547, p 530. The authors make a valiant attempt at defining mutual trust.

[1187] Ms May's Letter, p 6 (emphasis added).

[1188] See Chapter 2, footnote 272.

[1189] UK government, 'Providing a cross-border civil judicial cooperation framework: a future partnership paper' published 22 August 2017, p 6.

[1190] TFEU, Art 216(2).The EU ratified the 2007 Lugano Convention on 18 May 2009. It entered into force in the EU on 1 January 2010.

[1191] TFEU, Art 216(2). See further Dickinson (2016), footnote 21. The status of the Civil Jurisdiction and Judgments Regulations 2009, which were enacted under the powers conferred by ECA 1972, will be in

The UK is not an EFTA Member State and Ms May's proposals (to date) do not envisage the UK becoming an EFTA Member State. It seems that Ms May would like to have a fresh agreement between the EU and the UK, presumably so that the UK's interests are protected in so far as possible. This means that the UK could only accede to the 2007 Lugano Convention as "any other State" pursuant to Article 70(1)(c) of the 2007 Lugano Convention, which is subject to Article 72. The latter Article requires completion of a number of administrative hurdles but most importantly, it requires unanimous agreement of the Contracting States to the 2007 Lugano Convention before the UK would be invited to accede.[1192] This provides scope for the EU to block the UK's accession to the 2007 Lugano Convention if relations between the EU and the UK break down during Brexit negotiations. If desired, consent to accede should be obtained as soon as possible. Furthermore, the UK may be required to agree to other conditions to which the Contracting States are bound, such as the free movement of persons.[1193]

Even if the UK could accede to the 2007 Lugano Convention, the Convention does not include the changes adopted in the Recast Regulation,[1194] which were agreed to improve the cross-border enforcement of court judgments between the EU Member States.[1195] The changes were not only intended to enhance the efficacy of the Brussels Regime *vis-à-vis* jurisdiction agreements and judgments but also arbitration agreements and awards. As discussed in Chapter 5, Recital 12 of the Recast Regulation clarifies that judgments on the validity of an arbitration agreement are excluded from the provisions on recognition and enforcement in the Recast Regulation, whereas judgments on the merits must be recognised albeit without prejudice to an EU Member State's obligations under the New York Convention.[1196]

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question once ECA 1972 is repealed; Masters, S., & McRae, B., 'What does Brexit means for the Brussels Regime?' (op cit), p 486.

[1192] 2007 Lugano Convention, Art 72(3).

[1193] See Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (2016) (Jul/Aug) *STL* 1-4, p 1.

[1194] See Recast Regulation, Art 73(1).

[1195] For a summary of the main innovations of the Recast Regulation, see Masters, S., & McRae, B., 'What does Brexit means for the Brussels Regime?' (op cit), pp 489-490. On the improvements made *vis-à-vis* jurisdiction agreements, see Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (op cit).

[1196] See Chapter 5, pp 186 *et ff*.

In order to bring the EFTA Member States up to speed with the EU, the 2007 Lugano Convention should be updated as soon as possible, although only a Contracting State can request its revision.[1197] Regrettably, there is no indication that the 2007 Lugano Convention will be updated any time soon.[1198] Further, the 2007 Lugano Convention will need to be amended each and every time the Recast Regulation is amended, in accordance with the Convention's amendment provisions.[1199] This necessitates the administrative burden of the agreement of all Contracting States each time the 2007 Lugano Convention is to be amended. The next report on the Recast Regulation must be prepared by the European Commission by 11 January 2022 and, where appropriate, the report should be accompanied by a proposal for amendment of the Recast Regulation.[1200] It is very likely that amendment of the Recast Regulation will be proposed in 2022, as the current version does not incorporate all of the suggestions in the European Commission's previous proposal regarding changes to be made to the Jurisdiction Regulation.[1201]

Further, as discussed in Chapter 2, courts in EFTA Member States are bound to take "due account of" CJEU judgments on the various Brussels Regime instruments although they are not permitted to make a preliminary reference request to the CJEU.[1202] As such, courts in the UK (post-Brexit), along with courts in EFTA Member States, would be entitled only to submit statements of case or to make written submissions on preliminary reference requests made by courts in the remaining EU Member States.

In spite of the above issues, the UK should still seek to accede to the 2007 Lugano Convention if it wishes to benefit from a harmonised regime with Denmark, Iceland, Norway and Switzerland, which can continue with or without an EU-UK agreement. If the UK does so, the amendments made to the Civil Jurisdiction and Judgments Act 1982 by the Civil Jurisdiction and Judgments Regulations 2009 may need to be updated, or another statute/statutory instrument may need to be passed, in order

[1197] 2007 Lugano Convention, Art 76.

[1198] At its meeting on 25 September 2013, the Standing Committee of the 2007 Lugano Convention discussed the possibility of updating the Convention in order to bring it into line with the Recast Regulation but no further steps have been taken, see Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (op cit), p 2.

[1199] 2007 Lugano Convention, Art 76 and Protocol No 2.

[1200] Recast Regulation, Art 79.

[1201] See Chapter 2, pp 66 *et ff.*

[1202] Chapter 2, p 87.

to give the 2007 Lugano Convention force of law in the UK with the UK as a Contracting State in its own right.

The contrary opinion is to not accede to the 2007 Lugano Convention at all, as this would bind the UK to the CJEU's interpretation of the 2007 Lugano Convention to date and the inadequacies that resulted from ECJ judgments such as *Gasser v MISAT*, *Turner v Grovit* and *West Tankers*, which have encouraged forum shopping, abusive tactical litigation and prohibited anti-suit injunctions. If this outcome results, the statute book will need to be updated to remove all references to the 2007 Lugano Convention, if this is not an automatic consequence of repeal of the European Communities Act 1972.

As mentioned in Chapter 2,[1203] Liechtenstein, while an EFTA Member State, has not ratified either of the Lugano Conventions. It is not yet clear whether the UK will be forced to follow Liechtenstein's example and adopt individual treaties with the EU and EFTA Member States, i.e. if an agreement with the EU cannot be reached.

3. A separate agreement between the EU and the UK

Supposing it is possible, the third option of a new agreement between the EU and the UK[1204] would allow the UK to benefit from the updated regime set out in the Recast Regulation, possibly also with some additional enhancements that would benefit the UK. It also seems to be the most desirable solution for the UK, although it would be foolish to believe that such an agreement will be in place prior to the UK's exit of the EU.

The EU-Denmark Agreement may provide a blueprint for any agreement between the EU and the UK. Any EU-UK agreement should be governed by rules of public international law rather than EU law and could be as flexible as desired. For example, the EU-Denmark Agreement can be updated upon notification and amendments will enter into force automatically upon the expiry of a certain time period.[1205] Alternatively, a stricter consent-based approach could be adopted for future

[1203] Chapter 2, footnote 274.

[1204] And Denmark, as well as Norway, Switzerland and Iceland if the UK cannot accede to the 2007 Lugano Convention.

[1205] EU-Denmark Agreement, Art 3(2).

changes to any EU-UK agreement. National legislation giving any EU-UK agreement force of law in the UK would also be needed.

The obvious advantage of this option is that the reciprocal arrangements of the Brussels Regime could remain in force once the UK has left the EU, with the courts of the remaining EU Member States being bound to recognise proceedings before the English courts and English court judgments in the same way as they are now. The innovations of the Recast Regulation would also continue to be applicable.

The House of Commons Justice Committee certainly prefers this option recommending in its 9th Report[1206] that

> "protecting the UK as a top-class commercial law centre should be a major priority for the Government in Brexit negotiations given the clear impacts on the UK economy of failure to do so. Protecting court choices and maintaining mutual recognition and enforcement of judgments are central to this objective: the Government should aim to replicate the provisions of Brussels I Recast as closely as possible, perhaps using the EU-Denmark agreement as a blueprint. As a minimum, it must endeavour to secure membership of Lugano II and the 2005 Hague Convention[1207] in its own right.[1208] Rome I and II should be brought into domestic law […]".[1209]

In order to maintain harmonisation, the Justice Committee also proposed that "a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-

[1206] *Implications of Brexit for the Justice System* (HC 750).

[1207] Comment on the 2005 Hague Convention is outside the scope of this thesis. See Newing, N., & Webster, L., 'Could the Hague Convention bring greater certainty for cross-border disputes post-Brexit?' (2016) 10 *DRI* 105 for analysis of whether the 2005 Hague Convention is a viable option for maintaining certainty on issues of jurisdiction and judgments between the EU and UK post-Brexit. See also Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (op cit).

[1208] The House of Commons Justice Committee clearly recognises that accession to the 2007 Lugano Convention and the 2005 Hague Convention would not fully replace the current Brussels Regime, not least because the 2005 Hague Convention omits important maritime contracts that are significant to the London market, e.g. carriage of goods and passengers in 2005 Hague Convention, Art 2(2)(f). See further, Hjalmarsson, J., 'A dog's Brexit' (op cit), p 2.

[1209] *Implications of Brexit for the Justice System* (HC 750), p 16, [32].

border tools of justice".[1210] This latter suggestion does not accord with Ms May's current plans, although it is only a matter of time before it is seen how firm a stance the EU will take on the application of the CJEU's jurisdiction to the UK.

The Bar Council Brexit Working Group[1211] has also urged the Government to enter into an agreement with the EU based on the EU-Denmark Agreement, along with ratification of the 2007 Lugano Convention and the 2005 Hague Convention.[1212] The Working Group did not go as far as the Justice Committee, proposing instead an EU-Denmark style agreement "albeit with a clause providing not for interpretative jurisdiction of the CJEU but for 'due account' to be taken of the decisions of the courts of all 'Contracting Parties'", reflecting the current requirements on Danish courts in relation to CJEU judgments.[1213]

Such an agreement would require the blessing of the EU on behalf of the remaining EU Member States, as the EU has exclusive competence in this area.[1214] The EU therefore has a very strong bargaining chip at its disposal and may use any EU-UK agreement as leverage for the EU in other areas. As such, it seems somewhat fanciful to believe that the EU would accept an agreement on a harmonised private international law system where the UK is free to ignore the judgments of its most prominent arbiter. Whether the UK will agree to take account of CJEU rulings is another matter. Moreover, there would no longer be any UK judges or Advocates General at the CJEU, which will further complicate the matter.[1215]

[1210] *Ibid*.

[1211] Bar Council Brexit Working Group, 'The Brexit Papers', 'The Brexit Papers: Second Edition', 'The Brexit Papers: Third Edition' are available at http://www.barcouncil.org.uk/media-centre/campaigns/brexit/ (accessed 24/01/2017).

[1212] *Ibid*. 'The Brexit Papers: Third Edition', Paper 4: Civil Jurisdiction and Judgments, November 2016, pp 2, 7-8. The Working Group also suggests ratification of the 2007 Lugano Convention to preserve the present regime with Norway, Iceland and Switzerland.

[1213] *Ibid*. p 34. See also Chapter 2, p 86. It is also proposed that any EU-UK agreement should apply only to proceedings instituted after the agreement's entry into force. If proceedings in the State of origin were commenced before the entry into force of the agreement, judgments given after that date should be recognised and enforced in accordance with the agreement, p 35.

[1214] TFEU, Arts 2(1), 3(2).

[1215] Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 487 and footnote 35, which explains that the UK would not be entitled to have a UK judge or Advocate General at the CJEU or General Court.

In addition, the UK would not be involved in any negotiations concerning further amendment of the Recast Regulation, unless any EU-UK agreement specifically provides for this.[1216] While the UK will not be obliged to adopt future amendments to the Recast Regulation, it may nonetheless be 'forced' to accept the amendments in order to maintain harmonisation with the remaining EU Member States, in the same way that Denmark is held hostage under the EU-Denmark Agreement.[1217] The UK would need to consider whether it is willing to be bound by such restrictions as a compromise for the continued application of the Brussels Regime. It should be noted that the UK will be in a slightly different position to Denmark, as the UK will no longer be an EU Member State, which hopefully will allow some room for negotiation on the above-mentioned points.

Separate agreements also lead to fragmentation in terms of substance and application. For example, Denmark remained subject to the Brussels Convention until 1 July 2007, while the other EU Member States were bound by the Jurisdiction Regulation from 1 March 2002.[1218] In addition, the 2007 Lugano Convention entered into force in Norway, Iceland and Switzerland at different times.[1219] A further notification from Denmark will be needed following the 2022 review of the Recast Regulation and, if an agreement is concluded between the EU and the UK within the next two years, i.e. by 2019, another agreement or notification will then be needed following the 2022 review for the UK also.

The only thing that is clear is that the continuation of a harmonised private international law regime with the remaining EU Member States and the EFTA Member States cannot be achieved unilaterally by the UK. As commented by Hess, "the whole current development is a pity (no, a nightmare) – but

[1216] *Ibid*. p 486 and footnote 25 in respect of the EU-Denmark Agreement.

[1217] Masters, S., & McRae, B., 'What does Brexit means for the Brussels Regime?' (op cit), p 487.

[1218] Jurisdiction Regulation, Arts 66, 76. Although it should be noted that the necessary legislative amendments to allow for the Recast Regulation to apply in Denmark entered into force on 1 June 2013 before the Regulation became applicable across the EU Member States. See the *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2013] OJ L79/4.

[1219] The 2007 Lugano Convention entered into force in Norway, Switzerland and Iceland on 1 January 2010, 1 January 2011 and 1 May 2011, respectively.

populist politicians in power are obviously unable to realize the adverse consequences of their half reflected actions".[1220]

4. Brussels Convention and 1988 Lugano Convention

The UK is still a Contracting State to the Brussels Convention and its Protocols, and the Brussels Convention remains in force to a limited extent,[1221] notwithstanding the Jurisdiction Regulation.[1222] Whether the Brussels Convention[1223] could apply in the UK again once the European Communities Act 1972 is repealed involves questions on the status of the Brussels Convention that need to be answered by public international law and EU law. The status of the domestic statutes giving force of law to and restricting the application of the Brussels Convention concerns issues of UK statutory interpretation.[1224] The Brussels Convention may revive as a matter of public international law but not, without further amendment, according to the terms of the relevant statutes; or, the Brussels Convention may not revive as a matter of public international law but UK courts would be bound to give effect, if/where possible, to the relevant statutory provisions, as currently implemented (unless repealed by Parliament).[1225] As such, no matter what outcome is correct, national law should be updated to avoid judges having to sift through pages and pages of legislation in order to determine

[1220] Comment by Hess, B., on von Hein, J., '"And as the fog gets clearer…" (17/01/2017) – May on Brexit', www.conflictoflaws.net (accessed 01/02/2017).

[1221] Brussels Convention, Art 66. The Brussels Convention continues to have force in the UK (see footnote 262) and the Brussels Convention's application would not, in theory, be affected by Brexit, as the UK became a Contracting State to the Brussels Convention in its own right. That being said, the Brussels Convention's application is currently fettered where the Recast Regulation is applicable, CJJA 1982, s 1(4). CJJA 1982, s 1(4) was inserted by the Civil Jurisdiction and Judgments Order, SI 2001/3929, Art 4 and Sch 2. See further footnote 323.

[1222] Jurisdiction Regulation, Art 68(1) provides that "This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty". For the territories where the Brussels Convention continues to apply, see footnote 323.

[1223] The same considerations apply to the 1988 Lugano Convention and Rome Convention.

[1224] Dickinson (2016), p 201. Dickinson explains that these two considerations must be considered separately by reason of the constitutional separation of powers in the UK, the effect of which is that it is for the Crown to make (or unmake) a treaty and for Parliament to give force of law to that treaty (or to remove it) by legislation, p 201. See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *Blackburn v Attorney General* [1971] 1 WLR 1037.

[1225] Dickinson (2016), p 201.

what is the current legislative position in the UK, which may or may not accord with Parliament's expectations.

Amendments to domestic statutes that relate to the Brussels Convention, even though made through statutory instruments having effect under the European Communities Act 1972, would not automatically be reversed upon repeal of the 1972 Act, thereby requiring the UK courts to consider any continued application.[1226] This will depend on the statutory provisions in question and the outcome to be achieved.[1227]

As discussed above, the Brussels Convention remains in force in respect of certain overseas territories of the EU Member States.[1228] Once the UK leaves the EU, it will no longer be an EU Member State, and therefore, the Jurisdiction Regulation, which supersedes the Brussels Convention as regards the EU Member States,[1229] would no longer be applicable. Reciprocal application of the Brussels Convention in the remaining EU Member States, instead of the Recast Regulation (to the extent of any inconsistency), could be supported by reference to Article 71 of the Recast Regulation.[1230]

It is also argued by Masters and McRae that the Brussels Convention could be applied to the UK once again:

> "[…] the Treaty unquestionably remains in force. It is not the case that it is a terminated treaty purporting to come back to life; rather, it is a case of it re-expanding its territorial application. Secondly, it is unlikely to be considered to be impliedly terminated, according to the relevant provisions of the Vienna Convention on the Law of Treaties. Although a later treaty may provide a basis from which to imply termination of its predecessor, this is of no assistance, as Article 68(1) forms part of a regulation, not a 'later treaty'. It is also unlikely that the UK's withdrawal

[1226] Interpretation Act 1978, s 16(1)(a); Dickinson (2016), pp 202-203.

[1227] It seems as though the position with regard to the Rome Convention is straightforward, as the statutory amendments discussed in footnote 1158 above, as regards the inapplicability of Rome I following repeal of ECA 1972, would simply remove the current restrictions on the application of the Rome Convention. For the Brussels Convention, the CJJA 1982, s 1(4), requires UK courts to interpret Jurisdiction Regulation, Art 68 (see footnotes 323 and 1222), which is incorporated into UK law. Further difficulties arise in respect of the 1988 Lugano Convention, which are discussed at footnote 1242 below.

[1228] See footnote 323 above.

[1229] Jurisdiction Regulation, Art 68(1). See further Jurisdiction Regulation, Recital 9.

[1230] Dickinson (2016), pp 204-205.

would constitute a 'fundamental change of circumstances', in the light of the fact that membership of the EU (or EC, as it then was) was not stated as a positive condition for eligibility to accede to the Convention. As explained above, the UK's membership was simply the impetus for it. Thirdly, the plain words of the [Jurisdiction] Regulation, in particular, Article 68, with its specific reference to 'supersede as between Member States' and recital 23, which states that the Convention 'continues to apply', indicate that not only does the Convention remain alive and well, but that its application could be supplanted only in the EU judicial space. For these reasons, there is a sound argument to say that the Brussels Convention would revive, once the UK operates outside of that space".[1231]

The matter is far from clear cut and there are a number of arguments that reach the opposite conclusion.[1232] It may be argued that a State's ability to rely upon the Brussels Convention is conditional upon its continued membership of the EU,[1233] although there is no express condition of continued membership within the Brussels Convention. It should be remembered that Switzerland originally wanted to accede to the Brussels Convention but was precluded from doing so, as it was not an EEC Member State. For this reason, the 1988 Lugano Convention was agreed. Accordingly, it is arguable that the UK, when it is *no longer* an EU Member State, cannot remain a Contracting State to the Brussels Convention, even though it did satisfy the conditions to become a Contracting State to the Brussels Convention at the relevant time (unlike Switzerland).

Further, the UK's withdrawal from the EU could amount to a fundamental change of circumstances, which may be relied upon by the remaining EU Member States, as a ground for termination of or

[1231] Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 492, *cf*. Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), pp 3-4.

[1232] See Dickinson (2016), pp 205-206; Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, pp 104-107. Dickinson also argues that there is a strong link between the Brussels Convention and the former EEC Treaty, and that the assumption implicit in the Treaty of Amsterdam and the adoption of the Jurisdiction Regulation is that the process of change should be in one direction only i.e. from convention to regulation and from actions by the EU Member States themselves to action by the EU, p 205. This does not, in itself, appear to be a particularly convincing argument where the issue concerns the status of an international convention that was entered into by the individual States prior to the EU having exclusive competence in this area.

[1233] *Ibid*, p 205. See Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, pp 105-106.

withdrawal from the Brussels Convention.[1234] Alternatively, it could be argued that Article 68 of the Jurisdiction Regulation had the effect of permanently displacing the Brussels Convention as between the EU Member States at that time, save as regards the overseas territories.[1235] It may also be the case that the remaining EU Member States could not, as a matter of EU law, rely on Article 71 of the Recast Regulation to justify the application of the Brussels Convention.[1236] The CJEU could be asked to give its opinion on these issues, although the binding nature of any CJEU judgment on the UK (at least directly) would depend on whether the judgment was given prior to the withdrawal date and/or any agreement that would give CJEU judgments binding status in the UK thereafter.

Even if a possibility, it is questionable whether this is a desirable solution for the UK post-Brexit.[1237] The Brussels Convention does not include the innovations of either the Jurisdiction Regulation or the Recast Regulation, and would therefore lead to even further fragmentation of the Brussels Regime between the UK, EU Member States and EFTA Member States.[1238] For the remaining EU Member States and the EFTA Member States, reversion to the Brussels Convention would no doubt require changes to those States' national laws, including reviving or amending the original implementing legislation, to which those States may not be agreeable, although they may be obliged to comply if they are still bound by the Brussels Convention and they do not wish to denounce it.

Further, it is likely that only the EU Member States that were Contracting States to the Brussels Convention, i.e. before the application of the Jurisdiction Regulation, would remain bound by it.[1239] In opposition, it has been argued that Article 63 of the Brussels Convention still requires all new EU

[1234] *Ibid*. See VCLT, Art 62(1); Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, p 107. *Cf*. Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 492.

[1235] *Ibid*, pp 205-206.

[1236] *Ibid*, p 206.

[1237] Hjalmarsson comments "There is unlikely to be any appetite for such negotiations among UK's partner states, given that Brexit is purely self-inflicted damage", Hjalmarsson, J., 'A dog's Brexit' (op cit), p 2. See further, Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), pp 26-27.

[1238] See Dicey, Morris & Collins, [11-021] for a summary of the principal difference between the Brussels Convention, Lugano Conventions and the Jurisdiction Regulation.

[1239] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK. See Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), p 4, footnote 14.

Member States to become party to it, notwithstanding the Jurisdiction Regulation.[1240] In any event, it is expected that there will be considerable resistance by the EU and possibly also the EU Member States who would be required to apply simultaneously three very similar regimes depending on whether the matter involved parties in another EU Member State, an EFTA Member State or the UK.

If the Brussels Convention applied, then presumably the 1971 Protocol would also remain applicable to the UK. The 1971 Protocol originally gave the ECJ power to interpret the Brussels Convention.[1241] Ironically, the continued application of the 1971 Protocol, if in doubt, should be ruled on by the CJEU. As such, the UK would need to formally denounce the 1971 Protocol (and repeal any implementing legislation) if it did not want the CJEU to have jurisdiction over the revived application of the Brussels Convention. Whether this would work in practice is doubtful. It would certainly be a strange outcome for the Brussels Convention to apply in the UK once again but for the 1971 Protocol to no longer be applicable.

Similar points can be made in respect of the 1988 Lugano Convention,[1242] although it is more likely that the 2007 Lugano Convention replaced the original version[1243] and it is therefore not a viable option for the UK,[1244] unless Parliament passes new legislation to give the 1988 Lugano Convention

[1240] See Aikens, R., & Dinsmore, A., 'Jurisdiction, enforcement and the Conflict of Laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (op cit), pp 909-910.

[1241] See Chapter 2, pp 80 *et ff.*

[1242] As set out at footnote 269, the 1988 Lugano Convention was given force of law in the UK by the CJJA 1982, as amended by the CJJA 1991. That being said, the CJJA 1982 has been amended by the Civil Jurisdiction and Judgments Regulations, SI 2009/3131, Reg 3(2), so that references to the 1988 Lugano Convention have been replaced by references to the 2007 Lugano Convention, save for proceedings, judgments and authentic instruments to which the 1988 Lugano Convention continues to apply under the transitional provisions in 2007 Lugano Convention, Art 63, and the provisions giving force of law to the 1988 Lugano Convention (CJJA 1982, ss 3A-3B) have been removed by the Civil Jurisdiction and Judgments Regulations, SI 2009/3131, Reg 4. As explained in footnote 1145 above, the 2007 Lugano Convention is binding in the UK in accordance with TFEU, Art 316(2).

[1243] 2007 Lugano Convention, Art 69(6). Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 493; Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128, p 112.

[1244] Although it remains unclear whether the EU, in ratifying the 2007 Lugano Convention, had the requisite authority or ability to terminate the application of the 1988 Lugano Convention to which the UK was a Contracting State in its own right. This would need to be determined in accordance with public international

renewed legal force. It should also be remembered, as discussed above,[1245] that the UK is not a Contracting State to the 2007 Lugano Convention in its own right, so the 2007 Lugano Convention's binding status on the UK post-Brexit and the consequences of the EU agreeing to the 2007 Lugano Convention on behalf of the UK as an EU Member State is particularly complex.[1246]

5. Existing agreements with individual EU Member States and EFTA Member States

Prior to the UK's accession to the Brussels Regime, the UK was party to a number of bilateral conventions[1247] with France,[1248] Belgium,[1249] the Federal Republic of Germany,[1250] Austria,[1251] Italy,[1252] Netherlands,[1253] Norway[1254] and other non-EU jurisdictions, such as Australia.[1255] The legal

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law rules. See further, Aikens, R., & Dinsmore, A., 'Jurisdiction, enforcement and the Conflict of Laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (op cit), p 912.

[1245] See section III(B)(2) above.

[1246] See further Dickinson (2016), pp 206-207.

[1247] See further, Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), p 16.

[1248] *Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters* and its Protocol, 18 January 1934, Cm 5235. This Convention also applies to other territories that were governed by the UK at the time, such as New Zealand and Hong Kong.

[1249] *Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters* and its Protocol, 2 May 1934, Cm 5321.

[1250] *Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 14 July 1960, Cm 1525.

[1251] *Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 14 July 1961, Cm 1868, and its Protocol, 6 March 1970, Cm 4902.

[1252] *Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 7 February 1964, and its Protocol, 14 July 1970, Cm 5512.

[1253] *Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters*, 17 November 1967, Cm 4148.

[1254] *Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters*, 12 June 1961, Cm 1761, and its Protocol, 13 October 1971, Cm 4990.

[1255] *Agreement providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 23 August 1990, with an Exchange of Notes, 1 September 1994, Cm 2896.

basis for these conventions was the Foreign Judgments (Reciprocal Enforcement) Act 1933, although the scope of this Act was limited to final money judgments.[1256]

It is unlikely that the conventions with the now EU Member States could still apply between the UK and those States as they have been superseded by the Recast Regulation.[1257] Arguably, the Recast Regulation could not have 'terminated' those conventions, as the conventions themselves have their own termination provisions, so they are only inoperative.[1258] The convention with Norway is treated in a similar way by the 2007 Lugano Convention.[1259] It is less clear if the original convention with Norway has been terminated by the 2007 Lugano Convention.[1260]

In any event, there are many remaining EU Member States with whom the UK does not have a bilateral convention and it is highly unlikely that the UK could negotiate such conventions post-Brexit, as the EU now has exclusive competence in this area. Further, there would be no consistency in interpretation of such agreements, as the UK courts may differ in opinion to those in the corresponding State and there is no overseeing supranational court to act as arbiter. The scope of the conventions is also much narrower than the Brussels Regime instruments.

6. Reversion to the UK's common law rules

While it remains a possibility for the UK to revert to its common law rules entirely,[1261] this would require Parliament repealing or amending all statutes and statutory instruments that currently enact the Brussels Regime instruments into English law,[1262] as well as refraining from adopting these

[1256] Foreign Judgments (Reciprocal Enforcement) Act 1933, ss 4-5. The Brussels Regime also extends to interim and other final judgments.

[1257] Recast Regulation, Art 69 provides that conventions covering the same matters as those to which the Regulation applies are superseded. The UK has also notified the Commission of these conventions pursuant to Recast Regulation, Art 76. *Cf.* Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit), p 16, footnote 48. See also Jurisdiction Regulation, Art 69.

[1258] Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), p 496.

[1259] 2007 Lugano Convention, Art 65. It is listed as superseded in 2007 Lugano Convention, Annex VII.

[1260] Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), pp 496-497.

[1261] See footnote 1179 above.

[1262] If this is not an automatic consequence of repealing ECA 1972.

instruments as part of the EU Withdrawal Bill. This option is fraught with uncertainty not least because of "the gulf between the European and common law approaches to jurisdiction".[1263]

That being said, EU law has revolutionized[1264] the rules applicable to cross-border dispute resolution to such an extent that the UK's common law private international law rules have become almost completely Europeanised. Briggs comments that this area of law is no longer "a common law discipline coming to terms with its new European components" but instead "a European legal structure of private international law, if one with a residuum of common law content".[1265]

As mentioned above,[1266] repeal of the European Communities Act 1972 should result in many instruments that make up the Brussels Regime (where they are acts of the EU) no longer having any force in the UK. Even so, this does not mean that the UK's private international law regime will return to the state that it was in on 31 December 1972, i.e. the day before accession to the EEC.[1267] A tidying up exercise would also need to take place to repeal or amend any residual statutes or statutory instruments (or provisions thereof) that are not automatically repealed. Such an exercise is likely to take some time and UK courts should be advised of how they are to interpret or follow any national instruments/provisions that have not yet been repealed if they are applicable to a matter that comes before them in the interim.

At present, the common law rules apply as residual rules of jurisdiction where the Brussels Regime instruments are not applicable, for example, where the defendant is domiciled/habitually resident in a third State[1268] and there is no exclusive jurisdiction clause that nominates an EU or EFTA Member State,[1269] and/or where the 2007 Lugano Convention is not applicable.[1270] Once the Brussels Regime

[1263] Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (op cit), pp 496-497.

[1264] See Dickinson (2016), pp 196-197, where Dickinson quotes Lord Collins of Mapesbury stating that "the EU has demonstrated its intention to legislate for virtually the whole area" in *Dicey, Morris & Collins The Conflict of Laws* (London, Sweet & Maxwell, 15th edn, 2012), p xvii.

[1265] *Ibid*.; Briggs, A., *The Conflict of Laws* (Oxford, OUP, 3rd edn, 2013), Preface.

[1266] See footnote 1145 above.

[1267] See Dickinson (2016), p 198.

[1268] See CPR, rr 6.36-6.37 and Practice Direction 6B. The common law rules also apply to intra-UK disputes where the defendant is domiciled in e.g. Scotland; see CJJA 1982, s 20 and Sch 8.

[1269] *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 1 Lloyd's Rep 466; [2013] 2 AC 337.

[1270] See further footnote 1179 above.

instruments are denuded of legal force, restrictions on the application of the common law rules should, to a large extent, be removed.[1271] It is unclear if any statute or statutory instrument would need to be passed to positively confirm that the common law rules are once again applicable across the board or whether it would automatically be the case that UK courts simply refer to the common law rules without further ado.

Reversion to the common law rules would give the UK courts much more flexibility as compared to the strict rules of the Brussels Regime. The UK courts would also be able to apply the doctrine of *forum non conveniens* once again and, arguably, to grant anti-suit injunctions to uphold jurisdiction and arbitration agreements and/or to prevent vexatious litigation before the courts of the remaining EU Member States. With flexibility comes a degree of uncertainty. However, stronger protection for jurisdiction and arbitration agreements, including those nominating courts and tribunals in other States, can only be welcomed.

The UK courts would not have the benefit of the *lis alibi pendens* provisions in the Brussels Regime. Instead, UK courts would apply the doctrine of *forum non conveniens* and it is possible that UK courts would once again issue anti-suit injunctions no matter where (i.e. EU or otherwise) a court had been seised in breach of a jurisdiction or arbitration agreement. It is arguable that anti-suit injunctions are a far more effective solution to uphold jurisdiction and arbitration agreements, and which court was seised first will no longer be of any concern to an English court if it is not the nominated court/tribunal.

It is also arguable that a completely different approach to our continental neighbours will reduce the UK's attractiveness as a dispute resolution centre given the globalised commercial industry that has flourished in the previous decades. That being said, Brexit could be an opportunity for English law to be completely overhauled in order to make the UK a highly attractive forum for the resolution of disputes.[1272]

[1271] It is unclear whether the common law rules would remain residual insofar as the provisions of the Brussels Convention and 1988 Lugano Convention (see section III(B)4 above) and Rome Convention (see section III(A) above) maintain any force in the UK.

[1272] See generally Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (op cit).

C. Relevance to arbitration

The impact that Brexit will have on arbitration in the UK is also uncertain, although likely to be less significant.[1273] As arbitration is technically excluded from the scope of the Recast Regulation, as explained in Chapters 2 and 3,[1274] Brexit may not have any effect on arbitration in the UK or in the remaining EU Member States. The Arbitration Act 1996 will continue to govern arbitration procedures in England, Wales and Northern Ireland, and the English courts will still provide curial assistance to arbitral tribunals seated in England and Wales where needed. Also, the recognition and enforcement of foreign arbitral awards will still be regulated by the New York Convention.

Conversely, if Brexit does change the playing field for arbitration in the UK, the consequences for the three issues discussed in Chapters 3 to 5, namely, (1) the interpretation of the scope of the arbitration exclusion; (2) the ability to grant anti-suit injunctions in support of arbitration; and, (3) the recognition and enforcement of arbitral awards, will be of fundamental importance for the UK, as an attractive dispute resolution centre. These issues can be categorised as 'legal considerations', which in all likelihood, are not at the forefront of the minds of lay parties to international commercial transactions, who may end up litigating their disputes in the EU.

Parties contemplating the inclusion of an arbitration agreement in their commercial contracts may be more concerned with 'practical considerations'.[1275] These include the costs and speed of arbitration, expertise and powers of arbitrators, reputation of lawyers and lack of interference by the courts. While the legal considerations are being settled by the legislature and possibly also by the courts, commercial parties are likely to be more concerned with the practical considerations. As

[1273] Many commentators argue that Brexit will have little or no impact on arbitration and that commercial parties would be wise to swap out jurisdiction clauses for arbitration agreements until the fog has cleared. See e.g. Hjalmarsson, J., 'A dog's Brexit' (op cit); Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (op cit); Cannon, A., Naish, V., & Ambrose, H., 'When Life Gives You Lemons, Make Lemonade: Anti-suit Injunctions and Arbitration in London Post-Brexit' (op cit); Lloyd's Market Association Bulletin & Cooley LLP Briefing Note, 'Applicable Law and Jurisdiction Post-Brexit' (19 October 2017) available at http://www.lmalloyds.com/LMA/News/LMA_bulletins/LMA_Bulletin_2013/LMA17_035_KK.aspx (accessed 24/01/2018), along with similar comments released on the websites of a swathe of law firms based in the UK.

[1274] Recast Regulation, Art 1(2)(d). See further Chapters 2 and 3.

[1275] That is assuming that commercial parties give any (or any substantial) thought to the inclusion of dispute resolution clauses in their contracts at all. See Harris, B., 'London Maritime Arbitration' (op cit), p 116.

argued by Mcilwrath,[1276] the formal legal framework that will arise is only one factor in determining whether parties are less or more likely to choose a seat and it may not even be the most important factor.[1277] For this reason, the practical advantages of arbitrating in the UK need to reign supreme in order for London to remain a dominant arbitration centre while the legal considerations mentioned above are being ironed out.

An overview of how Brexit may impact upon the legal considerations is set out below.

1. Interpretation of the arbitration exclusion

As analysed in Chapter 3, countless legal disputes over the past four decades have attempted to grapple with the scope of the arbitration exclusion in the Recast Regulation and its predecessors. Going forward, the views of the remaining EU Member States, their courts and perhaps even the judgments of the CJEU on the scope of the arbitration exclusion may no longer be relevant to the UK, subject to any EU-UK agreement or accession to the 2007 Lugano Convention. If the Brussels Regime continues to apply in some form in the UK, even if unilaterally, a wide and all-encompassing interpretation of the arbitration exclusion could be adopted by the English courts, giving primacy to arbitration.

2. Anti-suit injunctions

The oft-discussed ability of the English courts to grant anti-suit injunctions pursuant to section 37(1) of the Senior Courts Act 1981 may revert to the 'good old days' post-Brexit. If so, this would be seen most notably with regard to court issued anti-suit injunctions precluding litigants before EU Member State courts from commencing or continuing proceedings that are in breach of an exclusive jurisdiction agreement in favour of the English courts. As explained in Chapter 4, such anti-suit injunctions are prohibited as a result of the ECJ judgments in *Gasser v MISAT* and *Turner v Grovit*.[1278]

Moreover, as discussed in Chapter 4, the ECJ subsequently extended its prohibition on anti-suit injunctions to injunctions intended to preclude proceedings in breach of an arbitration agreement in

[1276] Mcilwrath, M., 'An unamicable separation: Brexit consequences for London as a premier seat of international dispute resolution in Europe' (2016) 33(7) *J Intl Arbit* 450-462.

[1277] *Ibid*. p 450.

[1278] See Chapter 4, pp 147 *et ff.*

its decision in *West Tankers*, in spite of the exclusion of arbitration from the Brussels Regime.[1279] Even so, the impact of Brexit on the English courts' ability to grant anti-suit injunctions in support of arbitration agreements is perhaps less significant, as there is scope for arguing that the English courts currently have the ability to issue such injunctions given the changes made by the Recast Regulation.[1280] In any event, arbitral tribunals with their seat in the EU Member States have the ability to grant anti-suit injunctions in support of arbitration, so long as the relevant procedural law/arbitration agreement provides for such a power.

If the Recast Regulation has not reversed the *West Tankers* prohibition, English courts should (post-Brexit) be able to reinstate their ability to grant injunctions where another EU Member State court has been seised in breach of an exclusive jurisdiction agreement or a valid arbitration agreement, subject again to any EU-UK agreement or accession to the 2007 Lugano Convention. This would bring the English courts' powers of injunctive relief to preclude vexatious litigation before the courts of EU Member States back in line with powers currently exercised to preclude such abusive litigation in non-EU Member States. Courts supporting arbitral centres in the remaining EU Member States will not be able to issue such injunctions, as they remain shackled by the jurisprudence of the CJEU.

Accordingly, following Brexit, English courts *may* be free to determine the scope of the arbitration exclusion and to pronounce on their ability to grant anti-suit injunctions knowing that the final appellate court is the Supreme Court of England and Wales.

3. Recognition and enforcement of arbitral awards

As mentioned above, it is arguable that Brexit will have little effect on arbitration as the recognition and enforcement of arbitral awards is governed by the New York Convention.[1281] As stated in Chapter 1, all EU Member States, including the UK, are Contracting States to the New York Convention and all ratified or acceded to the New York Convention without input from the EU.[1282] Even so, such an observation is far too simplistic given the inconsistent interpretations of the

[1279] See further Chapter 4, pp 157 *et ff.*

[1280] See the Opinion of Advocate General Wathelet in *Gazprom*, discussed at Chapter 4, pp 161 *et ff.*

[1281] See footnote 1273 above.

[1282] As set out at footnote 143, the NYC entered into force on 7 June 1959. The last EU Member State to accede to the NYC was Malta in 2000.

arbitration exclusion and the potential conflict that an arbitral award may have with an EU Member State court judgment.[1283]

As discussed in Chapter 2, the Recast Regulation provides a detailed regime for the recognition and enforcement of judgments given by EU Member State courts.[1284] The Recast Regulation also sets out the limited exceptions in which an EU Member State court judgment must be refused recognition.[1285] If none of those exceptions are applicable, the EU Member State court judgment must be recognised and enforced.

The Recast Regulation does not expressly provide that an arbitral award on the same matter between the same parties should be given priority over a conflicting EU Member State court judgment. However, Recital 12 of the Recast Regulation states that the New York Convention takes precedence over the Regulation, so it is arguable that a foreign arbitral award should trump a conflicting EU Member State court judgment.[1286]

That being said, courts of remaining EU Member States may cite EU public policy as a reason for refusing to recognise and enforce an award given by an arbitral tribunal in London in accordance with Article V of the New York Convention.[1287] EU Member State courts also have a duty to set aside arbitral awards in breach of mandatory EU norms, such as the anti-trust rules provided in TFEU.[1288] Post-Brexit, EU public policy would no longer be of concern for an English court and this could make enforcement of arbitral awards much easier in the UK, so long as the arbitral award did not contravene UK public policy.

On the flipside, an arbitral award granted by a tribunal with its seat in London that breaches EU mandatory norms may not be enforceable in the remaining EU Member States and therefore would be worthless if the losing party's assets are located in an EU Member State.[1289] Accordingly, new challenges may arise in respect of arbitral awards issued in the UK should they need to be enforced

[1283] On these points, see Chapters 3 and 5.

[1284] Recast Regulation, Chapter III.

[1285] Recast Regulation, Art 45.

[1286] See further Chapter 5, pp 194 *et ff.*

[1287] See Chapter 1, pp 49-50.

[1288] See *Eco Swiss China Time Ltd v Benetton International NV*.

[1289] See further, Wahab, M., S., A., 'Brexit's chilling effect on choice of law and arbitration in the United Kingdom: Practical reflections between aggravation and alleviation' (op cit), pp 474-479.

in the remaining EU Member States.[1290] In sum, arbitral awards will need to comply with the New York Convention and supra-national EU laws to be capable of enforcement, thereby dampening opportunities to circumvent the application of prevailing EU laws by seating an arbitration in London where the opponent's assets are located in one or more of the remaining EU Member States.[1291]

D. Jurisprudence of the CJEU

The consequences described above may also depend on whether the CJEU is asked to provide a preliminary reference on any of the legal considerations before the UK leaves the EU. Hopefully, the CJEU will not interpret the changes made by the Recast Regulation narrowly. Also, any preliminary ruling given should disregard the fact that the UK will be leaving the EU.

After the UK has left the EU and if the CJEU's jurisprudence is no longer binding,[1292] the English courts should not seise the opportunity to undo everything that pre-existing ECJ/CJEU case law has settled. As can be seen from previous Chapters, the UK has always favoured a wider interpretation of the arbitration exclusion than its continental neighbours. If the opportunity to construe the arbitration exclusion in the Recast Regulation comes after the UK has left the EU, and in the absence of a statutory obligation to do so, the English courts should still take into account the binding CJEU judgments handed down before the UK's exit, which will include the ECJ judgment in *West Tankers*, unless the CJEU reverses the decision before then.[1293]

While the reasons for the UK's exit are complex and numerous, one cannot help but wonder, even in the relatively neutral area of private international law, whether certain decisions such as those in

[1290] Blanke, G., 'Arbitration in the MENA: between Brexit and the Arab Spring – a personal view' (2017) 83(1) *Arbitration* 3-6, p 4.

[1291] *Ibid*.

[1292] 'The Brexit Papers: Third Edition', Paper 9: CJEU Jurisprudence, June 2017, suggests that ECA 1972, ss 2-3, should not be appealed but amended so that the English courts are instead obliged 'to take account of' or 'to have regard to' (or similar) Commission Decisions and/or CJEU rulings, pp 6-7.

[1293] The Government's White Paper states that pre-Brexit CJEU rulings will have "binding precedent status" for English courts. It is envisaged that the English courts will interpret existing EU-derived law by reference to CJEU principles but only as they exist on the withdrawal date. See White Paper, [2.12]-[2.17]. It has been argued that there is a common law duty to interpret provisions of EU law that will be transplanted into national legislation with regard to the original intended purpose of the provision (as EU law), see 'The Brexit Papers: Third Edition', Paper 9: CJEU Jurisprudence, June 2017, pp 7-9.

Gasser v MISAT, *Turner v Grovit* and *West Tankers* represent judicial activism by the ECJ that has contributed to the UK's desire to leave the EU. Even before the judgment in *West Tankers*, Hartley had argued that "the continental judges on the European Court want to dismantle the common law as an objective in its own right".[1294]

Briggs has also commented extensively on the ECJ/CJEU's interpretation of the instruments that make up the Brussels Regime.[1295] Referring to the ECJ decision in *West Tankers*, Briggs has argued that "The most natural explanation for this remarkable principle of interpretation [of the Jurisdiction Regulation] is that the material scope of the [arbitration exclusion] was given a *deliberately* more narrow interpretation than had been previously supposed to be the case".[1296]

Even as early as 1988, there were warnings in the academic literature regarding the agenda of the ECJ. The ECJ's "pro-Community policy making" was described as being a success story in the sense that the European Court had achieved its main policy objectives while not forfeiting neutrality and trustworthiness.[1297] Yet, Rasmussen also noted that judicial activism by the ECJ could potentially spell disaster for the Community. He argued that,

> "if the European Court were to be seen to overstep the boundaries to its function and if court-curbing or court-destroying initiatives were launched accordingly, the European Court might well come out ruined in its authority and legitimacy. A day-to-day erosion of the European Court's authority and legitimacy would be ruinous too. Such outcomes would not be catastrophic solely for the European Court but for the entire Community experience, precisely because the European Court has been in the past an important source of Community regulatory legitimacy – a source which the Community could not afford to witness drying out under the weight of uncontrolled pro-Community activism".[1298]

[1294] Hartley, T., 'The European Union and the systematic dismantling of the Common Law of Conflict of Laws' (2005) 54(4) *ICLQ* 813-828.

[1295] Briggs, A., 'Fear and Loathing in Syracuse and Luxembourg: The Front Comor' (2009) 2(May) *LMCLQ* 161-166. See generally Briggs, *Private International Law in English Courts*, Chapter 2 and [4.32].

[1296] Briggs, A., & Rees, P., *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 5th edn, 2009), p 32. See Briggs, *Private International Law in English Courts*, where Briggs formerly argued that the Jurisdiction Regulation can be read in the light of the Recitals in the Recast Regulation and given effect accordingly, [14.19].

[1297] Rasmussen, H., 'Between self-restraint and activism: a judicial policy for the European Court' (1988) 13(1), *ELRev* 28-38, p 29.

[1298] *Ibid*. pp 29-31.

While it is unlikely that the UK's exit will spell disaster for the EU, the loss of one of its largest EU Member States will undoubtedly have a negative effect on the Community experience. It remains to be seen whether any other EU Member States will leave the EU, but at the very least, a precedent will have been set once the UK leaves the EU.

In any event, if there is to be any hope of the UK and the EU retaining a harmonised set of rules on the free movement of judgments, and in turn, the exclusion of arbitration from the same, the CJEU must now restrict itself to a purposive interpretation of the Recast Regulation, bearing in mind the intentions of the working party and the draftsmen of the Recast Regulation. The same approach in relation to the Brussels Convention was encouraged by Advocate General Darmon more than 15 years ago in *The Atlantic Emperor*, where he stated "however constructive and specific it may be, the Court's interpretation of the Convention must not lead to a result which strays beyond the limits of its wording, its scheme and the coherence of its provisions".[1299] If the CJEU does not do so, it appears to be inevitable that the UK will distance itself further from the rules adhered to by its continental neighbours.[1300]

E. A singular solution?

Earlier in this chapter, options were discussed regarding private international law rules on court jurisdiction and the recognition and enforcement. Some options sought to maintain a level of harmonisation with the remaining EU Member States post-Brexit, while others did not. The pros and cons of each option were also set out.

None of the above options considered arbitration. As highlighted many times in this thesis, the critical omission from the current international and European regimes is the lack of a mechanism to deal with (1) parallel arbitral and court proceedings on the same matter between the same parties; and, (2) enforcement of an arbitral award where there is a conflicting court judgment.

[1299] *The Atlantic Emperor*, p 526.

[1300] The White Paper provides that post-Brexit CJEU jurisprudence will not be binding on English courts, even for domestic legislation that is derived from the same regime. This does not mean that judges will be prohibited from taking CJEU rulings into account. See White Paper, [2.12]-[2.17] and 'The Brexit Papers: Third Edition', Paper 9: CJEU Jurisprudence, June 2017, p 4.

These two problems could be dealt with if the New York Convention was updated.[1301] However, it is highly unlikely that the New York Convention is going to be amended any time soon, particularly as any amendment would require the consent of all 159 Contracting States.[1302] This 'solution' to the two critical issues therefore seems unachievable.

Instead of the options regarding private international law rules on governing law, jurisdiction and the recognition and enforcement of judgments discussed earlier in this Chapter, the UK could choose a radical approach by adopting a new private international law statute (or set of statutes), which could also deal with parallel arbitral and court proceedings and enforcement of an arbitral award notwithstanding a competing court judgment. It has already been noted that resorting solely to the previous common law rules would not be an attractive option for the UK. Some advantages of a new statute are discussed here.

A new statute could select and consolidate current choice of law rules found in the common law rules, Rome I, Rome II and the Rome Convention. A detailed set of rules could be drawn up leaving aside any rules deemed to be disadvantageous or unworkable, and current gaps in the myriad of instruments and common law rules could be closed. Guidance for UK courts could be included where terms have a different meaning in the common law rules as compared to autonomous meanings given by the CJEU.

In terms of jurisdiction, a new statute could provide procedural certainty while maintaining the requisite level of flexibility using familiar doctrines such as the doctrine of *forum non conveniens*. For example, rules on the formalities to be satisfied for jurisdiction and arbitration agreements to be recognised and upheld could be set out in the statute, while leaving scope for the doctrine of *forum non conveniens* to apply in limited circumstances. The overriding principle to be applied by an English court should allow the court to reach a decision based on the interests of justice (where appropriate) instead of adherence to an inflexible system of rules that may result in absurd outcomes. In particular, the new statute could have exceptions to recognition of a jurisdiction or arbitration agreement where one of the parties is deemed to be a 'socio-weaker' party, such as a consumer.

[1301] As suggested by Diamond QC in *The Heidberg (No 2)*, p 303. See further pp 104 *et ff* above.

[1302] See footnote 143 above.

The new statute could build on the provisions set out in the Arbitration Act 1996, identifying and closing any gaps in the current legislation. For example, a new default rule could be introduced that would require the validity of a disputed arbitration agreement to be assessed by an arbitral tribunal, although parties would be allowed to appeal any finding to the English court.

There would be no need for a definition of 'arbitration' in the new statute, although courts should be bound to recognise procedures in other States that are similar to arbitration in the UK. It may even be appropriate to extend the application of the new statute to mediation and other types of ADR.

The new statute could seek to ensure that any dispute between the parties was heard before the optimum forum, i.e. before the court or arbitral tribunal nominated in any jurisdiction or arbitration agreement. By lowering the risk of litigating or arbitrating anywhere other than the contractual forum, the risk of non-enforcement of any resulting court judgment or arbitral award would also be lowered. The new statute could achieve this objective by allowing for anti-suit injunctions to be issued once again, which is unlikely to be an option if the 2007 Lugano Convention is ratified by the UK or if there is a new EU-UK Agreement. The other problems with these two options that are set out above would also be avoided if a new statute is drafted instead.

While forum shopping cannot be solved unilaterally, anti-suit injunctions can lessen the effects of any abusive litigation. For example, any foreign court judgment would not be capable of recognition in the UK if the English court had granted an anti-suit injunction on the basis of an English jurisdiction agreement or a London arbitration agreement. Even if the foreign court did not directly recognise and enforce the anti-suit injunction, it would be enforceable in the UK indirectly in contempt proceedings.

The new statute could also contain additional rules where arbitral tribunals with their seats in the UK and English courts should stay their proceedings where a court or tribunal in another State has been seised first. The doctrine of *forum non conveniens* could be updated to be as similar to or as different from the *lis alibi pendens* rules in the Brussels Regime instruments as desired.

Further, the English courts would have a wider scope to recognise and uphold foreign jurisdiction and arbitration agreements. The Recast Regulation currently caters for limited recognition of a jurisdiction agreement in favour of a court in a third State but the relevant provisions[1303] are fraught

[1303] See Recast Regulation, Articles 33 and 34.

with uncertainty. The English courts would also continue to recognise and enforce asymmetric jurisdiction agreements for all States, which do not fall for recognition under the Recast Regulation.

Specific guidance can be laid down to govern whether a conflicting court judgment or arbitral award is given priority, and whether the English courts can refuse recognition of a court judgment obtained in breach of an arbitration agreement that they would have held to be valid. The relevant factors that a court should take into account such as whether the conflicting judgment or award was issued first or whether the conflicting judgment or award was issued by the nominated court/tribunal could be set out in the statute. The statute could expressly provide whether the same factors would apply where the arbitral award was given by a tribunal with its seat in the UK or by a tribunal seated elsewhere.

The CJEU would not be needed and the UK would be free to ignore CJEU jurisprudence.

Of course, this option of a new statute does not mean that courts in the remaining EU Member States and in third States would extend the same courtesy to English jurisdiction agreements and court judgments and/or to London arbitration agreements and arbitral awards. However, it is arguable that, in the majority of cases, an English court judgment that has resulted from the English court upholding an English jurisdiction agreement would be recognised and enforced abroad. The same should be true of arbitral awards granted by the tribunal nominated in the relevant contract. Also, all of the 'solutions' discussed in this Chapter do not provide for certainty, as we enter unchartered waters on the withdrawal date.

In sum, the interpretation of the arbitration exclusion in the Brussels Regime would no longer be of any concern; anti-suit injunctions could return to uphold both jurisdiction and arbitration agreements and to prevent vexatious and oppressive litigation in all States; and the English courts would be bound by an all-encompassing set of rules governing the recognition and enforcement of court judgments and arbitral awards.

Essentially, all of the problems identified in this thesis with the current Brussels Regime and with the options put forward for a post-Brexit private international law regime could be solved by way of a new statute. To achieve some level of reciprocity with other States, the UK should ratify the 2005 Hague Convention and extend the application of that Convention to maritime contracts.

Whether Parliament has any desire to adopt such changes seems unlikely, as private international rules are undoubtedly a low level priority when compared to the other consequences of Brexit, such as the free movement of persons. Even so, the UK Government and Parliament should seise this once in a lifetime opportunity to readjust their private international law provisions and to give arbitration the primacy that it deserves.

IV. WILL BREXIT AFFECT LONDON AS A DOMINANT ARBITRATION CENTRE?

In 2015, England and Wales was the leading centre for dispute resolution worldwide and the English legal sector generated approximately £3.3 billion in revenue.[1304]

The uncertainty created by Brexit will result in increased disputes between commercial parties, although *where* such disputes will be litigated or arbitrated remains to be seen. Putting the legal considerations outlined above to one side, there are many practical considerations that should allow London to remain a dominant arbitration centre irrespective of Brexit. These practical considerations are discussed in this section.

A. Keep calm and carry on! Arbitration in London will endure

London will undoubtedly remain a dominant arbitration centre. It has always been 'under attack' from other arbitration centres trying to attract business away from London.[1305] This will continue notwithstanding Brexit, although those centres will have another card to play: that of uncertainty until the Brexit dust has settled.

Even so, London already has a track record for resilience. One year after the ECJ's prohibition on anti-suit injunctions in support of arbitration in *West Tankers*, London remained the most popular

[1304] Bar Council Brexit Working Group, 'The Brexit Papers: Third Edition', Paper 4: Civil Jurisdiction and Judgments, November 2016, p 4.

[1305] A recent example is the promotion by Geir Gustavsson of a 'Nordic alternative to London' during a presentation at the 26th Nordic Maritime Law seminar hosted by the Nordic Institute of Maritime Law, Gustavsson, G., 'Nordic maritime and offshore arbitration' available at http://www.bahr.no/en/frontpage/article-in-marius-nordic-maritime-and-offshore-arbitration (accessed 24/01/2018).

seat of arbitration according to the 2010 International Arbitration Survey.[1306] This is in spite of the fact that it had lost the use of one of its most powerful tools to hold parties to their agreement to arbitrate where the party in breach of the agreement had seised a court of an EU Member State. Brexit pales in comparison to that setback. Rather, Brexit may be the very reason that anti-suit injunctions are once again made available, no matter where in the world a party in breach of an arbitration agreement chooses to seise a court.

More recently, according to the 2015 International Arbitration Survey, London remains the first choice for arbitration, with the five most preferred and widely used seats being London, Paris, Hong Kong, Singapore and Geneva.[1307] The primary factor driving selection of a seat is reputation and recognition (65%). London's reputation as an effective and efficient resolution dispute centre should not be affected by Brexit[1308] and, as discussed above,[1309] the cross-border recognition of awards from tribunals with London as their seat will still be governed in the main by the New York Convention.

Other factors driving selection of a seat include the seat's established formal legal infrastructure, neutrality and impartiality of the legal system, national arbitration law, and its track record for enforcing arbitration agreements and arbitral awards.[1310] All of these factors will remain the same post-Brexit. The Arbitration Act 1996 will continue to govern arbitrations with their seat in England and Wales, and the common law system will remain applicable where English law is chosen as the governing law. English courts[1311] will also remain on hand to offer curial assistance. If anything, the English courts' ability to enforce arbitral agreements can only improve post-Brexit.

[1306] London was also the most preferred (30%) and widely used seat of arbitration, p 19. London, Geneva and Paris were the seats used most frequently by respondents in the preceding five years. For all three seats, most users described them as either 'excellent' or 'very good'. 29% rated London 'excellent' and 40% rated it 'very good', pp 19-20.

[1307] 2015 IAS, pp 11-12. The most improved arbitral seat over the preceding five years was Singapore (24%), followed by Hong Kong (22%), p 15.

[1308] See generally Harris, B., 'London Maritime Arbitration' (op cit), for the many reasons why London is a dominant arbitration centre.

[1309] See pp 242 *et ff* above.

[1310] 2015 IAS, pp 2, 13-15.

[1311] It is worth noting that English judges are not trained as professional judges. Rather, they come from the English Bar where they have typically worked as advocates for some 25 years and therefore have a wealth of experience at the Commercial Bar. In turn, their ability as court judges to support commercial parties

In 2010, the main reasons parties chose London was its reputation as a neutral and impartial jurisdiction, the law governing the substance of the dispute and established contacts with specialist lawyers.[1312] It is clear that the reasons why parties choose London remain the same throughout the years and it has nothing to do with London being situated in an EU Member State. While there have been some discussions in the press of law firms moving some of their employees to the remaining EU Member States post-Brexit,[1313] the majority of solicitors, barristers, arbitrators and judges will stay in the UK and will be available to parties who choose to arbitrate in London.

The LCIA, one of the oldest arbitration institutions in the world, will also continue to make London an attractive seat, especially when combined with the pro-arbitration attitude of the English courts. According to the 2015 International Arbitration Survey, the five most preferred arbitral institutions are ICC,[1314] LCIA, Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[1315] Preferences are based on the quality of the institution's administration and their level of internationalism, with an institution's reputation and recognition being essential to its commercial appeal.[1316] In 2010, the main reasons parties opted for LCIA were its reputation, neutrality and expertise in certain types of cases.[1317]

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attempting to arbitrate their disputes is second to none. See further Harris, B., 'London Maritime Arbitration' (op cit), p 118.

[1312] 2010 IAS, pp 19-20.

[1313] Financial Times, ' Brexit: law firms set for the great EU demerger' (06/12/2016), available at https://www.ft.com/content/5a653770-83eb-11e6-8897-2359a58ac7a5 (accessed 07/05/2017).

[1314] According to the 2010 IAS, ICC (50%) was the most preferred and widely used arbitration institution, followed by LCIA (14%) and AAA/ICDR (8%) during the preceding five years. Most users rated them as 'good' or higher, p 23. 50% rated LCIA as 'very good', 32% rated it as 'good'.

[1315] 2015 IAS, pp 17-20.

[1316] *Ibid*. The most improved institution over the preceding five years was HKIAC (27%), followed by SIAC (15%), ICC (15%) and then LCIA (11%), p 15.

[1317] 2010 IAS, p 24.

In addition, there does not seem to be any suggestion of parties moving away from a choice of English law to govern their disputes.[1318] The predominance of English law[1319] appears to derive from its predictability, foreseeability or certainty, its well-developed jurisprudence, international acceptance and appropriateness for use in maritime, oil and gas, finance and insurance and reinsurance contracts, as well as respect for freedom to contract.[1320] Where international disputes remain subject to English law, even if litigated abroad or arbitrated in Singapore or New York, English lawyers will continue to be needed to advise on the interpretation and construction of English law.

It has been argued that a choice of English law and/or English jurisdiction is likely to be upheld as before, save, potentially, in relation to markets or participants subject to certain EU regulation.[1321] That being said, London may become more attractive post-Brexit, as it may no longer be bound by the multitude of EU regulations and laws.[1322] Post-Brexit, any EU law that is deemed unfriendly towards arbitration can be repealed by Parliament. The UK will be able to, for example, devise its own judicial policies with a view to attracting foreign legal business and direct investment. The UK will no longer be bound by EU-negotiated free trade and investment agreements, and will be able to participate in investor-state arbitration once again. Brexit also presents an opportunity for the UK to completely rethink its financial regulatory framework.[1323]

Further, in terms of basic economics, there has already been a drop in the pound against the other major currencies. Depending on how long this fall in value continues, the pound may make London more attractive, as it will become more affordable for some foreign parties.[1324]

[1318] 44% of corporations responding to the 2010 IAS said that they chose the law of their home jurisdiction, while another 25% said that they chose English law where this was not the law of their home jurisdiction. The next most popular choice was Swiss law at 9%. See pp 12-13.

[1319] The most frequently used governing law is English law (40%), 2010 IAS, p 14.

[1320] 2010 IAS, p 13. Respondents also stated that some 21% of their counterparties imposed English law as the governing law.

[1321] Kelsey, S., & Magnin, J. D., 'Brexit: Governing Law, Jurisdiction and Arbitration Clauses', 8 July 2016, available at http://www.klgates.com/brexit-governing-law-jurisdiction-and-arbitration-clauses-07-08-2016/ (accessed 30/01/2017).

[1322] Blanke, G., (op cit), p 4.

[1323] Reynolds, B., & Comyn, J., 'Opportunities after Brexit: a financial free zone within the City' (2017) 32(2) *JIBLR* 38-40.

[1324] Blanke, G., (op cit), p 5.

B. Brexit blues

In spite of the overwhelming evidence that London as a dispute resolution centre will continue to thrive, there are likely to be negative consequences that cannot be ignored and, as expressed by Harris, "what is valid today may not be true tomorrow".[1325] London cannot afford to be complacent.

For example, a serious consideration is whether the lack of free movement may result in fewer arbitrations being brought to London by parties residing in the remaining EU Member States. The convenience of arbitrating in Paris or Geneva without having to prepare any paperwork to cross political borders may be overwhelmingly attractive for some. Also, it may not be as easy to bring witnesses and/or experts to London.[1326] That being said, the costs of bringing and maintaining lawyers/experts/witnesses to/in London are likely to be absorbed in the same way that they are now and such costs are already associated with maintaining arbitration practitioners in other centres of arbitration that do not enjoy the EU's free movement of rights.[1327] The convenience of arbitrating disputes will need to remain high; the more barriers there are for people to travel to London, the less popular London will become.[1328]

On a more general level, arbitration may be impacted domestically and regionally because of the perception that the UK will no longer be part of the 'club'.[1329] Blanke suggests that, because of this,

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[1325] Harris, B., 'London Maritime Arbitration' (op cit), p 116.

[1326] Comment by Professor Dr Ingeborg Schwenzer speaking at the inaugural LSE-LCIA annual debate, 'Quo Vadis London? International arbitration and commercial law in more or less cosmopolitan times' on 17 March 2017. A video of the debate is available at http://www.lcia.org/News/quo-vadis-london-international-arbitration-and-commercial-law-i.aspx (accessed 19/04/2017).

[1327] Cannon, A., Naish, V., & Ambrose, H., 'When Life Gives You Lemons, Make Lemonade: Anti-suit Injunctions and Arbitration in London Post-Brexit' (op cit).

[1328] See further, Bar Council Brexit Working Group, 'The Brexit Papers: Third Edition', Paper 2: International Arbitration, November 2016, where the Bar Council urges the Government to preserve the rights of UK and EU Lawyers under Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L78/17 and to maintain the freedom of movement for immigration purposes for arbitrators, arbitration lawyers and clients both from the EU and to the EU as currently provided for by TFEU, Arts 45, 49 and 56 and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[1329] Blanke, G., 'Arbitration in the MENA: between Brexit and the Arab Spring – a personal view' (op cit), p 3.

London as a favoured seat of arbitration will fall into disfavour post-Brexit, although he does concede that "in reality, nothing much of relevance to arbitration will change".[1330]

A further issue is the fact that nobody knows how Brexit will affect London, and, indeed, whether there will be any impact on London at all. Parties may choose to litigate and arbitrate in New York, Singapore or other centres until the dust has settled. Commercial parties require certainty and if this means that they arbitrate elsewhere for the short-term, then so be it. As stated by Mcilwrath, "the predictability generally associated with London is already being undermined".[1331] A further risk is that commercial parties have a good experience in other centres during this 'break-up period' and simply do not return to London.

It is also arguable that the neutrality of London as a seat has been compromised following the result of the referendum. Mcilwrath reasons that "European parties with some scepticism towards an English style of arbitration will now find themselves negotiating commercial contracts in light of a situation in which London may appear less neutral, after the majority of UK voters have said they no longer wish to share a political and legal framework with their own governments".[1332] It is certainly true that a change, or even a perceived change, in neutrality does not have to be significant to make an impact.[1333]

Competing dispute resolution centres, particularly those outside Europe are also likely to jump on the opportunity for business by marketing their centres as stable and certain, and miles away from the turmoil in the UK and EU.

V. CONCLUSION

At the outset of the Cruz, Real & Jenard Report, it is noted that a genuine European legal area had developed from Article 220 of the Treaty of Rome, which "is destined to extend well beyond the

[1330] *Ibid*. p 3.

[1331] Mcilwrath, M., 'An unamicable separation: Brexit consequences for London as a premier seat of international dispute resolution in Europe' (2016) 33(7) *J Intl Arbit* 450-462, p 453.

[1332] *Ibid*. p 454.

[1333] *Ibid*. p 455.

relations between Member States of the European Communities".[1334] What remains to be seen now is whether (and if so, how) this legal area will continue to extend over the UK, even after it has left the EU.

For the time being, parties may wish to substitute jurisdiction agreements with arbitration agreements while the uncertainty of Brexit ensues.[1335] There is without doubt going to be less disruption to the international arbitration regime and the recognition and enforcement of foreign arbitral awards, as there inevitably will be for the recognition and enforcement of jurisdiction clauses, for court proceedings and for enforcement of court judgments within the EU.

A survey conducted by Simmons & Simmons' offices in Germany, France, Italy, Spain and the Netherlands as to their courts' approach to English jurisdiction clauses post-Brexit revealed that over 50% of clients were considering moving away from English jurisdiction clauses.[1336] It is also noted that "Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts, where previously this would have been an almost automatic choice, because of the uncertainty surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England due to the uncertainty over the ultimate enforceability of an English judgment".[1337] On the basis of this evidence, it is not just wise but perhaps necessary to substitute English jurisdiction agreements with London arbitration agreements without delay. Fortunately, such a change to standard form contracts could have the effect of boosting London arbitration or arbitration generally, albeit at the expense of litigation before the courts.

To conclude, London has the ability to remain a dominant place for arbitration provided that it is not complacent and it must continue to be an efficient place to resolves disputes.[1338] Accordingly, active

[1334] Cruz, Real & Jenard Report, p 189/38.

[1335] Kelsey, S., & Magnin, J. D., 'Brexit: Governing Law, Jurisdiction and Arbitration Clauses', 8 July 2016, available at http://www.klgates.com/brexit-governing-law-jurisdiction-and-arbitration-clauses-07-08-2016/ (accessed 30/01/2017).

[1336] Bar Council Brexit Working Group, 'The Brexit Papers: Third Edition', Paper 4: Civil Jurisdiction and Judgments, November 2016, pp 6, 9-10, Appendix 1.

[1337] *Ibid*. [18].

[1338] Comment by Sir Bernard Eder speaking at the inaugural LSE-LCIA annual debate, 'Quo Vadis London? International arbitration and commercial law in more or less cosmopolitan times' (cited at footnote 1326).

steps should be taken to reassure commercial parties across the globe that London remains the first choice for arbitration, where certainty can be provided in an uncertain era.

CONCLUSION

This thesis has reviewed commercial arbitration in the UK, with a particular emphasis on the enforcement of arbitral awards. It has been seen that, even where party autonomy is respected, as it is in the UK, the courts at the seat of the arbitration may be required to exercise their supervisory jurisdiction to assist with the arbitral proceedings. There are often occasions where one party may argue that it is not bound by an arbitration agreement and preliminary disputes subsequently arise as to whether the nominated tribunal, the courts of the seat or another court altogether should review the validity of the arbitration agreement. During the arbitral proceedings, for example, the courts may be requested to issue interim orders or injunctions that are outside the scope of the arbitrators' powers. In addition, it may be necessary to request assistance from the courts in the State of enforcement, where an arbitral award is not voluntarily complied with by the losing party. Accordingly, for a number of reasons, parties who select arbitration as their preferred method of dispute resolution may find that there is some level of court involvement.

Chapter 1 explained the system of cross-border recognition of foreign arbitral awards under the highly successful New York Convention. It was seen that the New York Convention requires Contracting States to uphold arbitration agreements in writing, unless the agreement is null and void, inoperable or incapable of being performed. Further, the New York Convention requires foreign arbitral awards to be recognised in the State of enforcement, subject to a limited number of discretionary exceptions set out in the Convention. Parties who prefer to arbitrate their disputes should therefore find their autonomy respected not only in the UK, but also in the international arena, given the ease with which, at least in theory, arbitration agreements and foreign arbitral awards should be recognised and enforced in the many other Contracting States to the popular New York Convention.

It was necessary to consider the harmonised rules on jurisdiction and the recognition and enforcement of court judgments in the Brussels Regime, even though arbitration is excluded from the Regime, as a prelude to the discussion in Chapter 5 on competing court judgments and arbitral awards. This allowed a comparison of the rules on the recognition and enforcement of awards in the New York Convention and of judgments in the Recast Regulation to be conducted. It was seen that neither the New York Convention nor the Recast Regulation has an explicit exception to recognition and enforcement on the basis that there is a competing court judgment or arbitral award, respectively. There is scope to argue that the public policy exception in each instrument may provide

the necessary basis for choosing one over the other. This is far from certain and would depend on the national concept of public policy in each State concerned and also whether the primacy given to a judgment or award would be inconsistent with EU public policy if it was to be recognised and enforced in an EU Member State.

It was also confirmed that neither instrument provides *lis alibi pendens* rules where there are parallel court and arbitral proceedings between the same parties concerning the same issues. While a party may request the court seised to stay its proceedings on the basis that there is an arbitration agreement, that court may consider the agreement to be invalid or not binding. It is also questionable whether, where an EU Member State court has jurisdiction under the Recast Regulation, the court can elect to stay its proceedings on the basis that there a potentially valid arbitration agreement. Presumably, now that the Recast Regulation is "without prejudice" to performance of an EU Member State's obligations under the New York Convention, there should be no question of being able to stay proceedings even if the respondent is domiciled in the EU Member State concerned, for example.

It is perhaps surprising that these issues were not resolved by the EU Member States at a supranational level given that the 1961 European Convention had provisions that dealt with such parallel proceedings. Further, as explained in Chapter 2, the same issues were considered in detail by the European Commission at the time that the Jurisdiction Regulation was being recast. Even so, it is clear that a consensus could not be reached between the EU Member States and therefore these matters are left to the mercy of the EU Member States' national laws. Regrettably, this 'solution' does not provide commercial parties with the certainty that they desire.

It is perhaps because of the inability to completely oust the courts' jurisdiction when selecting arbitration that the distinction between court proceedings and arbitration became blurred when the arbitration exclusion in the Brussels Regime was tested. As discussed in Chapter 3, the arbitration exclusion was approached differently by the English courts and by the ECJ/CJEU. Some judges looked solely at the dispute in question and whether that dispute was concerned with the parties' rights to arbitrate. Other judges preferred to look at the characterisation of the dispute, for example, did the dispute concern construction of a contract or had a tort been committed. Another approach was to consider whether, notwithstanding an alleged agreement to arbitrate, the rights that the parties were seeking to enforce were those in an underlying contract.

The 'clarifications' put forward by Recital 12 of the Recast Regulation allow practitioners to reflect back on the case law and consider whether the judgments would remain correct under the Recast Regulation. As the wording of the arbitration exclusion has remained the same since the inception of the Brussels Regime, arguably there is merit in the contention that Recital 12 has merely confirmed how the arbitration exclusion should always have been interpreted. One can then see where the courts took a wrong turn in their analysis. However, it is unlikely that this is a fair conclusion. There were only six Contracting States when the 1968 Convention was agreed, whereas there are now 28 EU Member States. The legal systems of the EU Member States, including their domestic arbitral practices, differ considerably, and it is for this reason that autonomous meanings have been selected for terms that require explanation within the Brussels Regime instruments. It is also arguable that Recital 12 was drafted in response to the body of case law concerning the arbitration exclusion and the reactions of the EU Member State courts, national bodies, practitioners and commercial parties to that case law, rather than as an explanation of the intentions of the original draftsmen of the 1968 Convention.

In any event, the result is that there are now clear circumstances where court proceedings and/or judgments will fall within the arbitration exclusion, as mapped out in Chapter 3. None are particularly surprising and the examples given accord with a wide interpretation of the arbitration exclusion.

There are, however, a number of matters that still require clarification and it remains to be seen whether the consequences of the amendments to the Recast Regulation were anticipated or even considered by the draftsmen of that Regulation. In particular, there is no rule or guidance in the Recast Regulation that gives primacy to arbitration or litigation proceedings where each forum is seised of the same matter between the same parties. While the supranational regimes governing jurisdiction and arbitration may be intended to be separate and independent, what should happen where one party to a dispute commences arbitration and the other seises a court? Without a mechanism to prevent parallel arbitral and court proceedings being commenced or continued, conflicting court judgments and arbitral awards will inevitably result.

It is now clear that judgments on the validity of arbitral agreements and awards are not subject to the rules on recognition and enforcement in the Recast Regulation. Abusive litigants are therefore able to seise multiple EU Member State courts and obtain multiple judgments on the validity of an arbitration agreement, with none of the judgments falling for recognition under the Recast

Regulation. That being said, a court of another EU Member State *may* recognise an earlier EU Member State court judgment on the validity of an arbitration agreement in accordance with its national law. Even so, this does not give commercial parties the certainty that they desire.

In addition, there is no exception to recognition and enforcement of an EU Member State court judgment on the basis of 'irreconcilability' with an arbitral award, although it is arguable that such an exception is not needed given the clarifications in Recital 12 and the confirmation in Article 73(2). As a result, where there are conflicting court judgments and arbitral awards on the same matter between the same parties, numerous difficulties arise. In particular, the Recast Regulation is silent on which decision should be given primacy, i.e. the judgment or the award, and on what basis.

Where there is a conflicting EU Member State court judgment and a foreign arbitral award, there is scope for the foreign arbitral award to be given primacy as the Recast Regulation is "without prejudice" to an EU Member State complying with its obligations under the New York Convention. Whether this result will ensue depends on the national law of the EU Member State of enforcement, as there is no guidance as to what factors the EU Member State courts should consider when evaluating whether the conflicting judgment and award should be enforced. Should priority be given simply to the decision that was handed down first? Does the award have to be registered in the State of enforcement in order for priority to be given?

As regards the UK, the consequence of section 32 of the Civil Jurisdiction and Judgments Act 1982 is that English courts may be required to give precedence to an EU Member State court judgment that is required to be recognised and enforced under the Recast Regulation, notwithstanding the clarifications regarding the New York Convention in the Recast Regulation.

Separate considerations arise where the court of enforcement is faced with a competing EU Member State court judgment and a domestic arbitral award. Domestic arbitral awards do not fall for recognition under the New York Convention or the Recast Regulation. The priority to be given to a domestic arbitral award will again depend on the national law of the State concerned. In the UK, the same ambiguity arises in section 32 of the Civil Jurisdiction and Judgments Act 1982 where a competing EU Member State court judgment is required to be recognised and enforced under the Recast Regulation, although in this situation, the precedence given to the New York Convention by the Recast Regulation is irrelevant. If the statute gives a blanket preference to EU Member State

court judgments, a domestic arbitral award may be rendered worthless. The same section also appears to be a statutory defence to any public policy arguments of issue estoppel or *res judicata*.

English courts may expect to be able to deny recognition of an EU Member State court judgment that is given contrary to an arbitration agreement that they would have held to be valid, in the same way that they can with non-EU court judgments. However, again, section 32 of the Civil Jurisdiction and Judgments Act 1982 appears to allow judgments of EU Member State courts that are given in breach of an arbitration agreement a free pass.

It remains to be seen whether the public policy exception to recognition and enforcement in the Recast Regulation would provide the necessary solution to give arbitral awards the primacy they deserve, although this is doubtful. The ultimate consequence is that parties are faced with a race to enforce their award or judgment in the relevant State where their opponent's assets are located.

The UK Parliament needs to amend national law as a matter of urgency in order to resolve the aforementioned situations. This is all the more important while the ability of English courts to grant anti-suit injunctions remains unclear and the effectiveness of devices to avoid non-recognition of arbitral awards is questionable.

The problems associated with parallel arbitral and court proceedings, and conflicting awards and judgments could be avoided if anti-suit injunctions were no longer prohibited within the EU and if the EU Member State courts upheld them. As discussed in Chapter 4, an anti-suit injunction issued by an English court can be extremely effective, as non-compliance with the injunction may result in the party addressed being held in contempt of court, being fined or having assets within the UK seized. However, since the ECJ judgments in *Turner v Grovit* and *West Tankers*, anti-suit injunctions are no longer allowed where an EU Member State court has been seised, even if it has been seised in breach of a jurisdiction or arbitration agreement.

Given the negative perception of anti-suit injunctions on the Continent, it appears unlikely that such injunctions will be permitted anew. It is arguable that the Recast Regulation has reversed the *West Tankers* judgment, at least in part, with the result that anti-suit injunctions are once again acceptable in support of arbitration. It has been seen that anti-suit injunctions are not incompatible with a State's obligations under the New York Convention and may even assist in performance of those obligations. As the Recast Regulation is expressly "without prejudice" to an EU Member State

complying with such obligations, this provides an additional ground for arguing that anti-suit injunctions are once again allowed. However, the better view is that the prohibition remains in place until the CJEU confirms otherwise.

If anti-suit injunctions have returned, they would not be subject to the recognition or enforcement provisions of the Recast Regulation. Recital 12 has clarified that (1) judgments of EU Member State courts concerning whether an arbitration agreement is null and void, inoperative or incapable of being performed; and (2) court proceedings in support of arbitration along with actions and judgments on the recognition and enforcement of arbitral awards, fall outside the scope of the Recast Regulation. Arbitral agreements and awards are examined in court proceedings in support of arbitration before an anti-suit injunction is granted by the English courts. Anti-suit injunctions may nonetheless fall to be recognised in accordance with an EU Member State's national law but this is far from certain.

Even if an anti-suit injunction was not recognised in another EU Member State, it would remain enforceable in the UK and the party in breach of the injunction would find itself in significant difficulty if it needed to travel to or carry out business in the UK. Such an outcome should produce enough of a deterrent in itself.

The above mentioned problems need to be resolved notwithstanding Brexit. Brexit could provide an opportunity for the UK to amend and update its private international law rules in order to resolve the above issues. However, it seems that the insurmountable hurdle of what private international law rules will be in place on the withdrawal date needs to be answered first.

Together with Parliament, the UK Government owes a number of obligations to commercial parties in respect of dispute resolution in the UK. In relation to governing law, parties will undoubtedly want assurance that the terms in their commercial contracts will be interpreted and construed in the same manner as they have been for the past few decades. Commercial parties will also want certainty that any jurisdiction agreements in their contracts will be recognised and upheld in accordance with the rules on jurisdiction currently provided by the Brussels Regime instruments. Parties already in litigation before courts in the UK or in the other EU Member States will also want to be sure that, post-Brexit, any resulting judgment will be enforceable if the opposing party has its assets in a remaining EU Member State. Chapter 6 therefore considered the options available to the UK that would allow the Brussels Regime, or at least some part of it, to continue post-Brexit.

For governing law, it was seen that the provisions of Rome I and Rome II could easily be transplanted into national law by adopting new statutes and/or by updating current English law rules. This would require the UK to update its new statutory provisions each and every time EU law is updated if it wanted to continue to have a harmonised governing law regime with the remaining EU Member States, although this would not be difficult. The continuing application of the Rome Convention to the UK and the Convention's status under international and EU law would need to be examined, as it may revive following Brexit even if unwanted. The key point with governing law rules are that they do not require any reciprocity from other States, so whatever option the UK chooses, it should work in practice.

It was also seen that adopting the harmonised rules on court jurisdiction and the recognition and enforcement of judgments is much more complex. It is most likely that the UK will attempt to unilaterally implement the Recast Regulation by way of statute. This option will not work, as there would be no obligation on the remaining EU Member States to recognise court proceedings in the UK and to enforce judgments of an English court in the same way that they are currently required. The UK would therefore be extending a level of courtesy to the remaining EU Member States that it may not see returned.

It is also likely that the UK will seek to ratify the 2007 Lugano Convention. For the reasons set out in this thesis, it is preferable that this option is not adopted, as the UK would be taking a step backwards. Chapter 6 explained how the 2007 Lugano Convention does not include the innovations of the Recast Regulation, with the result that the UK would still be bound by the unwelcome ECJ judgment in *Gasser v MISAT*. If the 2007 Lugano Convention is updated so that it is line with the Recast Regulation, it may then be desirable for the UK to accede to the Convention so that there is a harmonised regime with the EU and the EFTA Member States.

The alternative option is that the EU and the UK agree to extend the Brussels Regime to the UK post-Brexit by way of an EU-UK Agreement, which could be based on the EU-Denmark Agreement. This would allow the UK to benefit from the changes adopted in the Recast Regulation and business would continue as normal. The main obstacle to any agreement with the EU is likely to be whether the CJEU has any say once the UK leaves the EU. The UK appears set on removing the CJEU's jurisdiction completely, although it seems incomprehensible that the EU would agree to any deal that removes the jurisdiction of its most prominent arbiter. That being said, as summarised in

Chapter 2, Denmark and the EFTA Member States interact with the CJEU in a different way to the EU Member States and there is scope for the UK to have a similar arrangement. If the CJEU's rulings are no longer binding on English courts, fragmentation is inescapable even with an EU-UK agreement that extends the current Brussels Regime to the UK post-Brexit. It is also unlikely that such an agreement would be finalised before the withdrawal date.

The other options described in Chapter 6 including the revival of the Brussels Convention and/or the 1988 Lugano Convention; the restoration of bilateral conventions on private international law that predate the Brussels Regime; or, the UK reverting to its previous common law rules, are not attractive and should be avoided.

In any event, in the absence of some explanation as to what private international law rules will be in place on the withdrawal date, commercial parties are likely to go elsewhere, at least until the dust has settled.

It was also argued in Chapter 6 that the effect of Brexit on arbitration will be minimal. All EU Member States are party to the New York Convention in their own right and the interface between arbitration and litigation, in the light of the Recast Regulation, now appears to favour arbitration and the remaining EU Member States will remain bound by the new provisions insofar as incoming foreign arbitral awards are concerned.

An alternative and radical option for the UK post-Brexit was also considered in Chapter 6. This would see the UK adopting a new private internal law statute for governing law, jurisdiction and the recognition and enforcement of judgments and arbitration that would seek to cater for all of the problems described in this thesis. If adopted, the interpretation of the arbitration exclusion in the Brussels Regime would no longer be of any concern; anti-suit injunctions could return to uphold both jurisdiction and arbitration agreements and to prevent vexatious and oppressive litigation in all States; and, the English courts could employ additional devices to avoid non-recognition of an English court judgment or London arbitral award without being concerned with dreamt up notions of 'mutual trust'. In addition, the English courts could apply an all-encompassing set of rules governing the recognition and enforcement of court judgments and arbitral awards. Fundamentally, this new statute could provide a much needed solution for parallel arbitral and court proceedings on the same matter between the same parties; and, enforcement of an arbitral award where there is a conflicting court judgment. Specific guidance can also be laid down to govern whether the English

courts can refuse recognition of a court judgment obtained in breach of an arbitration agreement that they would have held to be valid. The CJEU would not be needed and the UK would be free to ignore CJEU jurisprudence. To achieve some level of reciprocity with other States, the UK could ratify the 2005 Hague Convention and extend the application of that Convention to maritime contracts.

Whether Parliament has any appetite to adopt such radical change seems unlikely, as private international rules are undoubtedly a low level priority when compared to the other consequences of Brexit, such as the free movement of persons. Some attempt at retaining at least part of the Brussels Regime appears to be inescapable.

To conclude, the Recast Regulation has, undoubtedly, clarified the scope of the arbitration exclusion. Regrettably, the Recast Regulation raises more questions than it answers and it seems that the draftsmen of the Recast Regulation either did not put their mind to the practicalities of arbitration or, perhaps the Recast Regulation is simply the unfortunate result of compromise between the EU Member States. Leaving aside the pre-existing unanswered questions, the major risk going forward is the likely proliferation in abusive proceedings given that court judgments on the validity of arbitration agreements and arbitral awards are not required to be recognised and enforced under the Recast Regulation. There is no longer just a race to an award, but a race to enforcement of an award, before the opposing party obtains an EU Member State court judgment on the merits.

With the imminent exit of the UK from the EU, the only certainty is uncertainty. Even so, with change comes opportunity and the UK Government and Parliament need to seise this once in a lifetime opportunity to readjust their private international law provisions and to give arbitration the primacy that it deserves. In the field of private international law and arbitration, if smart, the UK may just about be able to have its cake and eat it.

BIBLIOGRAPHY

Books

Blake, S., Browne, J., & Sime, S., *The Jackson ADR Handbook* (Oxford: OUP, 2nd edn, 2016)

Born, G.B., *International Arbitration: Law and Practice* (Kluwer Law International, 2012)

Briggs, A., *Civil Jurisdiction and Judgments* (Informa law from Routledge, 6th edn, 2015)

Briggs, A., *Private International Law in English Courts* (Oxford: OUP, 2014)

Briggs, A., & Rees, P., *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 5th edn, 2009)

Lord Collins et al (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2017)

Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)

Goldby, M., & Mistelis, L., (eds), *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016)

Hess, B., Pfeiffer, T., and Schlosser, P., *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (Beck, 2008)

Joseph, D., *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd edn, 2015)

Lenaerts, K., Maselis, I., & Gutman, K., *EU Procedural Law* (Oxford: OUP, 2014)

Magnus, U., & Mankowski, P., *ECPIL: Brussels Ibis Regulation* (Verlag Dr Otto Schmidt KG, 2016)

Maurer, A. G., *The Public Policy Exception under the New York Convention: History, Interpretation, and Application* (New York: JurisNet LLC, 2013)

Merkin, R., & Flannery, L., *Arbitration Act 1996* (Informa Law from Routledge, 5th edn, 2014)

Ozdel, M., *Bills of Lading Incorporating Charterparties* (Oxford: Hart Publishing, 2015)

Raphael, T., *The Anti-Suit Injunction* (Oxford: OUP, 2008)

Raphael, T., *The Anti-Suit Injunction*, Updating Supplement (Oxford: OUP, 2010)

Spencer, Bower and Handley, *Res Judicata* (LexisNexis Butterworths, 4th edn, 2009)

Book Chapters

Baatz, Y., 'Incorporation of a charterparty arbitration clause into a bill of lading and its effect on third parties' in Goldby, M., & Mistelis, L., (eds), *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016)

Gaillard, E., 'Introduction' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)

Goldby, M., & Mistelis, L., 'Introduction' in Goldby, M., & Mistelis, L., (eds), *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016)
Graves, J., 'Court Litigation over Arbitration Agreements: Is it time for a New Default Rule?' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)
Lévy, L., 'Anti-suit injunctions issued by arbitrators' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)
Mistelis, L., 'Competition of arbitral seats in attracting international maritime arbitration disputes' in Goldby, M., & Mistelis, L., (eds), *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016)
Schneider, M.E., 'Court Actions in Defence Against Anti-Suit Injunctions' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)
Schwebel, S. M., 'Anti-suit injunctions in international arbitration – an overview' in Gaillard, E., (ed), *Anti-Suit Injunctions in International Arbitration* (New York: Juris Publishing Inc, 2005)

Journal Articles & Newsletters

Aikens, R., & Dinsmore, A., 'jurisdiction, enforcement and the Conflict of Laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (2016) 27 *EBLR* 903-920
Ambrose, C., 'Arbitration and the free movement of judgments' (2003) 19(1) *Arbitration Int* 3-26
Ambrose, C., 'Can anti-suit injunctions survive European Community law?' (2003) 52(2) *ICLQ* 401-424
Asariotis, A., 'Antisuit Injunctions for Breach of a Choice of Forum Agreement: A Critical Review of the English Approach' (2000) *YEL* 447
Auda, A. G. R., 'The future of arbitration under the Brussels recast Regulation' (2016) 82(2) *Arbitration* 122-128
Baatz, Y., 'A jurisdiction race in the dark' (2010) 3(Aug) *LMCLQ* 364-375
Baatz, Y., 'How will Brexit affect exclusive English jurisdiction agreements?' (2016) (Jul/Aug) *STL* 1-4
Blanke, G., 'Arbitration in the MENA: between Brexit and the Arab Spring – a personal view' (2017) 83(1) *Arbitration* 3-6
Blanke, G., 'The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part I)' (2017) 10(2) *GCLR* 85-101
Blobel, F., & Spath, P., 'The tale of multilateral trust and the European law of civil procedure' (2005) 30(4) *ELRev* 528-547
Briggs, A., 'Anti-suit injunctions and Utopian ideals' (2004) 120 *LQR* 529
Briggs, A., 'Arbitration and the Brussels Regulation Again' (2015) 3(Aug) *LMCLQ* 284-288

Briggs, A., 'Fear and Loathing in Syracuse and Luxembourg: The Front Comor' (2009) 2(May) *LMCLQ* 161-166

Briggs, A., 'Forum non conveniens and ideal Europeans' (2005) 3(Aug) *LMCLQ* 378-382

Briggs, A., 'Secession from the European Union and Private International Law: The cloud with a silver lining' (2017) Lecture to the Commercial Bar Association, 24 January 2017

Briggs, A., 'The hidden depths of the law of jurisdiction' (2016) 2(May) *LMCLQ* 236-255

Briggs, A., 'The impact of recent judgments of the European Court on English procedural law and practice' (2005) II 124 *Zeitschrift fur Scweizerisches Recht* 231

Clifford, P., & Browne, O., 'Lost at sea or a storm in a teacup? Anti-suit injunctions after West Tankers' (2009) 12(2) *Int ALR* 19-22

Dickinson, A., 'Back to future: the UK's EU exit and the conflict of laws' (2016) 12(2) *J Priv Int L* 195-210

Dickinson, A., 'Once bitten – mutual distrust in European private international law' (2015) 131(Apr) *LQR* 186-192

Dilworth, N., 'Life set upon the Recast: the (recent) past and (near) future of questions of jurisdiction within the EU' (2016) 6 *JIBFL* 362

Draetta, U., & Santini, A., 'Arbitration exception and Brussels I Regulation: no need for change' (2009) 6 *IBLJ* 741-747

Gaffney, J., 'Should the European Union regulate commercial arbitration' (2017) 33(1) *Arbitration Int* 81-98

Harisankar, K. S., 'Annulment versus enforcement of international arbitral awards: does the New York Convention permit issue estoppel?' (2015) 18(3) *Int ALR* 47-53

Harris, B., 'London Maritime Arbitration' (2011) 77 *Arbitration* 116-124

Harris, J., 'Restraint of foreign proceedings – The view from the other side of the fence' (1997) *CJQ* 283

Harris, J., 'The Brussels I Regulation, the ECJ and the rulebook' (2008) 124(Oct) *LQR* 523-529

Hartley, T., 'The European Union and the systematic dismantling of the Common Law of Conflict of Laws' (2005) 54(4) *ICLQ* 813-828

Hartley, T., 'The Brussels I Regulation and arbitration' (2014) 63(4) *ICLQ* 843-866

Hartley, T., 'The scope of the Convention: proceedings for the appointment of an arbitrator' (1991) 16(6) *ELRev* 529-533

Hascher, D. T., Commentary on the European Convention on International Commercial Arbitration of 1961 (2011) XXXVI *YBCA* 504-562

Hill, J., 'Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements' (2014) 63(3) *ICLQ* 517-534

Hjalmarsson, J., 'A dog's Brexit' (2017) Sept *STL* 1-2

Hjalmarsson, J., 'Case roundup – anti-suit injunctions' (2015) Sept *STL* 7-8

Jenard, P., 'Opinion' (1991) 7(3) *Arbitration Int* 243-250

Kajkowska, E., 'Anti-suit injunctions in arbitral awards: enforcement in Europe' (2015) 74(3) *CLJ* 412-415

Knight, C., 'Arbitration and Litigation after West Tankers' (2009) 3(Aug) *LMCLQ* 285-291

Lavelle, J., 'Review of the Brussels I Regulation' (2009) 9(9) *STL* 3-5

Lavelle, J., 'A breath of fresh air from Europe' (2011) 11(1) *STL* 1-4

Lavelle, J., 'The availability of declaratory relief' (2010) 10(4) *ALM* 1-3

Lord Mance, 'The interface between national and European law' (2013) 38(4) *ELRev* 437-456

Masters, S., & McRae, B., 'What does Brexit mean for the Brussels Regime?' (2016) 33(7) *J Intl Arbit* 483-500

McCormack, G., 'Reconciling European conflicts and insolvency law' (2014) 15(3) *EBOR* 309-336

Mcilwrath, M., 'An unamicable separation: Brexit consequences for London as a premier seat of international dispute resolution in Europe' (2016) 33(7) *J Intl Arbit* 450-462

Merkin, R., 'Anti-suit injunctions: The future of anti-suit injunctions in Europe' (2009) (Apr) *ALM* 1-9

Newing, N., & Webster, L., 'Could the Hague Convention bring greater certainty for cross-border disputes post-Brexit?' (2016) 10 *DRI* 105

Nurmela, I., 'Sanctity of dispute resolution clauses: Strategic coherence of the Brussels system' (2005) 1(1) *J Priv Int L* 115-149

Ozdel, M., 'Is the devil in the detail? A maritime perspective on incorporating charterparty arbitration clauses: the fifth annual CIArb Roebuck Lecture 2015' (2015) 81(4) *Arbitration* 389-397

Peel, E., 'Forum non conveniens and European ideals' (2005) 3(Aug) *LMCLQ* 363-377

Petrochilos, G., 'Arbitration and interim measures: in the twilight of the Brussels Convention' (2000) 1(Feb) *LMCLQ* 99-112

Pocar, F., ' The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2008) X *Yrbk Priv Intl L* 1-18

Raphael, T., 'Do as you would be done by? System-transcendent justification and anti-suit injunctions' (2016) 2(May) *LMCLQ* 256-274

Rasmussen, H., 'Between self-restraint and activism: a judicial policy for the European Court' (1988) 13(1) *ELRev* 28-38

Reynolds, B., & Comyn, J., 'Opportunities after Brexit: a financial free zone within the City' (2017) 32(2) *JIBLR* 38-40
Rodger, B., 'Interim relief in support of foreign litigation?' (1999) 18(Jul) *CJQ* 199-202
Roodt, C., 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' (2011) 19(2) *AJICL* 236-282
Ruhl, G., 'Judicial cooperation in civil and commercial matters after Brexit: which way forward?' (2018) 67(1) *ICLQ* 99-128
Sanders, P., 'Cross-border arbitration – a view on the future' (1996) 62(3) *Arbitration* 168-174
Schlosser, P., 'The 1968 Brussels Convention and arbitration' (1991) 7(3) *Arbitration Int* 227-242
Seriki, H., 'Litigating in breach of arbitration: what exactly does Article 1(4) of the Brussels Convention cover?' (2000) 66(1) *Arbitration* 49-58
Tan, D., 'Damages for breach of forum selection clauses, principled remedies, and control of international civil litigation' (2005) 40 *Tex Int L J* 623
Todd, P., 'Damages for breach of an arbitration agreement' (2018) 5 *JBL* 404-424
Todd, P., 'Incorporation of charterparty terms by general words' (2014) 5 *JBL* 407-424
Tynes, D. S., & Haugsdal, E. L., 'In, out or in-between? The UK as a contracting party to the Agreement on the European Economic Area' (2016) 41(5) *ELRev* 753-765
van Houtte, H., 'May court judgments that disregard arbitration clauses and awards be enforced under the Brussels and Lugano Conventions?' (1997) 13 *Arbitration Int* 85
Wahab, M., S., A., 'Brexit's chilling effect on choice of law and arbitration in the United Kingdom: Practical reflections between aggravation and alleviation' (2016) 33(7) *J Intl Arbit* 463-482
Wilhelmsen, L., 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arbitration Int* 169-185

Studies & Policy Papers

Bar Council Brexit Working Group, 'The Brexit Papers', 'The Brexit Papers: Second Edition' and 'The Brexit Papers: Third Edition'
Heidelberg Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03), September 2007
Queen Mary, University of London and PricewaterhouseCoopers LLP, 2006 International Arbitration Study: Corporate Attitudes and Practices
Queen Mary, University of London and White & Case LLP, 2010 International Arbitration Survey: Choices in International Arbitration

Queen Mary, University of London and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process
Queen Mary, University of London and PwC, 2013 International Arbitration Survey – Corporate choices in International Arbitration: Industry perspectives
Queen Mary, University of London and White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration
UK government, 'Providing a cross-border civil judicial cooperation framework: a future partnership paper' published 22 August 2017

Online Articles

Cannon, A., Naish, V., & Ambrose, H., 'When Life Gives You Lemons, Make Lemonade: Anti-suit Injunctions and Arbitration in London Post-Brexit', 27 July 2016, available at http://kluwerarbitrationblog.com/2016/07/27/when-life-gives-you-lemons-make-lemonade-anti-suit-injunctions-and-arbitration-in-london-post-brexit/ (accessed 30/01/2017)

Hess, B., 'Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views', published on www.conflictoflaws.net on 22 January 2015 (accessed 19/02/2015)

Gaunt, I., 'Incorporation of arbitration clauses in bills of lading: the saga continues' (Paper presented at International Congress of Maritime Arbitrators XIX, Hong Kong, 11 May 2015) available at http://www.lmaa.london/uploads/documents/ICMA%20Paper%20-%20Incorporation%20of%20arbitration%20clauses%20in%20bills%20of%20lading.pdf (accessed 27/01/2018)

Gaunt, I., 'London Maritime Arbitration: Jurisdiction and Preliminary Issues' available at http://www.lmaa.london/uploads/documents/Ian%20Gaunt%20paper.pdf (accessed 27/01/2018)

Gustavsson, G., 'Nordic maritime and offshore arbitration' available at http://www.bahr.no/en/frontpage/article-in-marius-nordic-maritime-and-offshore-arbitration (accessed 24/01/2018)

Kelsey, S., & Magnin, J. D., 'Brexit: Governing Law, Jurisdiction and Arbitration Clauses', 8 July 2016, available at http://www.klgates.com/brexit-governing-law-jurisdiction-and-arbitration-clauses-07-08-2016/ (accessed 30/01/2017)

Schwenzer, I., speaking at the inaugural LSE-LCIA annual debate, 'Quo Vadis London? International arbitration and commercial law in more or less cosmopolitan times' on 17 March 2017, available at http://www.lcia.org/News/quo-vadis-london-international-arbitration-and-commercial-law-i.aspx (accessed 19/04/2017)

Eder, B., speaking at the inaugural LSE-LCIA annual debate, 'Quo Vadis London? International arbitration and commercial law in more or less cosmopolitan times' on 17 March 2017, available at http://www.lcia.org/News/quo-vadis-london-international-arbitration-and-commercial-law-i.aspx (accessed 19/04/2017)

van den Berg, A. J., 'The New York Convention of 1958: An Overview', (available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (accessed 02/10/2017)

von Hein, J., 'The Protection of Arbitration Agreements within the EU after West Tankers, Gazprom and the Brussels I Recast" (17/07/2015), www.conflictoflaws.net (accessed 01/02/2017)

von Hein, J., '"And as the fog gets clearer…" (17/01/2017) – May on Brexit', www.conflictoflaws.net (accessed 01/02/2017)

Financial Times, ' Brexit: law firms set for the great EU demerger' (06/12/2016), available at https://www.ft.com/content/5a653770-83eb-11e6-8897-2359a58ac7a5 (accessed 07/05/2017)