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## Arbitration and the Brussels I Regulation – Before and After Brexit

Trevor Hartley\*

This article deals with the effect of the Brussels I Regulation on arbitration. This Regulation no longer applies in the UK, but the British Government has applied to join the Lugano Convention, which contains similar provisions. So the article also discusses the position under Lugano, paying particular attention to the differences between the two instruments. The main focus is on the problems that arise when the same dispute is subject to both arbitration and litigation. Possible mechanisms to resolve these problems – such as antisuit injunctions – are considered. The article also discusses other questions, such as freezing orders in support of arbitration.

**Keywords:** arbitration; Brussels Regulation; Lugano Convention; conflicts between arbitration and litigation

This is an article about the effect of the Brussels I Regulation<sup>1</sup> on arbitration. Since the Brussels Regulation ceased to apply in the United Kingdom at 11 pm (UK time) on 31 December 2020, it might seem that this is no longer of much interest to UK lawyers. However, there are several reasons why it is still important. First, the UK has applied to join the Lugano Convention of 2007.<sup>2</sup> As this was modelled on the Brussels Regulation of 2000,<sup>3</sup> it is very similar to the Recast Brussels Regulation, but lacks its most recently added provisions. If the UK is permitted to join – the European Union has to give its consent – it will be in much the same position as before.<sup>4</sup> Even if the UK does not join the

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<sup>1</sup>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, OJ 2012, L 351, p. 1.

<sup>2</sup>OJ 2009, L 147/5.

<sup>3</sup>Regulation 44/2001.

<sup>4</sup>The differences between Lugano and the Recast Brussels Regulation will be explained below in so far as they affect arbitration. Where the provisions are the same, they will almost certainly be interpreted in the same way: Article 1(1) of Protocol 2 to Lugano 2007 provides that, when interpreting provisions of Lugano, the courts of Parties to Lugano must “pay due account” to the decisions of the courts of other Parties, and of the CJEU, concerning the instruments referred to in Article 64(1) of the Lugano Convention. One such instrument is the Brussels Regulation of 2000. This means that when they

Lugano Convention, it will still be useful to know how the Brussels Regulation impacts on arbitration, since this will show how courts in EU Member States are likely to act in a case involving parallel proceedings.

It might be thought that arbitration and the Recast Brussels I Regulation had nothing to do with each other. After all, Article 1(2)(d) of the Regulation<sup>5</sup> says expressly that it does not apply to arbitration. So it might seem that there is nothing to write about. In fact, there is a great deal to write about. The first point is that when the Regulation says it does not apply to arbitration it means that it is not intended to *regulate* arbitration. It does not mean that it does not have any *effect* on arbitration. It might well have incidental effects on arbitration, even though it is not the intention that it would regulate it. If it had been intended that the Regulation would have no effect on arbitration, it would have said so expressly. It would have said: “This Regulation shall not affect arbitration.” Article 73(2) of the Regulation says this with regard to the New York Convention. It says: “The Regulation shall not affect the application of the 1958 New York Convention.” It is significant that the Regulation does not say something similar with regard to arbitration in general.

### **Parallel proceedings: the problem**

So the Regulation can affect arbitration, even though it is not its specific purpose to do so. It applies to court proceedings (litigation) and, in regulating jurisdiction and the recognition and enforcement of judgments in such proceedings, it may have an incidental effect on arbitration. The most obvious example is where the same dispute is subject to arbitration in one country and litigation in another, something which can occur if the courts in the two countries take different views regarding the validity or scope of an arbitration agreement. Cases like this are not uncommon, the two countries often being Italy and England. One reason for this is that Italian law has special provisions laying down formal requirements designed to ensure that the parties to the arbitration agreement really understand what they are agreeing to.<sup>6</sup> If the parties do not comply with these, the arbitration agreement will be invalid. There might also be other reasons why Italian and English courts would reach different conclusions.

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interpret Lugano (if the UK joins that Convention), UK courts will have to “pay due account” to the decisions of the CJEU not only on Lugano itself but also on equivalent provisions of Brussels 2000.

<sup>5</sup>The same words are to be found in Article 1(2)(d) of Lugano.

<sup>6</sup>The clause that contains the arbitration agreement must be separately executed when it is part of the general terms and conditions of one of the parties (Article 1341 of the Italian Civil Code), or when the agreement is entered into by signing a contract template or a form that is made available by one of the parties (Article 1342 of the Italian Civil Code). In all cases, it must be concluded in writing (Articles 807 and 808 of the Italian Code of Civil Procedure).

**First example: Marc Rich v. Impianti**

One such case is *Marc Rich and Co. v. Società Italiana Impianti*.<sup>7</sup> Marc Rich was a Swiss company that traded in oil and Impianti was an Italian company that imported oil. The two concluded a contract under which Impianti agreed to sell Marc Rich a quantity of oil, delivery to take place in Genoa, Italy. Some time after the contract had been concluded, Marc Rich sent Impianti a telex adding two clauses to the contract: a choice-of-law clause designating English law and an English arbitration clause. Impianti received the telex but did not reply. It then shipped the oil as per the contract. After the oil arrived in Genoa, a dispute arose. Marc Rich claimed that the oil was contaminated; Impianti denied this. Marc Rich said that the contract was subject to arbitration in London; Impianti said it was not. Impianti brought legal proceedings for a declaration of non-liability before the courts of Genoa; Marc Rich wanted to commence arbitration in London.

Was the arbitration agreement part of the contract? If one considers the question without preconceptions, it seems that there is something to be said on both sides. In most legal systems, including English law and Italian law, a contract needs agreement. In general, mere silence does not constitute consent. On this basis, it could be said that Impianti's silence did not mean that the arbitration agreement was part of the contract. However, Marc Rich might argue that when Impianti shipped the oil after receiving his telex, it was impliedly agreeing to the new terms. However, Impianti could reply that its shipment of the oil was simply carrying out the original contract: it did not mean that it was agreeing to a new contract.

In a situation such as this, it is easy to see that the Italian courts might decide that there was no valid arbitration agreement and that the Italian proceedings could go ahead. It is equally easy to see that if Marc Rich wanted to begin arbitration proceedings in London, the arbitral tribunal and the English courts (if seised) might decide that the arbitration agreement was valid. Neither view would be unreasonable.

It will be seen from this example that the mere fact that the Brussels I Regulation does not purport to apply to arbitration does not mean that it cannot have a significant effect on arbitration proceedings. After all, it is not satisfactory from the point of view of arbitration that the dispute is subject to litigation in another country. Nor, for that matter, is it satisfactory from the point of view of litigation that the dispute is subject to arbitration in another country. Inconsistent awards and judgments, or inconsistent procedural directions could be given; in any event, costs are bound to be much greater.

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<sup>7</sup>Case C-190/89, ECLI:EU:C:1991:319, [1991] ECR I-3855.

**Second example: Allianz v. West Tankers**

A second example of the same problem involving the same two countries is *Allianz v. West Tankers*.<sup>8</sup> West Tankers was a shipping company which shipped oil. It concluded a charterparty with an Italian oil importer called Erg to deliver oil to its terminal in Syracuse, Italy. The charterparty contained an English choice-of-law clause and an English arbitration clause. There was no dispute regarding the validity of both clauses. Unfortunately, when the tanker was delivering the oil, it collided with Erg's jetty and damaged it.

Erg had insured the jetty with Allianz, an insurance company, and it made a claim against Allianz under the policy. Allianz paid out up to the limit of the policy. Under the law of most countries, including English and Italian law, this meant that Allianz was subrogated to Erg's rights against West Tankers. In the circumstances, this gave the right to sue West Tankers in tort for damage to the jetty. Allianz proceeded to do so: it brought a claim in tort against West Tankers in the local court in Italy with jurisdiction over the place where the jetty was situated. Under the Brussels I Regulation (now Art 7(2), then Art 5(3)) and no doubt also under Italian law, that court had jurisdiction to hear the claim.<sup>9</sup> West Tankers, however, argued that the arbitration clause in the charterparty was also binding on Allianz, since its right to bring the claim derived from Erg.

Again, one can think of arguments on both sides. It seems that the arbitration clause was widely drawn and that, under English law (the law applicable to the charterparty), it covered proceedings in tort arising out of the charterparty. This would mean that if Erg had made a claim in tort against West Tankers for the damage to the jetty, the arbitration clause would have applied. Did this mean that a similar claim by Allianz was covered? Allianz was not a party to the charterparty. It was not suing in contract and it did not derive its right from the charterparty. It derived its right from Italian insurance law, though English insurance law is the same. There may possibly also have been a provision to this effect in the contract of insurance. However, as Allianz's right was derived from Erg and Erg was bound by the arbitration clause, was the arbitration clause attached to the right, so to speak, when it came to Allianz?

This is not an easy question to answer and different legal systems might answer it differently.<sup>10</sup> What law should decide it? Should it be English law

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<sup>8</sup>Case C-185/07, ECLI:EU:C:2009:69, [2009] ECR I-663.

<sup>9</sup>It is not clear from the case where West Tankers was domiciled. If it was domiciled in a Member State, the Brussels Regulation would apply; if it was domiciled in a non-member State, Italian law would apply.

<sup>10</sup>On the analogous question of when a choice-of-court clause is binding on a person who is not a party to the contract containing it, see the following decisions of the CJEU: *Gerling v. Amministrazione del Tesoro dello Stato*, Case C-201/82, ECLI:EU:C:1983:217, [1983] ECR 2503; *Tilly Russ v. Nova*, Case C-71/83, ECLI:EU:C:1984:217, [1984] ECR 2417; [1985] 3 WLR 179 (Full Court); *Refcomp*, Case C-543/10, ECLI:EU:C:2013:62; *Cartel Damage Claims (CDC) Hydrogen Peroxide*, Case C-352/13, ECLI:EU:C:2015:335 (at

as the law governing the charterparty, the contract which contained the arbitration clause? Since Allianz was not a party to this contract, and since its right to sue was not derived from it, this would not seem right. Another possibility would be to apply the law governing the insurance contract between Erg and Allianz, since there would have been no subrogation if there had been no insurance. But again this would seem wrong since West Tankers was not a party to this contract. The fairest solution would be to apply the law governing the tort committed by West Tankers when its ship damaged the jetty. This was almost certainly Italian law.

However, this solution was not accepted when the matter came before the English court.<sup>11</sup> Colman J held that, while Italian law governed the subrogation to Allianz of Erg's right against West Tankers, English law – the law governing the arbitration agreement – determined whether the substantive rights subrogated were to be enforced by arbitration alone.<sup>12</sup> The result was that, in English eyes, the arbitration agreement was binding on Allianz. The Italian courts, on the other hand, held that it was not binding. So the same situation arose as before: the English courts thought that the arbitration agreement was valid and applicable; the Italian courts thought that it was not.

### **Parallel proceedings: possible solutions**

What should be done in such a situation? This is a complex question and the answer depends a great deal on the circumstances. At this point, however, a general issue should be raised: what is the general approach that should be adopted? Should one form of dispute-resolution be privileged over the other so that it will automatically prevail in a situation such as this? Or should an attempt be made to adopt a balanced approach which regards neither as inherently superior to the other? This is important, because in discussions and negotiations on the Brussels Convention and Regulation, the UK Government has always sought to put arbitration in a privileged position compared to litigation.<sup>13</sup> This

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paragraphs 64 and 65 of the judgment); *Profit Investment SIM*, Case C-366/13, ECLI:EU:C:2016:282; *Assens Havn v. Navigators Management (UK) Limited*, ECLI:EU:C:2017:546; *Balta v. Grifs AG*, Case C-803/18, ECLI: EU: C: 2020: 123. These cases show that there is no simple solution to the problem.

<sup>11</sup>*West Tankers Inc v. Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 All ER (Comm) 240; [2005] 2 Lloyd's Rep 257; [2005] 1 CLC 347.

<sup>12</sup>[2005] 1 CLC at 357.

<sup>13</sup>For when the UK first joined the Brussels Convention, see the Schlosser Report: Report on the 1978 Convention of accession to the Brussels Convention (by which Denmark, Ireland and the UK joined the Convention), OJ 1979 C 59, p. 71 at paragraph 61. When arbitration was being discussed in the course of the negotiations leading to the Recast Regulation, the UK proposed that the Brussels Regulation should not even apply to legal proceedings covered by an arbitration agreement. It hoped that this would be

has been resisted by the other Member States. Moreover, the cases discussed in this paper suggest that, where the arbitration is taking place in England, the English courts often take a more pro-arbitration stance than the Court of Justice of the European Union (“CJEU”). This difference goes a long way towards explaining the lack of harmony between the two systems.

### Antisuit injunctions

In the situation under consideration, an English lawyer automatically thinks of antisuit injunctions. If, in English eyes, the arbitration agreement is valid and applicable to the claim, an English court would normally grant an injunction to put an end to the court proceedings in the foreign country. In the past, antisuit injunctions have proved extremely effective because, except in the case of the United States, foreign countries do not retaliate.<sup>14</sup> Until recently, Continental European countries have almost never granted them, apparently on the ground that they were regarded as contrary to international law.

In the EU context, however, the CJEU has banned their use against proceedings in other Member States – at least, when the court hearing those proceedings derives its jurisdiction from the Brussels Regulation – on the ground that each court in the EU should be entitled to decide its jurisdiction for itself without interference from a court in another Member State.<sup>15</sup> The defence sometimes advanced by English lawyers – that the injunction is directed against the claimant in the foreign court, not the court itself – is dismissed (as it should be) as mere pedantry.

It was, however, argued by lawyers in England that the ban on antisuit injunctions did not apply to injunctions granted in support of arbitration. Since the ban on antisuit injunctions is derived from the Brussels Regulation, the exclusion of arbitration from the scope of the Regulation should, it was said, mean that the ban did not apply to injunctions where the foreign proceedings were subject to an arbitration agreement.

The test came in the *West Tankers* case (above). *West Tankers*' first move in London was to ask the English court to grant an antisuit injunction against Allianz

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combined with a proposal by the EU Commission that the validity of an arbitration agreement should be determined by the courts of the seat of the arbitration, and that this should be binding on the court in which the litigation was taking place. Neither proposal was accepted.

<sup>14</sup>The only case in which conflicting antisuit injunctions and counter-antisuit injunctions were used appears to be the *Laker Airways* case, in which English and American courts fought a full-scale battle of injunctions and counter-injunctions. In the end, the English courts gave way: *British Airways v. Laker Airways* [1985] AC 58. For a full description, see Trevor Hartley, “Comity and the Use of Antisuit Injunctions in International Litigation” (1987) 35 *American Journal of Comparative Law* 487.

<sup>15</sup>*Turner v Grovit*, Case C-159/02, ECLI:EU:C:2004:228, [2004] ECR I-3565 (Full Court).

requiring it to discontinue the tort action it had begun against West Tankers in Italy.<sup>16</sup> The House of Lords made a reference to the CJEU.<sup>17</sup> The CJEU accepted that the proceedings in which the injunction had been granted, being ancillary to arbitration, were outside the scope of the Regulation.<sup>18</sup> However, it ruled that this was not decisive: what mattered was whether the proceedings against which the injunction was *directed* – the tort action in Italy – were covered.<sup>19</sup> Since they *were* covered,<sup>20</sup> the prohibition still applied.<sup>21</sup>

In the *Gazprom* case (discussed below), Advocate General Wathelet made a rather ill-advised attempt to overturn this judgment.<sup>22</sup> His argument was that the Recast Brussels I Regulation had the effect of legitimizing antisuit injunctions in support of arbitration. He began with the rule on which *West Tankers* was based, that the applicability of the prohibition depends on whether the proceedings against which the injunction is directed fall within the scope of the Regulation. He argued that the effect of the Recast Regulation is to put cases to which an arbitration agreement applies outside the scope of the Regulation, thus making them fair game for an injunction. This, he said, followed from the rule that a decision on the validity of an arbitration agreement by the courts of one Member State is not subject to recognition under the Regulation in other Member States.<sup>23</sup>

This argument has several weak points and one fatal flaw. First of all, it was not the intention of the Member States to legitimize antisuit injunctions in support of arbitration when they negotiated the Recast Regulation. The UK tried to do this, but it failed to gain support.<sup>24</sup> Secondly, the argument would apply only if

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<sup>16</sup>*West Tankers Inc v. Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 All ER (Comm) 240; [2005] 2 Lloyd's Rep 257; [2005] 1 CLC 347. This decision was appealed directly to the House of Lords under section 12 of the Administration of Justice Act 1969: see below.

<sup>17</sup>*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* 21 February 2007, 2007 WL 504700, [2007] UKHL 4 SESSION 2006-07, on appeal from: [2005] EWHC 454 (Comm).

<sup>18</sup>Paragraph 23 of the judgment.

<sup>19</sup>Paragraphs 24–28 of the judgment.

<sup>20</sup>The CJEU expressly said in paragraph 26 of its judgment that if the substantive proceedings before the foreign court come within the scope of the Brussels Regulation, “a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.”

<sup>21</sup>Several British authors objected strongly to this decision: see Adrian Briggs, “Fear and Loathing in Syracuse and Luxembourg” [2009] LMCLQ 161; Edwin Peel, “Arbitration and Antisuit Injunctions in the European Union” (2009) 125 LQR 365.

<sup>22</sup>*Gazprom v. Lithuania (Lietuvos Respublika)*, Case C-536/13, ECLI:EU:C:2015:316 (Grand Chamber); Advocate General's Opinion: ECLI:EU:C:2014:2414.

<sup>23</sup>Recast Regulation, Recital 12, second paragraph.

<sup>24</sup>The UK proposal was to introduce a provision to the effect that legal proceedings covered by an arbitration agreement would fall outside the scope of the Regulation. It was hoped that this would be combined with a rule (proposed by the Commission) that



the antisuit injunction was aimed solely and expressly at proceedings to determine the validity of the arbitration agreement, not if it applied to the merits of the case.<sup>25</sup> Thirdly, the Recast Regulation was not applicable to the *Gazprom* case: the case was governed by the original Brussels I Regulation,<sup>26</sup> which did not contain anything equivalent to Recital 12. The Advocate General recognized this, but thought that as Recital 12 was intended to indicate the interpretation of the provision which excludes arbitration from the scope of the Regulation, and as *that* provision was contained in the original Regulation, it was legitimate to apply Recital 12 to the case.

These weaknesses were surely enough to sink the argument, but the fatal flaw was that Recital 12 does not actually say that a ruling on the validity of an arbitration agreement is outside the scope of the Regulation. It says that such a ruling “should not be subject to the rules of recognition and enforcement laid down in this Regulation”. This is not the same thing: the jurisdictional provisions of the Regulation – what matters in the context of the *West Tankers* rule – continue to apply. In *West Tankers*, the CJEU expressly said that where the substantive proceedings fall within the scope of application of the Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.<sup>27</sup> When the CJEU gave its judgment, therefore, it ignored the Advocate General’s arguments and treated *West Tankers* as good law.<sup>28</sup>

Whether the position will be changed by Brexit depends very much on whether the UK becomes a Party to the Lugano Convention. The prohibition against antisuit injunctions is based on a principle inherent in the Brussels Regulation,<sup>29</sup> this principle being that no court (other than the CJEU) is better placed to determine the jurisdiction of a Member-State court than the courts of that Member State.<sup>30</sup> This principle would almost certainly apply under Lugano as well. The

the validity of an arbitration agreement should be determined by the courts of the seat of the arbitration and that this should be binding on all other courts in the EU. However, neither proposal gained support.

<sup>25</sup>This argument was particularly misguided in the context of the *Gazprom* case, since the validity of the arbitration agreement was not an issue.

<sup>26</sup>Paragraph 3 of the CJEU’s judgment.

<sup>27</sup>Paragraph 26 of the judgment in *West Tankers*.

<sup>28</sup>For a full discussion of the case, see Trevor Hartley, “Antisuit Injunctions In Support of Arbitration: *West Tankers* Still Afloat” (2015) 64 ICLQ 965.

<sup>29</sup>The final ruling in *West Tankers* reads:

It is incompatible with Council Regulation (EC) No 44/2001 [the old Brussels Regulation] ... for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

<sup>30</sup>Paragraph 29 of the judgment in *West Tankers* and the other cases cited therein.

small differences between the two instruments<sup>31</sup> are not relevant to this issue; in any event, *West Tankers* was decided under the old Brussels Regulation, not under the Recast Regulation. The Lugano Convention is the same as the old Brussels Regulation in this respect. Even apart from this, the hostility felt by Continental lawyers towards antisuit injunctions is so great that it is hard to imagine that the European Union would permit the United Kingdom to join Lugano if there was any possibility of antisuit injunctions being granted with regard to proceedings to which it applies.

If the UK does not join Lugano, British courts will be free to grant antisuit injunctions with regard to proceedings in EU courts. However, it would be a mistake to think that the EU will sit back and let English courts rain injunctions down on their courts. Recently, French and German courts have begun granting counter-antisuit injunctions with regard to proceedings in courts outside the European Union. In December 2019, the Munich Court of Appeal (*Oberlandesgericht*) upheld an injunction ordering a party who had obtained an antisuit injunction in the United States to have it rescinded.<sup>32</sup> In March 2020, the Paris Court of Appeal held that French courts have the power to grant similar orders.<sup>33</sup> Such injunctions are normally enforced by a fine, possibly a penalty of a specified amount per day until the antisuit injunction is lifted. Contrary to what might be thought, such a penalty would be enforceable in other EU Member States under Brussels I, provided that the substantive claim to which the antisuit injunction applied came within the scope of Brussels I. This would be so even if the penalty was payable to, and enforceable by, the State or some other public authority. This follows from the rule of EU law that in deciding whether an ancillary order falls within the scope of the Regulation, one must consider, not the nature of the order itself, but the nature of the rights it is intended to protect.<sup>34</sup>

The CJEU judgment in *Realchemie Nederland v. Bayer CropScience*<sup>35</sup> is an example. This did not concern a counter-antisuit injunction, but an order given in a patent-infringement action under which the defendant, a Dutch company, was required to refrain from importing into, possessing or marketing certain products in Germany. It was also ordered to provide details of its commercial

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<sup>31</sup> These differences are, first, that there is no equivalent in Lugano to Article 73(2) of Brussels Recast and, secondly, there is no equivalent to Recital 12.

<sup>32</sup> *Oberlandesgericht München*, 12 December 2019. For a comment, see Matthias Lehmann, “Anti-Anti-Suit Injunctions by German Courts – What Goes Around, Comes Around” <https://epil.org/2020/03/30/anti-antisuit-injunctions-by-german-courts-what-goes-around-comes-around/>. For an English translation, see <http://eplaw.org/wp-content/uploads/2019/12/DE-AASI-HRC-Munich-6-U-5042-19-EN.pdf>.

<sup>33</sup> *Cour d’appel de Paris*, 3 March 2020. For a comment, see Gilles Cuniberti, “Paris Court Issues Anti Suit Injunction” <https://epil.org/2020/03/25/paris-court-issues-anti-antisuit-injunction/>.

<sup>34</sup> *Realchemie Nederland v. Bayer CropScience*, Case C-406/09, paragraph 40 of the judgment.

<sup>35</sup> *Supra*.

transactions involving the product and to transfer its stock into the custody of the courts. The fine was imposed when it failed to obey the order. The CJEU held, applying the principle set out above, that the fine could be enforced in the Netherlands under the Regulation, even though it was payable to the German State, not to the claimant. The final ruling of the CJEU stated that the Regulation applies to “the recognition and enforcement of a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter.” In view of this, a party who obtained an antisuit injunction in England might find that his assets in any EU State were in jeopardy.

### **Anti-arbitration injunctions**

Another possible solution to the problem of conflicts between litigation and arbitration would be for the court hearing the litigation to grant an injunction restraining the arbitration proceedings. So far, this has not come before the CJEU. However, if we apply the logic of the *West Tankers* case – that the crucial question is whether the proceedings against which the injunction is directed fall within the scope of the Brussels Regulation – it would seem that such proceedings would not be covered by the Regulation and that, as a result, the prohibition against antisuit injunctions would not apply. Moreover, the prohibition also does not apply to an arbitral award prohibiting a party from bringing claims before a court of a Member State, at least if there is no penalty attached.<sup>36</sup> So the field would appear to be open for a jurisdictional battle between courts and arbitrators.

### **Damages for unlawful litigation**

A possible way round the *West Tankers* decision proposed by some English lawyers was that the party wanting to arbitrate could sue in England (or some other sympathetic Member State) to obtain damages for the “wrongful” act of bringing legal proceedings in a Member State, such as Italy, in which the arbitration agreement was invalid. Indeed, this was done in the *West Tankers* case itself. Once the CJEU had ruled that an antisuit injunction could not be granted, *West Tankers* asked the arbitrators to award damages for Allianz’s “wrongful” litigation in Italy. Such damages would have covered, first, the legal fees and expenses necessarily incurred in defending the Italian proceedings; and, secondly, indemnification against any damages that might be granted by the Italian courts. The arbitrators refused to do so on the ground that that too would be contrary to EU law. *West Tankers* then appealed to the High Court under section 69 of the Arbitration Act 1996. In the High Court, Flaux J held that the arbitrators had

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<sup>36</sup>*Gazprom v. Lithuania (Lietuvos Respublika)*, Case C-536/13, ECLI:EU:C:2015:316 (Grand Chamber) (discussed below).

been wrong to rule that such a claim was contrary to the CJEU's judgment;<sup>37</sup> however, the case never went to the CJEU.

Since the purpose of such damages is to attain the same result as an antisuit injunction, it is hard to believe that they are compatible with EU law: if, before the other court has given judgment, the party wanting to arbitrate brings proceedings before a sympathetic court asking for a declaration that the other party will have to indemnify him for any damages the other court might award, the effect – and the purpose – of the claim would be to stop the case going ahead in the other court; if, on the other hand, it is brought after the other court has given judgment, it would mean that the English court was sitting in judgment on the other court and “correcting” its judgment. Neither would be compatible with the EU principle of mutual trust and mutual respect.<sup>38</sup>

What if the damages are awarded, not by a court, but by arbitrators? To answer this, we must return to the *Gazprom* case.<sup>39</sup> In this case, Gazprom and the Lithuanian Government had concluded a contract which contained an arbitration clause. Subsequently, the Lithuanian Government sued Gazprom before a Lithuanian court. Gazprom considered that these proceedings were covered by the arbitration agreement; so it commenced arbitration in Sweden. The arbitrators ruled that some of the claims in the Lithuanian proceedings were indeed subject to the arbitration agreement. They ordered the Lithuanian Government to withdraw these claims. Gazprom then asked the Lithuanian courts to enforce the award. The lower courts refused to do so on the ground that the award was contrary to Lithuanian public policy. The case then went to the Supreme Court of Lithuania. It seems that the Supreme Court wanted to gain the support of the EU in its rejection

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<sup>37</sup>*West Tankers v. Allianz* [2012] EWHC 854 (Comm); [2012] 2 All ER (Comm) 395; [2012] 2 Lloyd's Rep 103.

<sup>38</sup>For a discussion of the analogous issue of the award of damages for litigation contrary to a choice-of-court agreement, see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008), Chapter 8 (the EU dimension is covered on pp. 330–338); Louise Merrett, “The Enforcement of Jurisdiction Agreements within the Brussels Regime” (2006) 55 ICLQ 315; Christopher Knight, “The Damage of Damages: Agreements on Jurisdiction and Choice of law” (2008) 4 JPIL 501; Koji Takahashi, “Damages for Breach of a Choice-of-Court Agreement” (2008) 10 *Yearbook of Private International Law* 57; Koji Takahashi, “Damages for Breach of a Choice-of-Court Agreement: Remaining Issues” (2009) 11 *Yearbook of Private International Law* 73; Daniel Tan and Nik Yeo, “Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?” [2004] LMCLQ 435; Tham Chee Ho, “Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye” [2004] LMCLQ 46.

<sup>39</sup>*Gazprom v. Lithuania (Lietuvos Respublika)*, Case C-536/13, ECLI:EU:C:2015:316 (Grand Chamber); Opinion: ECLI:EU:C:2014:2414. For a fuller discussion of this case, see Hartley, *supra* n 28, 965; Ewelina Kajkowska, “Antisuit Injunctions in Arbitral Awards: Enforcement in Europe” [2015] *Cambridge Law Journal* 412; Eva Storskrubb, “*Gazprom OAO v. Lietuvos Respublika*: A Victory for Arbitration?” (2016) 41 *European Law Review* 578.

of the award; so it made a reference to the CJEU claiming that the award was contrary to EU law as it constituted an antisuit injunction.

The CJEU ruled that an antisuit injunction, as understood in EU law, is an order granted by a court and enforced by a penalty that prohibits the bringing of legal proceedings in another country. Since the award in the case was not granted by a court and was not backed by a penalty, it did not constitute an antisuit injunction. Whether it was enforced or not in Lithuania was, the CJEU ruled, entirely a matter for the Lithuanian courts to decide under Lithuanian and international law. EU law did not apply. This makes sense since the award would have no effect unless enforced by the Lithuanian courts and there was nothing to prevent them from refusing to enforce it.

The *Gazprom* case seems to establish, therefore, that an order by arbitrators not to litigate, with no penalty attached, is not contrary to EU law. However, if a court issued an enforcement order, with a penalty for disobedience, it would seem to have exactly the same effect as an antisuit injunction. That, one assumes, *would* be contrary to EU law. The same would probably be true regarding an award by arbitrators granting damages for “wrongful” litigation: if it was enforced by a court, its practical effect would be the same.

### The EU solution

The problem of parallel proceedings was an important item in the negotiations leading up to the Recast Brussels Regulation. The Commission put forward a proposal that would have given the upper hand to arbitration. It proposed that the validity of an arbitration agreement should be determined by the courts of the Member State in which the arbitration would have its seat;<sup>40</sup> however, this proposal was not adopted. Instead, the Member States adopted a solution that was based on a principle of strict equality between arbitration and litigation. This solution is to be found in a Recital explaining the interpretation to be given to the provision excluding arbitration from the scope of the Regulation.<sup>41</sup> This is Recital 12, which lays down a number of general principles. It is based on the Schlosser Report<sup>42</sup> and on the earlier case-law of the CJEU. There is nothing equivalent to Recital

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<sup>40</sup>This parallels a similar rule which was adopted with regard to choice-of-court agreements. Under Article 25(1) of the Recast Regulation, the substantive validity of a choice-of-court agreement is determined by the law of the Member State of the designated court.

<sup>41</sup>Another item in the compromise package was Article 73(2), which states that the Regulation will not affect the application of the 1958 New York Convention. Previously there was some doubt as to what would happen if there was a conflict between the Brussels Regulation and the New York Convention.

<sup>42</sup>Report on the 1978 Convention of accession to the Brussels Convention (by which Denmark, Ireland and the UK joined the Convention), OJ 1979 C 59, p. 71 at paragraphs 61–65.

12 in the Lugano Convention; however, since Recital 12 was intended to reflect the position under the pre-existing law (the earlier Brussels Regulation of 2000,<sup>43</sup> which also has nothing equivalent to Recital 12), the position would probably be the same under Lugano.

The first general principle is that the courts of each Member State have the right to determine for themselves, without interference from the courts of any other Member State, whether an arbitration agreement is valid and, if it is, whether it is applicable to proceedings before them. Since the Regulation does not apply to arbitration, this will be done exclusively under the national law of the Member State concerned and, to the extent applicable, under international law.

This principle has at least two consequences. The first is that antisuit injunctions (or measures having equivalent effect) remain prohibited since they force the courts of one Member State to accept the view of the courts of another Member State as to the validity or scope of an arbitration agreement. The second consequence is that a judgment on either of these issues granted by the courts of one Member State is not subject to recognition under the Regulation in any other Member State.<sup>44</sup> So if the Member State where the court proceedings are brought holds the arbitration agreement invalid, this does not have to be recognized in the Member State where the arbitration is taking place. It can decide the matter for itself. There is, however, nothing to prevent the latter Member State from recognizing the judgment under its own law, as was done (it appears) in the *Marc Rich* case (discussed further below).

The second general principle is that nothing in the Regulation prevents the court before which legal proceedings are brought from refusing to hear the case and referring the parties to arbitration.<sup>45</sup> Of course, it will do this only if it regards the arbitration agreement as valid and applicable to the proceedings. This principle is important in view of the fact that arbitration is outside the scope of the Regulation, and it could be argued that the existence of an arbitration agreement should not be a ground for refusing to hear a case if the court has jurisdiction to hear it under the Regulation. If one draws an analogy with choice-of-court agreements, the only such agreements covered by the Regulation are agreements designating the courts of an EU Member State,<sup>46</sup> and it is a matter of continuing controversy whether the existence of a choice-of-court agreement which is outside the scope of the Regulation because it designates the courts of a non-member State is a legitimate ground for refusing to hear a case if the court before which proceedings are brought has jurisdiction to do so under the

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<sup>43</sup>Regulation 44/2001.

<sup>44</sup>Recital 12, second paragraph.

<sup>45</sup>Recital 12, first paragraph.

<sup>46</sup>Recast Brussels I Regulation, Article 25(1).

Regulation.<sup>47</sup> In the case of an arbitration agreement, however, this is no problem.<sup>48</sup>

The third general principle is that if the court before which legal proceedings are brought decides that the arbitration agreement is invalid or inapplicable and proceeds to hear the case, the resulting judgment cannot be refused recognition and enforcement in the courts of any other Member State just because the latter consider that the arbitration agreement was valid and applicable to the proceedings.<sup>49</sup> This principle is without prejudice to the competence of the courts of other Member States to decide on the recognition and enforcement of arbitral awards under the New York Convention.<sup>50</sup> This could constitute an obstacle to the recognition of the judgment; however, this rule applies only if there *is* an award. If arbitration proceedings are merely pending, and there is as yet no award, any judgment given by the other court must be recognized and enforced.

As will be appreciated, complicated questions can arise where parallel proceedings exist. We will now try to see how these rules apply in practice in different situations.

### **The Member State in which the court proceedings are taking place**

We first consider the position in the Member State in which the court proceedings are taking place. We assume that, under the law of that Member State, the arbitration agreement is invalid or inapplicable to the proceedings. Until the award is given, the court can safely ignore the arbitration proceedings. The courts of the Member State where the arbitration is taking place are not entitled to grant an antisuit injunction or other measures having an equivalent effect.<sup>51</sup> Any ruling given by those courts on the validity or effect of the arbitration agreement does not have to be recognized under the Regulation (though the courts of the Member State where the litigation is pending could recognize it under their own law).

What happens when an award is given? It is clear from the *Gazprom* case (above) that EU law does not apply to the question whether the award should, or should not, be recognized. This applies even if the award is made into a

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<sup>47</sup>For a summary of the state of play on this issue, see Trevor Hartley, *Civil Jurisdiction and Judgments in Europe* (Oxford University Press, 2017), paragraphs 13.17–13.32.

<sup>48</sup>This also follows from Article 73(2) of the Recast Regulation, which provides that the Regulation will not affect the New York Convention.

<sup>49</sup>Recital 12, third paragraph, first sentence. This rule also applies if the court of origin took jurisdiction under national law.

<sup>50</sup>Recital 12, third paragraph, second sentence. See also Article 73(2).

<sup>51</sup>However, the arbitrators can give an order requiring the claimant in the court proceedings to withdraw the claim, at least if the order is not backed by a penalty. The court hearing the litigation can decide for itself whether or not to enforce the order of the arbitrators: EU law does not apply to this issue. See *Gazprom v. Lithuania (Lietuvos Respublika)*, Case C-536/13, ECLI:EU:C:2015:316 (Grand Chamber) (discussed above).

judgment in the Member State in which it was granted.<sup>52</sup> So the effect of the award will depend entirely on the law of the Member State in question, together with any relevant rules of international law – in particular, the New York Convention – as interpreted by the courts of that State. In other words, the Brussels Regulation has no effect on the recognition and enforcement of the award. This is in line with Article 73(2) of the Recast Regulation, which states that the Regulation does not affect the New York Convention. Everything depends on the courts of the Member State in question. Since they will already have held that the arbitration agreement is invalid or inapplicable, they are hardly likely to recognize the award, but this is their decision. The CJEU has no role to play.

### **A third Member State**

We next consider the position in a Member State which is neither that in which the legal proceedings were brought nor that in which the arbitration took place. The courts of this State are subject to an obligation under the Regulation to recognize the judgment. However, this is subject to the exception laid down in Article 73(2) referred to above. In other words, the Regulation will not stand in its way if it considers that the New York Convention requires it to recognize the award. If the award conflicts with the judgment, the courts of the Member State in question are excused from the obligation to recognize the judgment to the extent to which it is incompatible with the award. This exception does not, however, apply if the courts of the Member State want to recognize the award on some basis other than that of the New York Convention.<sup>53</sup> In most cases, the final result will depend on whether the courts of the Member State in question regard the arbitration agreement as valid and applicable. As we have seen, they can decide this issue for themselves.

### **The Member State in which the arbitration is taking place**

The position in the Member State in which the arbitration proceedings took place is the most problematic. The reason is that the New York Convention does not apply in this situation: it applies only to the enforcement of an award in a State other than that in which it was given. We have already seen that recognition and enforcement of a judgment cannot be refused on the ground that the claim on which it was based was, in the eyes of the court addressed, subject to

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<sup>52</sup>This is because, under Recital 12, third paragraph of the Recast Regulation, the Regulation does not apply to any action or judgment concerning the recognition or enforcement of an arbitral award.

<sup>53</sup>However, if there is an obligation to recognize the award under some other convention with a non-member State, Article 73(3) of the Recast Regulation might be relevant.



arbitration. Does this mean that the judgment must be recognized in preference to the award?

It would be absurd if the award had less effect in the Member State in which it was given than in other Member States. Perhaps a way forward can be found in Article 45(1)(c) of the Recast Regulation. This states that recognition of a judgment from another Member State will be refused if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed.<sup>54</sup> This rule applies even if the local judgment was given after the foreign judgment. If the arbitration award can be turned into a judgment, as is possible in England under section 66(2) of the Arbitration Act 1996, this might provide the solution.

However, there might be a snag: as we shall see below, the Regulation does not apply to any action or judgment concerning the enforcement of an arbitral award.<sup>55</sup> Since a judgment under section 66(2) is such a judgment, it falls outside the scope of the Regulation. However, the CJEU has already held that the equivalent provision in the Brussels Convention<sup>56</sup> applies even if the local judgment is outside the subject-matter scope of the Regulation (Convention). This was in the case of *Hoffmann v. Krieg*.<sup>57</sup> The case concerned a married couple who were originally both domiciled in Germany. The husband left the wife and went to live in the Netherlands. The wife went to the German courts and obtained a maintenance order. At the time, maintenance was within the subject-matter scope of the Convention; so the German judgment was enforceable under the Convention in the Netherlands. The husband then obtained a divorce in the Netherlands. Divorce was outside the subject-matter scope of the Convention; so the Germans were not required to recognize the divorce and they did not do so. The husband then invoked the equivalent of Article 45(1)(c) of the Recast Regulation (Article 27(3) of the Convention) to contest further enforcement of the maintenance order. The CJEU accepted that enforcement was indeed barred. The fact that the divorce decree fell outside the scope of the Convention was irrelevant. So it seems that a judgment incorporating an award could be used to block enforcement of a judgment from another Member State.<sup>58</sup> Since Article 34(3) of Lugano lays down the same rule as Article 45(1)(c) of the Recast Regulation, this solution would apply under Lugano as well.

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<sup>54</sup>There is a similar provision in the Lugano Convention: Article 34(3).

<sup>55</sup>Recital 12, last paragraph.

<sup>56</sup>This is Article 27(3) of the Convention.

<sup>57</sup>Case C-145/86, ECLI:EU:C:1988:61, [1988] ECR 645.

<sup>58</sup>In *West Tankers Inc v. Allianz SpA (The Front Comor)* [2012] EWCA Civ 27; [2012] 2 All ER (Comm) 113; [2012] 1 Lloyd's Rep. 398 the Court of Appeal held that a judgment can be entered in the terms of an arbitral award even where the award was in the form of a negative declaration.

### **The position under Lugano**

It will have been noticed that the analysis above depends in part on Article 73(2) of the Recast Regulation, which provides that the Regulation will not affect the application of the 1958 New York Convention. As was said earlier, there is no equivalent provision in the Lugano Convention. Does this mean that if the UK becomes a Party to the Lugano Convention, the obligation to recognize a judgment under Lugano will prevail over the obligation to recognize an award under the New York Convention, if the award and the judgment were both given in States that were a Party to Lugano? Since the Lugano Convention (1970) was concluded after the New York Convention (1958), it might be thought that this was the case.

The Vienna Convention on the Law of Treaties provides rules for determining what happens when two treaties conflict. According to Article 30(3), where all the Parties to the earlier treaty are also Parties to the later treaty, the earlier treaty applies only to the extent that its provisions are compatible with the later treaty. In other words, the later treaty prevails. This provision does not of course apply as regards conflicts between the New York Convention and Lugano because not all the Parties to the New York Convention are also Parties to Lugano. However, Article 30(4)(a) of the Vienna Convention goes on to say that as between States that are Parties to both treaties, the same rule applies. However, this is subject to the rule that if the later treaty provides that it is subject to the earlier one, the earlier one will prevail.<sup>59</sup> Article 73(2) of the Recast Regulation is of course such a rule.

It is, however, possible that the same result may follow from Article 67(1) of Lugano which provides that Lugano does not affect other conventions to which Lugano States are bound and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. However, this is not certain: it would depend on whether the New York Convention could be regarded as governing the recognition and enforcement of judgments in relation to a particular matter (arbitration). It might be said that that, though it affects the recognition and enforcement of judgments, it does not “govern” them. It was due to doubts on this matter that Article 73(2) of the Recast Regulation was adopted.

If we assume that neither Article 67(1) nor any other provision of Lugano gives priority to the New York Convention, it would seem that if the award and the judgment were both given in States that were Parties to both Lugano and the New York Convention, a UK court might have to recognize the judgment rather than the award, if the UK became a Party to Lugano. However, this problem will not affect what was said above regarding the recognition of a judgment in the State in which the award was given.

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<sup>59</sup>Vienna Convention, Article 30(2).

### **The scope of the arbitration exclusion**

Having studied the problems which arise when there are parallel proceedings, we can now turn our attention to considering what exactly is covered by the provision in Article 1(2)(d) stating that the Regulation does not apply to arbitration. What are the things that the Regulation does not purport to regulate? In general terms, there are three possibilities. The first is that the Regulation does not apply to arbitration proceedings – that is, proceedings before an arbitrator. This is obviously correct. The second is that it does not apply to court proceedings ancillary to arbitration proceedings. As we shall see, this too is correct, but the question arises what is covered by this. The third possibility is that the Regulation does not apply to substantive court proceedings to which an arbitration agreement applies. This view has for a long time been promoted by the United Kingdom, but it has never been accepted by the other Member States and is clearly wrong. This is demonstrated by cases like *West Tankers* (above)<sup>60</sup> in which the Italian litigation was, in English eyes, covered by the English arbitration agreement; nevertheless, the CJEU held that the Regulation applied to it.

All that remains to consider, therefore, is precisely which court proceedings are excluded on the ground that they are ancillary to arbitration. This is dealt with by the last paragraph of Recital 12 of the Recast Regulation. It reads:

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, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

It will be seen that this provision does not expressly say that court proceedings ancillary to arbitration are excluded. What it does is to give a number of particular examples, but to preface these examples with the words “in particular”. These words are an indication that what follows is not exhaustive. So Recital 12 gives a number of examples but leaves the possibility open that other things may be covered as well. Acting in this spirit, we will just take a few examples, without trying to lay down an exhaustive list.

### **The appointment of an arbitrator**

Arbitration agreements usually provide that each party will appoint its arbitrator and then there will be some system for appointing the third arbitrator. What happens if one party refuses to appoint its arbitrator? Under English law (and other systems as well), the other party can go to the court and ask it to appoint an arbitrator on behalf of the recalcitrant party. If this, or something similar, was not possible, one party would be able to block the arbitration by refusing

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<sup>60</sup>Footnote 8, above.

to appoint its arbitrator. Are court proceedings for the appointment of an arbitrator in these circumstances excluded from the scope of the Regulation? The case of *Marc Rich v. Impianti* (discussed above)<sup>61</sup> shows that they are.

In that case, Impianti took the view that the arbitration agreement was not part of the contract. As we saw above, this view was not inherently unreasonable. As a result, it refused to appoint an arbitrator. Marc Rich appointed its arbitrator and then asked the English court to appoint an arbitrator on behalf of Impianti. The latter argued that the *lis pendens* rule precluded the court from doing so. The argument was that, before appointing an arbitrator, the court would have to decide whether the arbitration agreement was part of the contract. This, said Impianti, was the issue before the court in Genoa, which had been seised of the case before the English court.

At the time, the relevant instrument was the Brussels Convention. Under Article 21 of the Brussels Convention (equivalent to Article 29(1) of the Recast Regulation), if proceedings involving the same cause of action between the same parties are brought before the courts of different Member States, the court seised second must stay the proceedings before it. Impianti said this meant that the English court had to stay the proceedings before it.

The English court made a reference to the CJEU and the latter held that the Brussels Convention did not apply to the English proceedings because they were concerned with arbitration. The Brussels Convention does not contain anything equivalent to Recital 12; so this ruling was based on an interpretation of the provision in the Convention which (in identical terms to the Recast Regulation) excludes arbitration.<sup>62</sup> However, the CJEU did refer to the reports on the Convention, including the Schlosser Report.<sup>63</sup> Under the present law, it is clear that the words “the establishment of an arbitral tribunal” in Recital 12 of Brussels 2012 would cover the case.<sup>64</sup> So the *lis pendens* rule did not apply to the proceedings before the English court.

This should have meant that the arbitration could go ahead in London. However, the CJEU had taken over two years to give the ruling. During this time, the question whether the arbitration agreement was part of the contract had gone up to the highest court in Italy, the *Corte Suprema di Cassazione*. It ruled that the arbitration agreement was not part of the contract. The case then went back to the court of first instance in Genoa. Marc Rich could have walked away at this point. If it had done this, a default judgment would have been given. Instead, it pleaded to the merits of the case. So when, some time later, the CJEU gave its ruling, Marc Rich had, in the opinion of the English courts,

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<sup>61</sup>Footnote 7, above.

<sup>62</sup>Article 1(4) of the Brussels Convention.

<sup>63</sup>See the reference to “Official Journal 1979 C 59, p. 93” in paragraph 21 of the judgment.

<sup>64</sup>The Schlosser Report expressly mentions the appointment of arbitrators: OJ C 59, p. 93 at paragraph 64.

submitted to the jurisdiction of the Italian courts. Therefore, ruled the English courts, it was bound by the judgment of the Italian Supreme Court that the arbitration agreement was invalid. This judgment was recognized by the English courts and the result was that the arbitration proceedings could not go ahead.<sup>65</sup>

### **Enforcement of an award**

Recital 12 also makes clear that the Regulation does not apply to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.<sup>66</sup> This means, for example, that if an award is turned into a judgment, that judgment does not come within the scope of the Regulation. For this reason, it is not possible to use the Regulation to enforce the award in another Member State by first turning it into a judgment and then asking the courts of the other Member State to enforce that judgment. The same would apply to a judgment based on an award from another country.

On the other hand, however, we saw in *Hoffmann v. Krieg* (discussed above)<sup>67</sup> that a judgment that is outside the subject-matter scope of the Regulation (or Convention) can nevertheless constitute a bar to the recognition or enforcement of a judgment from another Member State. This makes sense. From the point of view of a given legal system, a conflict between two judgments is just as unacceptable if one judgment is outside the scope of the Brussels Regulation: what matters is that both judgments are valid within the legal system in question.

### **Interim measures**

Interim measures do not appear to be covered by Recital 12. In *Van Uden v. Deco-Line*,<sup>68</sup> the CJEU held that a Dutch interim-payment order was not excluded from the scope of the Regulation. A Dutch interim payment order is similar to an English freezing order, but there is an important difference: under the Dutch system the court can, after a summary hearing (in Dutch, *kort geding*), order the defendant to pay a sum of money to the claimant. This sum may be all or part of the sum claimed. If there is subsequently a full hearing and the defendant wins, the money must be repaid. However, if neither party requests a full hearing, the claimant can keep the money.

In *Van Uden*, a Dutch party had a claim against a German party. The claim was subject to arbitration. The Dutch party asked the Dutch court for an interim

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<sup>65</sup>We now know from Recital 12 of the Recast Regulation that the Regulation does not require the recognition of a judgment on the validity of an arbitration agreement. It is not clear whether the English court recognized the Italian judgment under the Convention or under the English doctrine of issue estoppel.

<sup>66</sup>Recital 12, fourth paragraph.

<sup>67</sup>See footnote 57, above.

<sup>68</sup>Case C-391/95, ECLI:EU:C:1998:543, [1998] ECR I-7091.

payment order. This appears to be possible under Dutch law even if the substantive claim is subject to arbitration. The CJEU was asked whether the *kort geding* proceedings for the interim-payment order were covered by the instrument in force at the time, the Brussels Convention. It held that they were. The reason was that the interim payment order was really intended to secure payment of the *claim*, rather than to support any particular procedure for enforcing it. This makes sense in view of the fact that the claimant often just takes what he is given in the *kort geding* proceedings and does not proceed to litigation or arbitration.<sup>69</sup>

This does not mean that an order of this kind cannot be obtained where the claim is subject to arbitration. The CJEU said that a claim subject to arbitration should be regarded as being in the same position as a claim subject to the jurisdiction of the courts of another Member State. In this latter case, Article 24 of the Brussels Convention (equivalent to Article 35 of the Recast Regulation and Article 31 of Lugano) provides that application may be made to the courts of a Member State for such provisional and 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. This, the CJEU held, may also be used where the claim is subject to arbitration.

The significance of this ruling is that the limits on the measures ordered that apply under Article 24 of the Brussels Convention (Article 35 of the Recast Regulation) cannot be avoided just because the substance is subject to arbitration. The most important limit, which was laid down by the CJEU in *Van Uden*, is that the interim order can apply only to assets located within the territory of the court making the order. This excludes world-wide orders.

## Conclusions

We have seen that complicated issues are raised by the relationship between litigation and arbitration. The policy of the CJEU (and of the Regulation itself) is to provide a level playing field for the two forms of dispute resolution. Although there are still some unanswered questions, this has produced a reasonable system which is generally fair to all concerned. Since the cases on arbitration discussed above have all been decided under the 2000 Brussels Regulation or the Brussels Convention, this solution will almost always<sup>70</sup> apply under Lugano as well, if the UK becomes a party to it.

## Disclosure statement

No potential conflict of interest was reported by the author.

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<sup>69</sup>In reaching its conclusion, the CJEU quoted from the Schlosser Report, which in part formed the basis for Recital 12.

<sup>70</sup>The only exceptions are where an obligation under the New York Convention to recognise an award conflicts with an obligation under Lugano to recognise a judgment. This was discussed above.