Chapter 6
Brussels Ibis in Relation to Other Instruments on the Global Level

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Abstract This chapter will discuss the relationship between the Brussels Ibis Regulation and other international conventions which regulate the recognition and enforcement of foreign judgments or arbitral awards in civil and commercial matters. Since a number of such conventions are in force, a possible collision with the Brussels Ibis Regulation may occur. As to the preceding Brussels I Regulation, the Court of Justice has already addressed the problem of conventions that may concur with the Regulation. This raises the question whether this case law remains untouched by the entry into force of the Brussels Ibis Regulation. Also, the relationship of Brussels Ibis with the Hague Convention on Choice-of-Court Agreements of 2005 will be discussed, since this Convention has not been signed by Member States but instead by the Council on behalf of the European Union. Thus, a different approach to a possible collision between the two instrument may be required. Lastly, the position of the New York Arbitration Convention of 1958 will be dealt with. Though explicitly excluded from the substantive scope

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of Brussels Ibis, arbitration has still been subject to some debate *vis-à-vis* its position in light of the Brussels I regime. The recent *Gazprom* case is an interesting example in this respect, which will be looked at in more detail.

Keywords Foreign · Judgments · Recognition and enforcement · Choice-of-court agreements · Arbitral awards · Brussels ibis regulation · Hague convention on Choice-of-Court agreements 2005 · New york arbitration convention 1958 · CM

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6.1 Introduction

This contribution will look into the relationship between the Brussels Ibis Regulation[1] and other international conventions which regulate the recognition and enforcement of foreign judgments or arbitral awards in civil and commercial matters. At the moment, a number of such conventions are in force which may concur with the Brussels Ibis Regulation. With respect to the Regulation's predecessor—the Brussels I Regulation—the Court of Justice has already addressed the problem of concurring instruments. It will be interesting to see whether this case law remains untouched by the entry into force of the Brussels Ibis Regulation or whether a change has been brought about in this respect.

But apart from the Brussels Ibis Regulation's relationship with conventions concluded by Member States, it is questionable whether this would hold true with respect to the position of the Hague Convention on Choice-of-Court Agreements

[1] Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, p. 1.

of 2005. For this Convention has not been signed by Member States but instead by the Council on behalf of the European Union. Does this circumstance make a difference? Would the case law of the Court of Justice still have a bearing on the application of this Convention?

Another matter to be dealt with is the position of the New York Arbitration Convention of 1958. Though explicitly excluded from the substantive scope of Brussels Ibis,[2] arbitration has still been subject to some debate *vis-à-vis* its position in light of the Brussels I regime. The recent *Gazprom* case[3] is an interesting example in this respect, which will be looked at in more detail.

In order to find answers to the aforementioned questions, we will first look into the case law of the CJEU—or the ECJ as it used to be called—concerning Article 71 of the Brussels I Regulation. We will also briefly address the changes that Brussels Ibis has brought about in this respect (Sect. 6.2). Furthermore, the position of the Hague Convention of 2005 will be addressed, since this convention seems to have a special position in relation to both Brussels I and Brussels Ibis (Sect. 6.3). After the conventions on the recognition and enforcement of judgments have been discussed, the focus will be on the recognition and enforcement of arbitral awards as regulated by the New York Convention of 1958 (Sect. 6.4). More specifically, the latter's interaction with the new Brussels Ibis Regulation will be scrutinised. Final remarks can be found in the conclusions (Sect. 6.5).

6.2 Article 71 of the Brussels I Regulation and Its Relationship with Other International Instruments

As has been said in the above, the Brussels Ibis Regulation contains a provision in its Article 71 stipulating under what circumstances it will give way to other conventions on international jurisdiction or the recognition and enforcement of foreign judgments in civil and commercial matters. In order to look at the particularities of this provision, though, it will be expedient to address the Court of Justice's case law on the interpretation of the predecessor of Article 71, namely Article 57 of the Brussels Convention of 1968. After all, the interpretation given to these instruments will still be necessary in order to maintain the continuity between the three instruments.[4]

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[2] See Article 1(2)(d).

[3] CJEU Judgment of 13 May 2015, Case C-536/13 (*Gazprom OAO v. Lietuvos Republika)* ECLI:EU:C:2015:316 (hereinafter: *Gazprom* judgment).

[4] See Recital 34 of the Brussels Ibis Regulation: '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.'

To start with the Brussels Convention, the Court of Justice interpreted Article 57 thereof in the *Tatry* case. In this case, the Court was confronted with the allegation that the Brussels Convention of 1968 and the Brussels Arrest Convention of 1952 concurred on the issue of *lis pendens*. One of the parties invoked the rule of the Arrest Convention that prohibits parties from arresting assets in multiple states in the same case once an arrest has been made,[5] stating that this rule contained a kind of '*lis pendens*' rule. The question arose whether Article 57 of the Brussels Convention should be interpreted as meaning that in case of conflicting instruments the application of the Brussels Convention is always precluded by the specialised convention or that it is only precluded in cases governed by it and not in those in which it does not apply. We take this to mean that the question was whether the specialised convention would only apply 'partially', i.e., *insofar* it collides with the Brussels Convention, or that it will apply *in toto*, i.e., completely instead of the Brussels Convention.

Without agreeing on the merits of this line of argument—the Court ruled that the litigious rule of the Arrest Convention was not to be equated with *lis pendens* in the sense of Article 22 of the Brussels Convention of 1968—the Court did determine that Article 57 of the Brussels Convention only precludes its application in cases governed by a specialised convention. Basically, this comes down to a 'partial' preclusion of the Brussels Convention, since only insofar as the specialised convention contains similar rules on—in this case—*lis pendens*, should the former instrument apply. For other matters, the Brussels Convention's applicability would not be precluded. The Court held that Article 57 is only intended as an exception to the general rule that, normally, the Convention takes precedence over other instruments with the purpose of ensuring compliance with the rules of specialised conventions.[6] The application of the provisions of the Brussels Convention is solely precluded *vis-à-vis* questions that are governed by a specialised convention.[7]

However, the Brussels Convention has been succeeded by the Brussels Regulation since the ECJ's judgment in *Tatry*. With the entry into force of the Brussels I Regulation, the character of the Brussels regime, including its provision on its relationship with other instruments, has changed from a convention into a regulation. This circumstance could lead to a number of questions. Does the Brussels regime, having become part of EC law, impact on the way in which the concurrence of different international instruments is dealt with? In the situation of Article 71 of the Brussels Regulations, though, the concurrence was one of a convention and a Regulation, the latter having direct effect and being directly

[5] Article 3(3) of the Arrest Convention of 1952.

[6] ECJ Judgement of 6 December 1994, Case 406/92, (*The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*), ECR 1994, I-05439, ECLI:EU:C:1994:400, (hereinafter: *Tatry* judgment) para 24.

[7] *Tatry* judgment, para 25.

applicable, and being the result of a 'normal' majority voting process instead of unanimity. What did the—albeit slightly—changed wording of Article 71 Brussels I Regulation amount to?[8]

In *TNT v Axa,*[9] the European Court of Justice had the opportunity to answer these questions. This case concerned the concurrence of the Brussels I Regulation and the Convention on the Contract for the International Carriage of Goods by Road ('CMR'). The CMR contains provisions on *lis pendens*[10] and on the recognition and enforcement of judgments,[11] just like the Brussels I Regulation.[12] The question arose to what extent the CMR would take precedence over the Brussels I Regulation. Reiterating the case law on Article 57 of the Brussels Convention, the Court considered that Article 71 of the Regulation is meant to make an exception to the precedence that the Regulation will normally have over other conventions in order to ensure compliance with the rules of such specialised conventions. The application of rules of the Brussels Regulation concerning issues governed by specialised conventions was therefore precluded.[13]

Although the ECJ thus applied its case law under the Brussels Convention on Article 71(1) of the Regulation, it nevertheless put some restrictions on the application of specialised conventions insofar as such an application would compromise the principles that underlie judicial cooperation in civil and commercial matters in the European Union. According to the ECJ, these principles concern the:

> '[…] free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.'[14]

According to the Court, Article 71(1) cannot purport to be an application of specialised conventions that violates these principles. The application of such a convention cannot lead to less favourable results for the internal market than the application of the Brussels I Regulation would, so the Court held.

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[8] In Article 71 of Brussels I, the wording of the provision no longer contained the phrase 'or will be parties'. Thus, only existing (and not future) conventions would take precedence over the Brussels I regulation. This makes sense in the light of the fact that the legislative competence of the EU in the matter of judicial cooperation in civil matters was moved from the so-called 'third pillar' to the 'first pillar'. In doing so, the EU would also have exclusive competence to negotiate conventions or agreements with third states on matters on which it had internal exclusive competence, based on the 'ERTA' (or 'AETR') doctrine. See for more information on this Kuijper 2011, p. 97 ff.

[9] ECJ of 4 May 2010, Case C-533/08, (*TNT Express Nederland BV v AXA Versicherung AG*), ECR 2010 I-04107, ECLI:EU:C:2010:243, (hereinafter: *TNT v AXA*).

[10] Article 31(2) CMR.

[11] Article 31(3) CMR.

[12] Articles 27 and 32 ff., respectively.

[13] *TNT v AXA*, para 48.

[14] *TNT v AXA*, para 49.

It is interesting to see that the ECJ in *TNT v AXA* addressed both the rules on *lis pendens* and the rules on recognition and enforcement.[15] As to the former, the Court held that rules on *lis pendens* that are contained in a specialised convention can only be applied insofar as they are 'highly predictable', would 'facilitate the sound administration of justice' and that they would minimise the risk of parallel proceedings. The Court referred in that respect to recitals 11, 12 and 15 of Brussels I.

In the specific context of the recognition and enforcement of foreign judgments, the ECJ put emphasis on the principles that are laid down in recitals 6, 16 and 17 of the Brussels I Regulation's preamble. From these recitals, the ECJ inferred two main principles that should be observed when applying a specialised convention's rules on recognition and enforcement. These are the principle of the free circulation of judgments and the principle of mutual trust in the administration of justice. In the latter context, the ECJ expressly spoke of a '*favor executionis*'. The ECJ held that these principles should be respected within the European Union, also when a specialised convention applies. Thus, the assertion by one of the parties that the recognition and enforcement mechanisms of the CMR did not take precedence over the Brussels I Regulation, was not followed. The regime of the recognition and enforcement of this Convention still applied, albeit with certain restrictions. More specifically, the ECJ ruled that Article 31(3) of the CMR, providing for the recognition and enforcement of judgments, can only be applied if it would make it possible for the aims of the free movement of judgments and of mutual trust in the administration of justice within the EU.

The *TNT v AXA* judgment has met some criticism. It has been argued that the judgment of the Court of Justice was contrary to the intentions of the Council in order to allow Member States to comply with their obligations under international law.[16] This intention is evidenced by recital 25 of the Brussels I Regulation[17] and in the Jenard Report on the Brussels Convention.[18] Also, it has been contended that the Court violated the *lex specialis* principle.[19] Others, though, have argued that the judgment was necessary to prevent an undermining of the Brussels I regulation.[20] It has also been said that the restrictions that the ECJ has made in *TNT v*

[15] Haak 2010, section 3.

[16] See, e.g., Van den Oosterkamp 2011, pp. 193–194, and Mankowski, in: Magnus & Mankowski, Brussels Ibis Regulation, Article 71, para 8–12, more specifically para. 10 as regards the ratio of Article 71.

[17] This recital reads as follows: 'Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.' See also Van den Oosterkamp 2011, pp. 193–194. In Brussels Ibis, this can be found in Recital 35.

[18] See Jenard Report, pp. 60–61.Van den Oosterkamp 2011, pp. 193–194.

[19] Van den Oosterkamp 2011, pp. 193–194.

[20] Kuijper 2011, p. 94.

AXA were of a more theoretical or dogmatic nature, and that in practice the CMR would actually meet the standards set by the ECJ.[21]

The ECJ's judgment was repeated in the *Nipponkoa* case.[22] In this case, the Court was again confronted with the question of how Article 71 of Brussels I should be interpreted in case of concurrence with the CMR. The matter concerned the conflict of rules on *lis pendens*. The ECJ reiterated its judgment in *TNT v AxA* by holding that the application of Article 71 of Brussels I—and thus of a specialised convention instead of the Brussels Regulation—may not purport to be a violation of the principles underlying the Regulation.[23] Article 71 Brussels I should be interpreted as meaning to preclude the interpretation of a convention in a way that does not ensure the observance of the underlying principles under conditions at least as favourable as the one of the Brussels I regime.[24]

However, in *Nipponkoa* the Court of Justice of the EU went farther. One of the questions concerned the problem of whether two concurring proceedings had the 'same cause of action'. The one concerned an action for indemnity, the other was a so-called action for a 'negative declaration', which means that the potentially liable person initiates proceedings for a declaratory judgment stating that he is not liable for the damages that have occurred. The question of to what extent this would constitute a 'same cause of action' has been raised in the past. Some jurisdictions, like the German, consider an action for negative declaratory relief ('*negative Feststellungsklage*') as not having the same cause of action as an action for indemnity.[25] If this view had been followed by the Court, it would have meant that the *lis pendens* rule does not apply, whilst the opposite view would have entailed that the court last seized will need to stay the proceedings and will have to wait for the first seized court to rule on its jurisdiction. In *Nipponkoa*, the Court chose the latter option by holding that Article 71 of Brussels I precludes an interpretation of Article 31(2) of the CMR according to which such concurring actions—i.e., one for indemnification and one for a negative declaratory relief—do not have the 'same cause of action'. This somewhat complicated wording means that the application of a specialised convention may not lead to the conclusion that such action, normally regarded as having the 'same cause of action' under the Brussels I Regulation's regime, would be regarded as different actions

[21] See Mankowski, in: Magnus & Mankowski, Brussels Ibis Regulation, Article 71, para 12. Although it is questionable whether this position would hold in the light of the Nipponkoa judgment.

[22] CJEU Judgement of 19 December 2013, Case C-452/12, (*Nipponkoa Insurance Co (Europe) Ltd v. Inter-Zuid Transport BV, intervening parties: DTC Sushuisterveen BV*), ECLI:EU:C:2013:858 (hereinafter: *Nipponkoa* judgment). Critical of this decision is Mankowski 2014.

[23] *Nipponkoa* judgment, paras 36–37.

[24] *Nipponkoa* judgment, para 39.

[25] See Hoeks 2011, p. 471.

under that specialised convention. This probably relates to the requirement set forth by the Court of Justice in *TNT v AXA*, namely that the application of a specialised convention should keep the risk of concurring proceedings to a minimum.[26]

A recent judgment of the CJEU on the interpretation of Article 71 of Brussels I can be found in the *Gazprom* case.[27] This case concerned the recognition and enforcement of an arbitral award rendered by the Stockholm Chamber of Commerce. Therefore, this case will be discussed in more detail in Sect. 6.4.5.

The case law of the Court of Justice shows that Article 71 of the Brussels I Regulation still allows specialised conventions to take precedence over the Brussels regime, even though the instrument is now shaped in the form of a Regulation and thus concerns a piece of European legislation instead of a convention. Nevertheless, the Court of Justice has introduced some safeguards in order to prevent the aims and objectives on which the Regulation is based from being undermined by an 'absolute' precedence of specialised conventions over the Regulation. Therefore, the Court restricted the application of Article 71 by requiring compliance with a given set of principles to be taken into account. This leads to the question of to what extent the Brussels Ibis Regulation has brought about a change in this situation. The case law of the Court of Justice seems to remain untouched by the entry into force of the Brussels Ibis Regulation. For the wording of its Article 71 is equal to the one of its predecessor in Brussels I. Also, when reading the preliminary documents accompanying the Recast, it seems that the legislator did not intend to bring changes to the system since no reference is made in this respect. From this, the conclusion can be inferred that the case law of the CJEU on Article 71 is still reflecting the state of the law in view of specialised conventions to which Member States are a party. Some other provisions of Brussels Ibis about the confluence of conventions and the Regulation have in fact a different wording compared to their predecessors in Brussels I. One of them is Article 69 which will be discussed in more detail in the subsequent Section.

[26] See *TNT v AXA*, para 49.

[27] *Gazprom* judgment. For a comment on this judgment, see Van Zelst 2015, p. 269 ff. Before *Gazprom*, the CJEU applied the *TNT/AxA* and *Nipponkoa* case law to the CMR again in *Nickel & Goeldner* (Judgment of 4 September 2014, Case C-157/13, ECLI:EU:C:2014:2145), without finding a violation of Brussels I. *Gazprom* is not the most recent case anymore. In the meantime, the CJEU has rendered the *Brite Strike* judgment (Judgment of 14 July 2016, Case C-230/15, ECLI:EU:C:2016:560), in which Article 71 of Brussels I was again interpreted. This judgment could not be taken into account in this contribution's main text anymore. It suffices to note that the CJEU applied the requirements as developed in *TNT/AxA* and *Nipponkoa*.

6.3 The Hague Convention on Choice of Court Agreements of 2005

6.3.1 The Hague Convention: Status and Scope

The Hague Convention on Choice of Court Agreements (hereafter: the Hague Convention) entered into force on 1 October 2015.[28] On that date, three months had passed since the deposit of the approval by the Council on behalf of the EU as a so-called Regional Economic Integration Organisation ('REIO').[29] Thus, the requirement of Article 31(1) that the Convention will enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession, was fulfilled. Mexico had already deposited its instrument of accession to the Convention on 26 September 2007.[30]

The Hague Convention 2005 can be seen in the broader light of the so-called 'Judgments Project' which the Hague Conference has embarked upon and which is still under consideration.[31] This project, originally initiated by the US delegates to the Conference in 1992, aims at providing for an international instrument that would regulate the recognition and enforcement of foreign judgments. Since there were some difficulties in coming to a mutual agreement on the issues of jurisdiction and enforcement, the idea came up to find some common ground on a more commonly accepted basis for jurisdiction in civil and commercial matters, such as party autonomy, and to arrange the recognition of judgments of courts that have based their competence upon a choice of court agreement.[32]

The Hague Convention has a restricted scope *ratione materiae*. For this instrument only regulates matters of international civil procedure insofar as an exclusive choice of court agreement is concerned (Article 1(1)). In Article 2 of the

[28] See, for more general information on this Convention, Lazić 2007, p. 214 ff.; Wagner 2009, p 100 ff.; Beaumont 2009, p. 125 ff.; Garnett 2009, p. 161 ff.; Hartley 2013, p. 18 ff. (for a background to the Convention).

[29] The EU signed the Convention on 1 April 2009 and approved it in the Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (2014/887/EU), OJ L 353 10 December 2014, p. 0005. Article 2 thereof stipulated that the deposit would take place within one month of 5 June 2015 by the President of the Council or someone empowered by him for that purpose.

[30] So far, there are no other States that have approved, ratified or accessed the Convention. The US signed the Convention on 19 January 2009 but has not yet ratified it. Recently, Singapore (25 March 2015) and the Ukraine (21 March 2016) have signed the Convention as well.

[31] Recently, the Draft for a Proposal for a Convention on recognition and enforcement was published on the Hague Conference website, see www.hcch.net under 'Projects'.

[32] The history of the project can be read on the Hague Conference's website (www.hcch.net), under 'Projects'/ 'Legislative projects'/ 'Judgments'. See also Wagner 2009, pp. 102–110.

Convention, a vast list of issues concerning international jurisdiction is excluded from the scope of the Convention. As has been noted by Hartley, Article 2 of the Hague Convention makes a distinction between, on the one hand, the nature of the agreement that has been excluded from its substantive scope and, on the other, the nature of the matter which is at stake.[33] In the second group, there are matters which are also excluded from the subject-matter of the Brussels I and Brussels Ibis Regulations, such as the status and legal capacity of persons, wills and successions, matters related to insolvency, and, not without significance, arbitration. It is beyond the scope of this contribution to touch upon these issues in too much depth, apart from arbitration.[34]

It is also required that the case should be of an international character. In order to determine the international nature of the case, the Convention uses different criteria depending on the question whether it concerns jurisdiction or recognition and enforcement. When jurisdiction is at issue, the international character of the case is determined by the fact that parties are not resident in the same state and whether the relationship of the parties and all other relevant elements are connected to more than one State. In short, if the only international element is the choice of a foreign court, the case is not regarded as an international one (Article 1(2)). In the case of the recognition and enforcement of a judgment, this requirement of internationality is met when the judgment is given by a foreign court (Article 1(3)).[35] In both cases, the court chosen and/or the court whose judgment is to be recognised and enforced should be the court of a Contracting State. It is not required that the residence of the parties (or of one of them) is situated in a Contracting State.[36] As we will see, the residence of the parties does play a role in delineating the application of the Convention with other international instruments.

6.3.2 Relationship with Other Conventions or REIO Legislation

The question arises as to which solution has been provided if the 2005 Hague Convention conflicts with other international instruments. This matter is regulated by Article 26 of the Convention, which comprises a rather complicated regime to cope with the relationship of the Hague Convention *vis-à-vis* other conventions or pieces of legislation. This provision, which is rather difficult to read,[37] consists of

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[33] Hartley 2013, p. 78.

[34] See, for an overview, Lazić 2007, p. 233 ff. Hartley 2013, pp. 77–78 and 83–86.

[35] See also Lazić 2007, p. 219 ff.

[36] Kramer 2006, p. 111, 112.

[37] Wagner 2009, p 134, Kramer 2006a, p. 116 and Kramer 2006b, p. 169 (who points out at the the use of multiple negations in this provision). Vlas refers to the provision's 'comprimise' character in this respect, see Vlas 2006, p. 94.

6 paragraphs, of which only the latter 5 allow for other treaties to take precedence over the Hague Convention.[38] These rules are also referred to as 'give way rules' in the Hartley/Dogauchi report.[39] The first paragraph of Article 26 merely stipulates that the Convention will be interpreted in a way that is compatible with other treaties, regardless of the fact that those treaties were concluded before or after the Hague Convention.

Focusing more on the so-called 'give way rules' of Article 26, it should be noted at the outset that Article 26(6) is the most important paragraph in the context of the Brussels I or Brussels Ibis Regulation.[40] It stipulates that under certain circumstances the Hague Convention will not affect the rules of a so-called 'Regional Economic Integration Organisation', which is, until now, only the European Union. It does not matter whether or not these rules predate the Hague Convention. Article 26(6) reads as follows:

> 'This Convention shall not affect the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention:
>
> a. where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
> b. as concerns the recognition or enforcement of judgments between Member States of the Regional Economic Integration Organisation.'

Although the double negation contained in Article 26(6)(a) does not contribute to its legibility, this provision can be understood as requiring that all the parties to the dispute should be resident in a Member State of the Regional Economic Integration Organisation at hand in order for the concurring instrument to apply. In the case of the Brussels Ibis Regulation this would mean that the parties should be resident in a Member State of the EU, except for Denmark.[41]

What is the relevance of this provision in the current state of affairs? Since Mexico and Singapore are the only Contracting States so far that do not belong to a REIO, the Convention would only apply when at least one of the parties is resident in Mexico or Singapore. So in the case of a Mexican buyer who brings an action against a German seller before the French courts on the basis of a choice of court agreement designating these courts as the competent courts to hear the case, the French court should determine its jurisdiction on the basis of the Convention and not the Brussels Ibis Regulation.

It should be noted that the provision does not say that all parties should be resident outside a REIO Member State. Otherwise this provision would have entailed that the Hague Convention applies when the parties are resident in a

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[38] Wagner 2009, p. 134.

[39] Hartley/Dogauchi, Explanatory report, para 269 ff. See also Hartley 2013, p. 111, 114–125.

[40] Vlas 2006, p. 91, 92 (in the context of the Brussels I Regulation). Some authors refer to Article 26(6) as a 'disconnection clause', zie Ahmed and Beaumont 2016, p. 3 and Van Calster 2016, p. 130.

[41] Wagner 2009, p. 137.

Non-Contracting State. This would have jeopardised the extended scope of application of the Brussels Ibis Regulation in relation to choice of court agreements. For the Brussels Ibis Regulation does not require that the parties to such an agreement are domiciled in an EU Member State,[42] meaning that also non-EU parties can make a valid choice of court under that Regulation. So if, for example, a Chinese buyer and a South African seller have agreed upon the competence of the French courts to settle their disputes, the Brussels Ibis Regulation would apply and not the Hague Convention.[43]

The emergence of the residence of the parties in Article 26(6)(a) does give rise to a specific question. If the residence of the parties is not a factor to be taken into account when looking at the personal or territorial scope of application of the convention,[44] why does it play a role when it comes to the 'give way rule' in view of the Brussels Ibis Regulation?[45] In the other sections of Article 26 of the Hague Convention the residence of the parties is not mentioned at all. It is arguable that the provision contained in Article 26(6) is not so much a 'give way rule', but rather a further restriction of the geographical scope of the Hague Convention. For the application of Article 26(6)(a) it is required that (a) there is a REIO, which (b) has enacted specific legislation with the same subject-matter as the convention, and (c) which has a 'universal scope' as regards choice of court agreements, and (d) prefers to have its REIO legislation applied to intra-REIO jurisdictional matters. That is why there is a special 'give way rule' for REIOs having enacted legislation with the same subject-matter as the convention. Also, it explains why the (almost unintelligible) double negation in Article 26(6)(a) comes down to the exclusion of cases in which the parties are either resident in the EU or in a non-Contracting State and why the concept of 'residence' is used, contrary to the other 'give way rules' of Article 26. It is a rather complex way of stating that the Brussels Ibis Regulation applies to EU Member State courts when the parties are resident in the EU and/or in a non-Contracting state.

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[42] See Article 6(1) in conjunction with Article 25(1) of Brussels Ibis. This is a change with regard to Article 23 of Brussels I, which stipulated that one of the parties had to be domiciled in an EU Member State. Under the Brussels I Regulation, national law would have applied in a case where both parties were domiciled in a State which was neither a Contracting State, nor an EU Member State. See example (v) given by Vlas 2006, p. 92, 93.

[43] For Article 4 in conjunction with Article 25 of Brussels Ibis stipulates that there is no need that one of the parties is domiciled in a Member State of the EU in case of a choice of court agreement.

[44] Unless it concerns the international character of the case, i.e., when both parties are resident in the same Contracting State. See Vlas 2006, p. 87–88.

[45] Despite the neutral language of Article 26(6), the only REIO so far is the EU, and the only 'conflicting instrument' under this provision is, thus, the Brussels Ibis regulations.

Since there is only one REIO, the Convention could just as well have stipulated that the Convention applies when a court of a Contracting State has been chosen, unless this is an EU Member State's court and none of the parties is resident in a Contracting State which is not an EU Member State. Or, more neutrally put, a Member State of a REIO with specific legislation on the matters mentioned in Article 1. Of course it is possible that REIOs other than the EU will enter the arena of the Hague Conference's unification efforts. Until now, this has not happened so that the 'give way rule' of Article 26(6)(a) basically comes down to a restricted personal or territorial scope of the convention. Either way, it is obvious that the incorporation of Article 26(6) amounts to a rather sophisticated 'coordination' in neutral wording of two instruments on international jurisdiction based on choice of court agreements.[46]

Article 26(6)(b) concerns the situations in which both the Hague Convention and the legislation of a REIO would concur in case of the recognition and enforcement of a foreign judgment. This 'give way rule' does not seem to give rise to any problems. [47] In the current situation, this would come down to the situation in which the courts of the one EU Member State are confronted with a judgment of the courts of another Member State. In that specific intra-European situation, the Hague Convention 'gives way' to the Brussels Ibis Regulation. So when a German court is confronted with a French court's judgment, the latter will apply the rules on recognition and enforcement of the Brussels Ibis Regulation. Even when the jurisdiction of the French court was based on the Hague Convention, since one of the parties resided in Mexico, the judgment will still be recognised and enforced according to Brussels Ibis. In a more overall view, the Convention may take precedence when jurisdiction is concerned, as it will still step back for a REIO's legislation in the stage of recognition and enforcement.

It has been argued by some that this may, in some exceptional cases, lead to a discrepancy. Hartley, for instance, has noted that the Hague Convention, contrary to the Brussels regime, does not restrict choice of court agreements in the field of insurance matters.[48] What if an EU court has based its jurisdiction on the Hague Convention, because one of the parties is domiciled in Mexico, and its judgment has to be recognised in another EU Member State? What if, using the example above, the French court's judgment has to be recognised in, say, Belgium? The Belgian court, looking at the Brussels Ibis regulation, will normally have to look whether Article 10 ff. of that regulation have been violated if the defendant is a policy holder, an insured, a beneficiary or an injured party. If so, the court should deny the recognition of the said judgment. Hartley has contended that in that case, the Belgian court should still recognise the judgment and to disregard the provision of Article 45(1)(e)(i) Brussels Ibis in this respect, as the protective

[46] Vlas refers to it as a 'comprimise text', see Vlas 2006, p. 94 and points out that this provision has been 'extensively discussed during the Twentieth Session' (Vlas 2006, p. 91, footnote 22).

[47] Idem Hartley 2013, p. 126, para 6.63.

[48] Hartley 2013, p. 124, para. 6.58. See also the Hartley/Dogauchi Report, para. 302.

jurisdictional rule of Articles 14 and 15 Brussels Ibis is not applicable.[49] However interesting this debate may be, the fact remains that it is no longer an issue—at least not to a great extent. Since when approving the Hague Convention the EU has made a Declaration on the basis of Article 21 of the Convention.[50] This Declaration excludes certain types of insurance contracts from the scope of the Hague Convention, in order to make it comply with the protection offered to the insured party under the Brussels Ibis regime.[51] The chance that a real 'gap' exists between the substantive scopes of both instruments is therefore rather small.

6.3.3 Relationship with Articles 69 and 71 of the Brussels Ibis Regulation

The question arises as to the relationship with Articles 69 and 71 of Brussels Ibis. Article 69 of the Brussels Ibis Regulation stipulates that this regulation shall, as between the Member States, supersede the conventions that regulate the same issues, save for Articles 70 and 71. Since Article 69 simply speaks of conventions 'as between the Member States', and not of conventions which are concluded by the Member States, the wording could in principle apply to the Hague Convention of 2005 as well. However, EU law should not be interpreted grammatically, but as to its function and purpose, so that it will be unlikely that Article 69 is meant to have the Brussels Ibis regulation take precedence over the Hague Convention.

Another matter concerns Article 71 of the Brussels Ibis Regulation. Mankowski has asserted that the Hague Convention can be the test for the problem of concurring EU conventions.[52] Two options have been argued: the analogous application of Article 71—putting the Hague Convention on a par with specialised conventions—or the application of Article 67—which regards the Hague Convention as a part of EU law.[53] Can the Hague Convention, however, be regarded as a 'specialised convention' in the sense of Article 71? Also, Article 71 concerns conventions to which the 'Member States are parties', whilst the Hague Convention has been concluded by the Council on behalf of the EU. This means that the Member States are bound by the Convention, but not necessarily that they are 'parties' in the sense of Article 71. Looking at the history of this provision in the preceding instruments,[54] this provision was originally meant to preserve the Member States' com-

[49] Hartley 2013, p. 124, para. 6.58-6.60.

[50] To be found in Annex I to the Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ L 353 10.12.2014, p. 005.

[51] Hartley 2013, p. 126, para 6.63 ff.

[52] Mankowski, in: Magnus & Mankowski, 'Brussels Ibis Regulation', Article 71, para 14.

[53] Mankowski, in: Magnus & Mankowski, 'Brussels Ibis Regulation', Article 71, para 13.

[54] Article 57 of the Brussels Convention of 1968 and Article 71 of the Brussels I Regulation.

pliance with their international commitments and, since the entry into force of Brussels I, only the 'existing' international commitments in this respect.[55] It is therefore difficult to conceive that the Hague Convention of 2005 will fall within the ambit of Article 71 Brussels Ibis.

But besides the issue of a teleological interpretation of EU law, it is also a matter of the hierarchy of legal norms within the EU's constitutional framework. The difference between the case law of the Court of Justice concerning Article 71 of the Brussels I Regulation and Article 57 of the Brussels Convention of 1968, on the one hand, and the concurrence with the Hague Convention, on the other, is that the latter convention was concluded by the EU itself. The EU is bound by its obligations under international law, including those deriving from international agreements. Article 216(2) of the TFEU expressly stipulates that agreements concluded by the Member States are binding upon the EU institutions and the Member States. This can be distinguished from the obligations under international law that the Member States themselves may have.[56] Basically, the EU had, when approving the Hague Convention, wilfully deviated from the system under Brussels Ibis by adhering to this new system in cases when one of the parties to the dispute is resident outside the EU.

This is evidenced by both the preamble and the explanatory memorandum to the proposal for a Council Decision approving the Hague Convention which give indications that the EU intended to have the Hague Convention take precedence over the Brussels I or Brussels Ibis Regulation. To start with the latter, the Explanatory Memorandum to the Proposal addressed the relationship between the Brussels I Regulation and the Convention and therefore referred to Article 26(6) of the Hague Convention of 2005. Based on this provision, the Proposal stated that 'the Convention affects the application of the Brussels I Regulation' in matters of jurisdiction and recognition and enforcement in situations as mentioned in Article 26(6) and that 'the Convention will prevail over the jurisdiction rules of the Regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention'.[57] Moreover, the Proposal even stated that the application of the Convention will diminish the application of the Brussels I or Brussels Ibis Regulation, but thought this to be 'acceptable in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties'.[58]

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[55] The fact that Article 71 of Brussels I does not, contrary to its predecessor, speak of 'future' conventions anymore, shows that this 'give way rule' is only meant for existing conventions. The EU has the power to conclude new conventions in this field of law on the basis of the 'ERTA' (or 'AETR') doctrine. See CJEU 7 February 2006, Opinion 1/03, ECR 2006 I-01145, ECLI:EU:C:2006:81.

[56] Wessel 2008, p. 156.

[57] See Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (COM (2014) 46 final, Sect. 1.3. Idem Van Calster 2016, p. 130–131.

[58] Proposal (COM (2014) 46 final, Sect. 1.3.

Furthermore, the preamble to Council Decision (2014/887/EU) expressly states that the Convention will 'affect' EU secondary legislation, recital 4 saying that:

> The Convention [Hague Convention of 2005, authors] affects Union secondary legislation relating to jurisdiction based on the choice of the parties and to the recognition and enforcement of the resulting judgments, in particular Council Regulation (EC) No. 44/2001, which is to be replaced as of 10 January 2015 by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council.

It is intriguing to observe a number of differences between the situation of concurring instruments as meant in Article 71 of Brussels I and Brussels Ibis, on the one hand, and the position of the Hague Convention of 2005 on the other. In the former case, specialised conventions may take precedence over the Brussels I regime, but this precedence is restricted. After all, the precedence of specialised conventions may not, as the CJEU or—then—ECJ has ruled, violate certain basic principles underlying the Brussels I Regulation. This is completely different in the situation that the Brussels I or Brussels Ibis Regulation concurs with the Hague Convention of 2005. Here, the restrictions put forward by the Court of Justice, such as the *favor executionis*, cannot be found in Article 26(6). If the Hague Convention takes precedence over the Brussels I or Ibis regimes—which will happen only occasionally—it will apply unconditionally.

What is the rationale of this difference? How can it be explained? There are a number of factors that can be taken into account to justify these differences. At first, the Hague Convention may apply unconditionally, but in the Convention itself the interests of the principles underlying the Brussels I and Brussels Ibis regimes are well protected. For the Convention's regime of recognition and enforcement will not apply to what can be called 'intra-European' cases. In case a French court's judgment is to be recognised in Germany, the latter's courts will have to assess the recognition of the judgment on the basis of the Brussels Ibis Regulation, even though the jurisdiction of the French court was based on the Hague Convention.[59]

Another reason for a more 'privileged' position of the Hague Convention of 2005 in comparison with the specialised conventions under Article 71 of the Brussels I or Brussels Ibis Regulation can be found in the fact that the Hague Convention has been concluded by the European Union itself, whilst the specialised conventions that are concurring with Brussels I or Brussels Ibis have been concluded by the Member States. When concluding an agreement itself, the EU might better be able to safeguard the interests of its own legislation, as occurred with Article 26(6) of the Hague Convention which basically keeps the Brussels Ibis Regulation's regime of recognition and enforcement intact. In other words, the EU might be better able to warrant Union-wide interests instead of Member States.

[59] Because one of the parties was resident in Mexico or Singapore.

Moreover, it does not seem to be necessary to apply the same set of restrictions on the application of the Hague Convention of 2005 to the same extent as to a specialised convention under Article 71 of the Brussels Ibis Regulation. The two instruments, both Brussels Ibis and the Hague Convention, have more or less 'converged'. For in matters of jurisdiction, the Brussels Ibis Regulation prescribes a manner of assessing the substantive validity of forum selection clauses in a way which is similar to the manner according to which such clauses are scrutinised under the Hague Convention. This is particularly mentioned in the proposal to the Recast.[60]

Although it is not necessary to apply the restrictions that the Court of Justice has applied when interpreting Article 71 on specialised conventions, it is not excluded that the Court of Justice will not apply these or similar restrictions to the applicability of the Hague Convention as well. After all, this is an international agreement concluded by the EU, so that the Court of Justice has full powers to interpret this instrument.[61] Furthermore, in a more institutional light, it is arguable that the Court of Justice can still become 'active' in its role of safeguarding the main principles underlying Brussels Ibis. It has already deviated from the Council's position on Article 71 of Brussels I.[62] There, the Council did not intend to follow a different approach to specialised conventions than under the Brussels Convention. On the contrary: recital 25 of the Brussels I Regulation expressly mentioned the need for Member States to comply with their international commitments. Nonetheless, the Court of Justice found it necessary to depart from the wording of the provision. If this was to ensure compliance with the principles underlying the Brussels regime, it is not unimaginable that the Court will do so as well *vis-à-vis* the concurrence of the Hague Convention with the Brussels Ibis Regulation.

6.4 The New York Arbitration Convention of 1958

6.4.1 General Remarks

The Brussels Ibis Regulation introduces some helpful clarifications on the interface between the Regulation and arbitration. For the first time there is an express reference to the 1958 New York Convention in Article 73(2). Additionally, the extent of the arbitration exception is clarified in recital (12).

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[60] 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, p. 9.

[61] Article 267 TFEU.

[62] See Van den Oosterkamp 2011, pp. 193–194.

When negotiating the 1968 Brussels Convention[63] it was chosen to exclude arbitration from its substantive scope of application. This deliberate choice was based on the idea that relevant aspects of arbitration were sufficiently regulated in other instruments, notably in the 1958 New York Convention.[64]

The issue of the interaction between the Brussels regime and arbitration occasionally appeared problematic for national courts in the EU Member States and required interpretation by the European Court of Justice (ECJ), later the Court of Justice of the European Union (CJEU). Decisions of the ECJ[65] usually triggered vivid debate on the interaction between the Regulation and arbitration. The discussion on the extent of the arbitration exception particularly intensified following the ECJ judgment in the infamous *West Tankers* case.[66] Therein the ECJ again clearly disapproved of the use of antisuit injunctions prohibiting a party from pursuing legal suits before the courts of the EU Member States. That was for the third time[67] that the ECJ had declared such injunctions incompatible with the Regulation even when they were issued in order to support arbitration.

The *West Tankers* judgment was extensively discussed in the legal literature and often widely criticised, especially in common law jurisdictions. Some authors and courts interpreted this decision so as to imply the binding nature of a decision on the validity of an arbitration agreement in other EU Member States (*infra* 5.2). The Commission heavily relied on this case in its Proposal to amend the provision on the 'arbitration exception' (*infra* 5.3). The Commission's Proposal was rejected, but the Brussels Ibis Regulation introduces important clarifications on the interface between arbitration and the Regulation (*infra* 5.4). Yet the extent of the

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63 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters Official Journal L 299, 31/12/1972 pp. 0032–0042.

64 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, United Nations, New York.

65 E.g., ECJ Judgment of 25 July 1991, Case C-190/89 (*Marc Rich & Co. AG v Società Italiana Impianti PA*) ECR I-3855, ECLI:EU:C:1991:319, *NIPR* 1993, 150, excerpt in 17 p. 233 *et seq*.; ECJ Judgment of 17 November 1998, Case C-391/95 (*Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*) ECR I-7091, ECLI:EU:C:1998:543, NIPR 1999, 77. Some other sources point to multiple potential problems, e.g., Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement to Judgments in Civil and Commercial Matters of 12 April 2009, COM(2009) 175 final, as well as the 'Heidelberg Report' (Hess et al. 2007).

66 *West Tankers* judgment.

67 Previous two decisions were ECJ Judgment of 9 December 2003, Case C-116/02, (*Erich Gasser GmbH v. Missat Srl*) ECR I-14693, ECLI:EU:C:2003:657, NIPR 2004, 36 and ECJ Judgment of 27 April 2004, Case C-159/02, 27 April 2004 (*Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*) ECR I-3589, ECLI:EU:C:2004:228, NIPR 2004, 146. In *Gasser* the ECJ held that the court of a EU Member State having jurisdiction under Article 23 of the Brussels I Regulation was not authorised to issue an anti-suit injunction so as to restrain the party from pursuing litigation before the court of another Member State which had been first seised of the dispute. In *Turner v. Grovit* the ECJ held that the court of a Member State was not to issue an anti-suit injunction so as to restrain a party from pursuing legal proceedings in another Member State on the ground that the proceedings had been initiated in bad faith.

arbitration exception has remained a topical issue especially after the Advocate General expressed his views in the case of *Gazprom*.[68] The discussion on the interface between arbitration and the Brussels I regime has continued after the CJEU rendered its judgment in May 2015[69] (*infra* 5.5).

6.4.2 Reasoning in the West Tankers Judgment[70]—Criticism and (Mis)Interpretation in Literature and Case Law

One of the present authors has already expressed her view on the *West Tankers* judgment in earlier publications[71] and in principle has disagreed with the criticism expressed. The CJEU decision was mainly criticised in the context of inaccurately defining the scope of the arbitration exception in the Regulation. However, the judgment merely confirmed what had already been accepted in previous decisions, notably the *Marc Rich* and *Van Uden* judgments regarding the scope of the arbitration exception and in *Gasser* and *Turner* judgements with respect to anti-suit injunctions. In particular, the Court affirmed that the nature of the subject-matter was crucial when deciding whether or not a dispute falls within the scope of the Regulation. It held that proceedings leading to the making of an anti-suit injunction could not fall within the scope of the Regulation,[72] but that they 'may nevertheless have consequences which undermine its effectiveness'.[73] The anti-suit

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[68] Opinion of the Advocate General Wathelet of 4 December 2014, Case C-536/13 (*Gazprom OAO v. Lietuvos Republika*) ECLI:EU:C:2014:2414 (hereinafter: Opinion of the Advocate General).

[69] *Gazprom* judgment.

[70] The vessel 'Front Comor', owned by West Tankers Inc. and chartered to Erg Petroli SpA, collided with a jetty owned by Erg Petroli SpA in Syracuse (Italy). An arbitration clause in the charter party agreement provided for the settlement of disputes by arbitration in London. The compensation for the damage resulting from the collision was paid by Erg Petroli's insurers Allianz SpA and Generalli Assicurazioni Generali. In order to recover damages for its uninsured losses, Erg Petroli initiated arbitration in London against West Tankers. The insurers for their part filed the claim against West Tankers with the court in Syracuse to recover the amounts paid for the damages caused to Erg Petroli under the insurance policy. West Tankers applied to the High Court of Justice of England and Wales seeking a declaration that the insurers were bound by the arbitration agreement in the charter party agreement between West Tankers and Erg Petroli SpA. Additionally, it applied for an injunction restraining the insurers from participating in any proceedings in relation to the dispute except in arbitration, particularly in the proceedings before the Italian court in Syracuse. The case reached the House of Lords which expressed the view that an anti-suit injunction in the present case could not infringe the Regulation, because all arbitration matters were excluded from its scope of application by Article 1(2)(d). It decided to stay its proceedings and referred the following question to the ECJ for a preliminary ruling.

[71] Lazić 2012; Lazić 2011.

[72] *West Tankers* judgment, para 23.

[73] *Id*., para 24.

injunction in the *West Tankers* case was directed at restraining a party from pursuing an action for damages, which is a matter falling within the scope of the Regulation. Consequently, since the injunction related to the subject-matter within the Regulation's scope, it was held to be incompatible with the Regulation even when issued in support of arbitration. It is rather obvious that a mere invoking of an arbitration agreement in the proceedings concerning the subject-matter falling within the Regulation's scope cannot transpose that subject-matter into an 'arbitration exception'. In other words, the substantive claim is not removed from the scope of application of the Regulation by a mere reference to an arbitration clause contained in the disputed transaction.

Furthermore, the *West Tankers* judgment was often interpreted so as to imply the binding nature of a decision on the validity of an arbitration agreement taken by the court seised of the matter in the proceedings where the arbitration agreement has been invoked.[74] Presumably the somewhat imprecise wording of the judgment in paras 26 and 27 induced some to reach the erroneous conclusion on the binding nature of the decision on the validity of an arbitration agreement. In particular, it is likely that the holding that 'a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application'[75] was the basis for the conclusion that consequently a decision made in that respect also falls within the Regulation's scope of application. The same holds true for the wording in para 27 stating that 'the basis of the existence of an arbitration agreement, including the question of the validity of that agreement' comes within the scope of the Regulation. Also the English Court of Appeal in *National Navigation*[76] reached such an obviously incorrect conclusion. It held that, in the light of the *West Tankers* judgment, it was bound by a preliminary decision concerning the validity of an arbitration agreement brought by the court in another Member State seised of the matter. The Court erroneously concluded that it was consequently precluded from ruling on that issue. The *West Tankers* judgment clearly prevented the Court of Appeal in *National Navigation* from issuing an anti-suit injunction, but it did not affect its jurisdiction to rule on the validity of an arbitration agreement. However, a decision refusing to stay court proceedings and to refer the parties to arbitration was appropriate as the right to arbitrate had been waived.[77]

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[74] See e.g., Van Haersolte-van Hoff 2011 p. 281; Markus/Giroud 2010, p. 237; Radicati di Brozolo 2011, p. 29; see also, Illmer 2010 p. 748; Moses 2014.

[75] *West Tankers* judgment, para 26.

[76] Decision of the English Court of Appeal in *National Navigation Co. v. Intesa Generacion SA*, [2009] EWCA Civ. 1396, http://www.bailii.org/ew/cases/EWCA/Civ/2009/1397.html.

[77] In the case at hand the right to invoke the arbitration agreement had obviously been waived so that the Court correctly refused to refer the parties to arbitration. Accordingly, the waiver was the true and appropriate reason for the refusal to refer to arbitration and not an allegedly binding nature of the decision on the validity of an arbitration agreement rendered by the court in another Member State as the English Court stated in support of its decision.

Even though the CJEU could have used more careful and more precise wording in paras 26 and 27 of the *West Tankers* judgment, nowhere in the judgment is it stated that a *decision* on the validity of an arbitration agreement fell within the scope of application for the purposes of recognition and enforcement under the Regulation. The wording in paras 26 and 27 merely states that for the purposes of ascertaining jurisdictions over a subject-matter of the dispute a court in a Member State may rule on the validity of an arbitration agreement. Moreover, the reasoning in the EC judgment as a whole presents no solid basis for the conclusion that a preliminary *decision* on the invalidity of the arbitration agreement was to be brought within the scope of the Regulation as some authors seem to suggest. It is clear that a decision on the merits of the case would be within the Regulation's scope of application for the purposes of recognition and enforcement, but not the decision on the validity of the arbitration agreement itself. In earlier publications[78] one of the present authors has already disagreed with what appeared to be a majority view on this issue. Earlier decisions in some Member States correctly held that a decision on the validity of an arbitration itself fell outside the scope of the Regulation.[79] Such a decision cannot be recognized in another EU Member State on the basis of the Regulation. Besides, it does not bind an arbitral tribunal either, so that arbitrators may take a different view on the validity of the arbitration agreement.

The criticism of the *West Tankers* judgment expressed in the literature lies in the essence of the Commission's Proposal[80] to amend the 'arbitration exception'.

6.4.3 Commission's Proposal—Summary

The Commission in its Proposal and the Impact Assessment[81] suggested to amend the 'arbitration exception' under the Regulation. Allegedly, 'the current legal framework does not sufficiently protect the effectiveness of arbitration agreements in the EU'. The necessity to avoid parallel proceedings and to reduce 'the possibilities of undermining arbitration through abusive litigation tactics' so as to enhance the effectiveness of arbitration agreements were the most important reasons for the suggested amendments. The Commission almost exclusively relied on the *West Tankers* judgment when attempting to substantiate its Proposal and the alleged

[78] Lazić 2012, p. 24.

[79] *See, e.g.,* in Germany, OLG Stuttgart, Dec. 22, 1986, *Recht der Internationalen Wirtschaft*, 1988, p. 480. In France, *Legal Department du Ministère de la Justice de la République d'Irak v Sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio*, 15 June 2006, *Cour d'appel de Paris* (2007) 1 *Rev Arb* 87.

[80] The European Commission's Proposal COM(2010) 748 final.

[81] The Impact Assessment Accompanying the Proposal (Commission Staff Working Paper) 18101/10 ADD1 JUSTCIV 239 of 17 December 2010.

problems that called for solutions. The most important changes suggested in the Commission's Proposal[82] are here summarised.[83]

In its Proposal the Commission suggested a 'partial deletion' of the arbitration exception in Article 1(2)(d) with the purpose of allegedly enhancing the effectiveness of arbitration agreements.[84] The proposed amendments were drafted within the framework of provisions of *lis pendens*, in particular Articles 29(4) and 33(3) of the Proposal (Articles 27 and 30 of the Brussels I Regulation).

A major shortcoming of the suggested rule can be seen in the unclear nature of a decision of the court at the seat of arbitration on the validity of the arbitration agreement, i.e., whether or not it would be binding in other Member States.[85] If such a decision were to fall within the Regulation and consequently to be binding in all EU Member States, that would substantially impact on Articles II(3) and V(a) of the 1958 New York Convention.

Additionally, the obligation for a court seised of the matter in one Member State to stay its proceedings in order to enable the court at the seat of arbitration to decide on the validity of an arbitration agreement undermines the *competence-competence* principle. Namely, it would be reasonable that a court seised would be required to stay its proceedings so that the arbitral tribunal may rule on its own jurisdiction, as is provided in Article VI(3) of the 1962 European (Geneva) Convention. However, it is difficult to find a rationale behind the obligation to stay court proceedings in one jurisdiction with the mere purpose that a court in another jurisdiction could decide on the validity of the arbitration agreement. In addition to these obvious shortcomings, there are grave deficiencies in the wording of the Proposal which would have caused serious difficulties in the application and interpretation by national courts in the Member States.[86]

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[82] The Proposal has been extensively discussed in the legal literature and heavily supported by some authors. See e.g., Illmer 2010; Radicati di Brozolo 2011; Haersolte-van Hoff, (2011) pp. 280 et seq. For criticism of the approach and the wording of the Proposal, see Lazić 2012.

[83] The summary of the proposed amendments is based on the overview presented in an earlier publication, Lazić 2013, pp. 181–209.

[84] To this end, the changes to the text of Article 1(2)(d) regarding the arbitration exception were suggested as follows: '2. This Regulation shall not apply to arbitration, save as provided for in Articles 29, para 4 and 33, para 3.'

[85] Even the members of the 'Expert Group' that has drafted the Proposal have expressed opposite views on the purpose and the intention of the suggested rules concerning the binding nature of the decision on the validity of an arbitration agreement. Some argue that such a decision would not be covered by the Regulation and accordingly would not be binding in other Member States (see, e.g.,, Radicati di Brozolo 2011, p. 29), whereas others have argued that the decision would indeed fall under the Regulation's scope of application and thus be binding in all Member States (see, Illmer 2010, p. 21).

[86] The major shortcomings of the Proposal are scrutinised in Lazić 2012, pp. 19–48; Lazić 2011, pp. 289–298. See also an early publication relating to the ECJ decision in *West Tankers*, Lazić 2009, pp. 130 *et seq*.

6.4.4 Brussels Ibis Regulation

Considering the serious shortcomings in the substance and wording of the suggested changes, it is not surprising that none of them has found a place in the revised text of the Regulation. Instead, a number of very helpful clarifications on the interface between arbitration and the Regulation have been introduced. Thus, it is for the first time that an express reference to the 1958 New York Convention has been made in Article 73(2), providing that '[t]his Regulation shall not affect the application of the 1958 New York Convention.'

The extent of the arbitration exception is further clarified in recital (12). It provides, *inter alia*, that '[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 of this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.' Such clear and unambiguous wording renders moot any further discussion on the uncertainties about the reach and scope the of the arbitration exception under the Regulation, as well as on the allegedly binding nature of a decision on the validity of the agreement of the court seised of the matter. Thereby, the idea that a decision on the validity of arbitration is covered by the Regulation and is accordingly binding in other EU Member States has been clearly rejected. Further wording in recital (12) leaves no doubts in that respect.

As explained previously, the *West Tankers* judgment was often interpreted in the literature so as imply the binding nature of such a decision.[87] This wording in the recital (12) merely confirms what was the rationale of the *West Tankers* judgment: the question of the validity of the arbitration agreement does not remove a subject-matter from the scope of the Regulation and as such this matter remains with its scope, but any decision rendered on validity cannot be subject to recognition under the Regulation.

The recital (12) further provides that nothing in the Regulation prevents national courts from ruling on the validity of an arbitration agreement. Furthermore, a ruling by a court of a Member State on the invalidity of an arbitration agreement shall not preclude the recognition and/or enforcement of that court's judgment rendered on the substance in another Member State. Finally, it reiterates that the New York Convention takes precedence over the Regulation and that the Regulation does not apply to any action or ancillary proceedings related to arbitration, such as, 'the establishment of the arbitral tribunal, the powers of

[87] See e.g., Van Haersolte-van Hoff 2011 p. 281; Markus/Giroud 2010, p. 237; Radicati di Brozolo 2011, p. 29; see also, Illmer 2010 p. 748; Moses 2014. See also the reasoning of Advocate General Wathelet in the *Gazprom* case, paras 127 and 128 indirectly concluding that the CJEU held that the decision on validity would fall within the Regulation's scope of application.

the arbitrators, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition and enforcement of an arbitral award.'

In an earlier publication[88] one of the present authors expressed the view that the added wording in the recital (12) answered all queries that may arise in the context of the arbitration exception in Article 1(2)(d) of the Regulation especially those triggered by the *West Tankers* judgment. As such it presents a valuable clarification and a useful tool in the interpretation of this provision. One would have expected that the revised text would have put an end to any further discussion on the interaction between arbitration and the Regulation.

Yet rather soon after the final text of the revised Regulation had been released some well-known objections and previously alleged problems occasionally reappeared in the legal literature. Alleged 'torpedoes' against arbitration, parallel proceedings and consequently conflicting decisions are some repeatedly raised objections.[89] The risk of irreconcilable decisions possibly rendered by a national court and an arbitral tribunal is indeed a major shortcoming. Yet as already explained in an earlier publication,[90] the problem is more potential than real, as the chances of it occurring are rather minimal. The Commission in the Impact Assessment mentioned no examples of irreconcilable decisions, besides the rather peculiar circumstances surrounding the decision in *West Tankers* case. In any case, even if such a problem would ever occur, the Brussels I regime of enforcement does provide for an appropriate solution by an analogous application of Article 34 of the Brussels I Regulation (Article 45 of the Brussels Ibis Regulation) with respect to arbitral awards. Thus, an earlier rendered foreign arbitral award which fulfils the conditions for enforcement under the 1958 New York Convention or a more favourable national law prevents the enforcement of a judgment rendered by a court of a EU Member State either on the basis of Article 34(4) or 34(1).[91] A domestic award prevents the enforcement of a foreign judgment by an analogous application of Article 34(3) of the Brussels I Regulation. The same holds true under the Brussels Ibis Regulation as the same grounds have been taken over in Article 45(1)(a)–(d). Any other interpretation would be contrary to the basic principles of procedural law and public policy. In a similar vein, an earlier rendered judgment by a court of a Member State would present a ground for refusing the enforcement of a subsequently issued arbitral award by

[88] Lazić 2013, p. 25.

[89] See e.g., Nielsen 2014, p. 71. Draguyev 2013.

[90] Lazić 2012, pp. 21–22.

[91] For a more detailed explanation, see Lazić 2012, pp. 21–22 and the literature referred to therein in footnote 8. See also, Lew et al. 2003, p. 503; Schlosser 1981, pp. 388 *et seq*.

relying on the public policy exception under Article V(2)(a) of the 1958 New York Convention.[92]

Another more vividly discussed issue is an alleged alteration of the holding on the incompatibility of anti-suit injunctions by the wording of Recital (12). The discussion is based on an erroneous presumption that the consequence of the *West Tankers* judgment was that decisions on the validity of arbitration agreements fell within the scope of application of the Regulation. The wording of the Recital (12) clearly stating the opposite has been interpreted by some as repealing the *West Tankers* judgment.[93] In addition, the wording excluding all other related matters from arbitration allegedly overturned the *West Tankers* decision on the incompatibility of anti-suit injunctions with the Regulation.[94] The discussion on this issue and more generally on the interface between the Brussels I regime and arbitration again intensified after the opinion the Advocate General Whatelet[95] was released and continued after the CJEU rendered its judgment in the case of *Gazprom*.[96] In particular, the debate on the continuous 'validity' of the *West Tankers* judgment and consequently the permissibility of anti-suit injunctions was reintroduced. Whereas in the *West Tankers* case anti-suit injunctions issued by the courts of a Member State were at stake, the *Gazprom* case concerned anti-suit injunctions issued by an arbitral tribunal.

6.4.5 Gazprom Case

The dispute between Gazprom, a company incorporated under Russian law, and Lietuvos Respublika arose in the context of a shareholders' agreement establishing the legal entity 'Lietuvos dujos AB'. The shareholders' agreement contained

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[92] *Contra*, Nielsen 2014, p. 71, expressing the view that since the Brussles Ibis Regulation does not regulate the question of the enforcement of a judgment which is in conflict with an arbitral award, the issue is left to the national law of EU Member States to give priority either to the award or to the judgment. Consequently, it seems that the author suggests that an earlier rendered judgment does not prevent the enforcement of the award under the New York Convention, 'which takes precedence over' the Brussles Ibis Regulation. Some authors are of the opinion that when a court is requested to enforce a foreign arbitral award and a judgment obtained in violation of arbitration agreement it will always enforce the award in view of the express provision of Article 73(2) giving prevalence to the New York Convention over the Brussles Ibis Regulation. Only with respect to domestic arbitral awards is an analogous application of Article 45(1)(c) of the Regulation suggested. See, Lutzi 2015, p. 3.

[93] Dowers and Tang 2015, p. 138. See also the Opinion of the Advocate General Wathelet of 4 December 2014, Case C-536/13 (*Gazprom OAO v. Lietuvos Republika*), paras 126–128.

[94] For more particulars, see *infra*, under 4.5.1.

[95] Opinion of the Advocate General Wathelet of 4 December 2014, Case C-536/13 (*Gazprom OAO v. Lietuvos Republika*) ECLI:EU:C:2014:2414 (hereinafter: Opinion of the Advocate General).

[96] *Gazprom* judgment.

an arbitration clause providing for dispute settlement according to the Rules of the Stockholm Chamber of Commerce. The parties thereto were Gazprom, E.ON Ruhrgas International GmbH, a company established under German law, and the State Property Fund acting on behalf of the Republic of Lithuania, the latter being subsequently replaced by the Ministry of Energy of the Republic of Lithuania. In the application to the Regional Court in Vilnius, the Ministry sought an investigation as to whether the activities of Lietuvos dujos AB, its general manager and a number of members of its board of directors were improper.

Gazprom initiated arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. It took the view that the Ministry had breached the arbitration clause in the shareholders' agreement and requested the arbitral tribunal to issue an order prohibiting the Ministry from continuing the proceedings before the Vilnius Regional Court. The arbitral tribunal rendered an award declaring a partial breach of the arbitration clause and ordering the Ministry to withdraw or limit some of its claims filed before the Lithuanian court. The Ministry continued the litigation and Gazprom, for its part, applied for the recognition and enforcement of the arbitral award containing an anti-suit injunction in separate proceedings. Gazprom's request for recognition was rejected at two instances and finally reached the Supreme Court of Lithuania. The Court submitted 3 questions to the CJEU for a preliminary ruling which be summarised as follows: can the court having jurisdiction under the Regulation refuse to recognise an award prohibiting a party from bringing certain claims or ordering to limit those claims before the court in that Member State as it restricts that court's right to determine its own jurisdiction?

6.4.5.1 Opinion of the Advocate General

In his Opinion of 4 December 2014, Advocate General Wathelet curiously enough held that the *West Tankers* judgment was to be regarded as having been overruled in view of recital (12). Allegedly, anti-suit injunctions in support of arbitration became permissible as they were to be considered as 'ancillary proceedings' and as such were excluded from the Regulation's scope by the wording in the fourth paragraph of recital (12). He argued that '[n]ot only does that paragraph exclude the recognition and enforcement of arbitral awards from the scope of that regulation, which indisputably excludes the present case from its scope, but it also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration'.

It is not clear where to find the basis for the holding that the EU legislator wanted to reverse the *West Tankers* judgment and that anti-suit injunctions can be qualified as 'ancillary proceedings' as referred to in the recital (12). If that had been the intention of the EU legislator then this would have been expressly stated in the revised Regulation. At least it would have been mentioned as an example of 'ancillary proceedings' in the recital (12) especially in view of the considerable

debate that the judgment prompted in the legal literature, as well as the ECJ's previous rulings on the incompatibility of anti-suit injunctions in the *Gasser* and *Turner* judgments. More importantly, the use of anti-suit injunctions in support of arbitration is certainly not a 'typical' example of proceedings 'ancillary' to arbitration. Such orders are generally an unknown concept in civil law jurisdictions. Even in common law legal systems it does not seem that support for arbitration by upholding arbitration agreements is the primary function of anti-suit injunctions, although they can be and often are used with the purpose of facilitating and supporting arbitration. For example, in the 1996 English Arbitration Act containing *inter alia* provisions on court intervention and support for arbitration there is no mention of anti-suit injunctions. Obviously, the English courts must rely on other sources and concepts of English law when issuing anti-suit injunctions in support of arbitration. Finally, that issue was directly addressed in the *West Tankers* judgment where the Court expressly stated that although anti-suit injunctions could be considered as ancillary proceedings related to arbitration and as such are excluded from the Regulation's scope 'they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters.'[97] What is not easily discernible is what is the basis for the conclusions of the Advocate General that the revised Regulation allegedly reversed the ruling on the incompatibility of anti-suit injunctions?

The Advocate General seems to find further support for his holding in an erroneous presumption that the consequence of the *West Tankers* judgment was that decisions on the validity of arbitration agreements were to fall within the scope of application of the Brussels I Regulation.[98] The inappropriateness of such an inter-

[97] *West Tankers* judgment, para 24.

[98] Opinion of Advocate General Wathelet para 126 reads as follows: 'Indeed, while the wording of the regulation's provisions were not altered, the second paragraph of that recital states that '[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*'. It continues in Para 127 as follows: 'The passage in italics shows that the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of the Brussels I Regulation (recast), since if that were not so the rules on recognition and enforcement in that regulation would be applicable to decisions of the national courts concerning the validity of an arbitration agreement.' In para 128 the Advocate General concluded 'that was not the Court's interpretation in the judgment in *West Tankers* para 26, where it based its position concerning the fact that the proceedings initiated by Allianz and Generali against West Tankers before the Tribunale di Siracusa, in breach of the arbitration agreement, themselves came within the scope of the Brussels I Regulation on the assumption that the verification, as an incidental question, of the validity of an arbitration agreement *was included* in the scope of that regulation.' (Emphasis in the original).

pretation of the CJEU judgment which was unfortunately a majority view in the legal literature has already been addressed.[99]

6.4.5.2 Gazprom Judgment

Considering the views expressed in the Opinion of the Advocate General, the judgment of the CJEU was expected with great interest. The reasoning of the CJEU can be summarised as follows:

(1) The Court upheld and reiterated its holding in the *West Tankers* judgment on the incompatibility of anti-suit injunctions issued by the courts of the EU Member States with the Brussels I Regulation.[100]

(2) It distinguished the case at hand from the *West Tankers* judgment, since the present case concerns the enforceability of anti-suit injunctions contained in an arbitral award.[101]

(3) It further held that 'in those circumstances, neither that arbitral award nor the decision [recognizing it]…are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation [Brussels I] is based'.[102]

(4) The Court distinguished the legal effects of anti-suit injunctions issued by a court in the *West Tankers* case from the effects of an arbitral award in the case at hand as the failure to comply with the arbitral award 'is not capable of resulting in penalties being imposed upon it by a court of another Member State.'[103]

(5) It concluded that the Brussels I Regulation 'must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party

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[99] *Supra*, under 5.2.

[100] In para 34 the Court held that an antisuit injunction 'runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and is liable to bar an applicant who considers that an arbitration agreement is void, inoperative or incapable of being performed from access to the court before which he nevertheless brought proceedings.'

[101] *Gazprom* judgement, para 35, stating that the question is 'whether it would be compatible with that regulation for a court of a Member State to recognise and enforce an arbitral award ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State'. Further, it held in para 38 that 'an arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party the judicial protection referred to in para 34 of the present judgment, since, in proceedings for recognition and enforcement of such an arbitral award, first, that party could contest the recognition and enforcement and, second, the court seised would have to determine, on the basis of the applicable national procedural law and international law, whether or not the award should be recognised and enforced.'

[102] *Gazprom* judgment, para 39.

[103] *Ibid.,* para 40.

> from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.'[104] In other words, it is up to the courts in each Member State to decide whether or not to give effect to such injunctions ordered by arbitrators. In this way, the enforceability of anti-suit injunctions in arbitral awards is given the same 'status' as the enforceability of any other measure ordered by an arbitral tribunal.

Thus, clearly the Court did not alter its holding in the *West Tankers* judgment regarding anti-suit injunctions issued by a court of a EU Member State and it did not follow the reasoning of the Advocate General, even though it did not express reject it. The reasoning of the judgment is generally well received by the arbitration community as being a sound decision[105] and is considered to provide a proper balance in the relationship between arbitration and the Regulation. In any case, nothing in the decision suggests a possible reversal of the *West Tankers* judgment regarding the permissibility of anti-suit injunctions issued by national courts.

Yet although it is 'politically correct', the decision is not free from criticism. First of all, it is regrettable that no reference is made to the revised Regulation and to the Opinion of the Advocate General. That leaves room for further speculation on the 'validity' of the *West Tankers* judgment in the context of the revised Regulation, as well as other alleged problems in the relationship between the Regulation and arbitration.[106] More importantly, the judgment may raise some concerns from a theoretical point of view, particularly on the nature and relevance of EU legislative acts.

Firstly, it seems that the *rationale* underlying the distinction between anti-suit injunctions issued by national courts and those issued by arbitrators lies in the fact that an arbitral award cannot impose sanctions or penalties in case of a failure to comply with the injunction. Consequently, it may be presumed that a court requested to inforce such an injunction contained in an arbitral award is expected not to impose such penalties either. It is regrettable that the judgment does not state this expressly, although this interpretation follows from the rationale of the decision in distinguishing between the injunctions issued by national courts and those by arbitrators. If this holding was to be interpreted differently, i.e., that a national court could impose such sanctions, it would result in exactly the type of anti-suit injunction that was considered incompatible with the Regulation in the *West Tankers* judgment.

Besides, it is conceivable that a failure of a party to comply with the injunction issued by an arbitral tribunal may result in arbitrators drawing inferences that they consider appropriate just as is the case in other cases where provisional measures

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104 *Ibid*., para 44.

105 See e.g., Ojiegbel 2015, p. 75.

106 E.g., Van Zelst 2015.

are ordered by an arbitral tribunal.[107] It is true that arbitrators generally exercise their authority to impose sanctions and issue anti-suit injunctions with restraint in order not to jeopardise the enforceability of the award. The *Gazprom* judgment gives a clear message that no penalties may be attached to such injunctions. The issue of awarding damages for a breach of choice of court and arbitration clauses remains open, i.e. whether or not such decisions impact on the operation of the Brussels I and Ibis Regulations. Awarding the costs of litigation by other courts or by arbitrators poses no problem when such costs cannot be awarded in the proceedings on the merits. However, it may be questioned whether awarding such costs even before litigation on the merits is concluded affects the operation of the Regulation.[108]

The holding that the enforceability of such orders is left to the courts and national law of the Member States results in maintaining double standards of enforcement within the European Union. Thus, probably in common law jurisdictions such injunctions will be effective so as to restrain court proceedings pending there, whereas they are likely to be ineffective in Member States in which anti-suit injunctions are an unknown legal concept. Such a result in itself is acceptable as far as it concerns proceedings pending in a particular Member State: the courts in each Member State are free to decide on which effect is to be attributed to such measures. However, the problem may arise if an injunction restraining court proceedings in one Member State is enforced in another Member State, as an anti-suit injunction is directed towards a party and not towards a foreign court. Thus it is conceivable that a court in a Member State which can assert *in personam* jurisdiction over a party enforces an anti-suit injunction prohibiting that party from continuing litigation in another Member State. It is appropriate to conclude that the reasoning of the *Gazprom* judgment does not apply to such a situation considering that the judgment consistently refers to the effect of injunctions regarding proceedings pending in a Member State where the enforcement of the order is sought.

Finally, from a theoretical point of view it is surprising that the Court held that 'neither that arbitral award nor the decision by which, as the case may be, the court of a Member State recognizes it are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation No. 44/2001 is based'.[109] It is understandable that the Court cannot give an interpretation on the application of the New York Convention or national arbitration law, as these are not EU legislative acts. However, in some other judgments the CJEU has sent some important messages which may be relevant in the context of enforcing arbitral awards. For example, in *Eco Swiss*[110] the Court clearly held that a viola-

[107] See e.g., Article 42 NAI Rules ('arbitral tribunal may draw conclusions that it deems appropriate').

[108] See the English Court of Appeal in *The Alexandros T* [2014] EWCA Civ 1010.

[109] *Gazprom* judgment, para 39.

[110] ECJ Judgment of 1 June 1999, Case C-126/97 (*Eco Swiss China Time Ltd v. Benetton International NV*) ECLI:EU:C:1999:269.

tion of EC competition law had to be interpreted as a violation of public policy in the context of proceedings for setting aside an arbitral award. The same holds true for the policy of consumer protection.[111] Although arbitrators as 'private judges' are strictly speaking not bound to apply EU law in contrast to such obligation for state court judges and arbitrators may not submit questions for a preliminary ruling to the CJEU, the courts of the Member States must ensure that arbitral awards do not run counter to certain principles incorporated in EU legislative instruments. That is at least what can be concluded from the relevant CJEU case law. The holding in the *Gazprom* judgment seems to imply that no such obligation is imposed upon the courts when a unification of conflict of law rules on international jurisdiction such as Brussels I Regulation is at stake. Thus, the courts in the EU Member States may not give effect to arbitral awards which violate such principles incorporated in some EU legal instruments unifying substantive law, but they are permitted to give effect to injunctions restraining a party from pursuing proceedings before a national court which does have jurisdiction according to the rules on international jurisdiction unified on the EU level. This implication of the different nature and treatment of various EU legal unifications and may give rise to criticism in the legal literature.[112]

From a practical point of view, the *Gazprom* judgment can be regarded as a sound decision, despite some shortcomings from the theoretical point of view addressed above. It attempts to provide a proper balance between basic principles of 'mutual trust' on which the unification of jurisdictional rules is based and the legal traditions of the Member States. Considering that the *Gazprom* judgment clearly insists that no sanctions may be imposed upon a party in order to comply with an anti-suit injunction it must be concluded that other types of orders would violate basic principles on which the Regulation is based. Finally, nothing in the decision implies that the CJEU intended to alter or overrule the *West Tankers* judgment as the Advocate General had argued.

6.5 Concluding Remarks

The case law of the Court of Justice has shown that there is room for the application of other instruments that touch upon the same matters as the Brussels I Regulation, albeit that it restricted this 'give way rule' in order to protect the most fundamental aims and objectives that the Brussels I Regulation strives for. This has not changed under the umbrella of the Brussels Ibis Regulation.[113]

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[111] ECJ Judgement of 26 October 2006, Case C-168/05 (*Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*) ECLI:EU:C:2006:675.

[112] See e.g., Ortolani 2015, pp. 15–17.

[113] See also, Mankowski, in: Magnus & Mankowski 2016, Article 71, para 5.

The Brussels Ibis Regulation expressly gives priority to the 1958 New York Convention and clarifies the extent of the arbitration exception. Most importantly, the recital (12) clearly states that decisions on the validity of an arbitration agreement fall outside the scope of the Regulation. It thereby overrules what appeared to be a majority view in the literature in interpreting the *West Tankers* judgment. Also, all court proceedings ancillary to arbitration, such as the appointment and challenge of arbitrators, setting aside and enforcement proceedings are excluded from the scope of application of the Regulation. The issue of enforcing a conflicting or irreconcilable arbitral award and a judgment can sufficiently be resolved by an analogous application of the provisions of the Regulation relating to the enforcement of conflicting judgments. Even though it relates to the Brussels I Regulation, the finding of the CJEU in the *Gazprom* case is in line with the clarifications introduced in the revised Regulation.

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