

Emergence of *Lis Pendens Arbitralis* in Europe

I. Introduction

Parallel proceedings before two different *fora*, between the same parties and the same cause of action constitute an inconvenient situation which needs to be addressed. On the national level – as far as two domestic court's proceedings are concerned – certain rules adopt the principle of *lis pendens* and prevent costly parallel proceedings and protect parties from oppressive litigation tactics. Although the principle of *lis pendens* varies depending on the country, in principle it provides that the court first seized will be competent to decide the case, unless it finds that it has no jurisdiction.

In international arbitration such principle does not exist. Instead, in order to avoid concurrent court and arbitration proceedings, the exclusive jurisdiction of an arbitral tribunal (which should be respected universally) entitles it to decide on all issues including its own jurisdiction. In essence this should suffice. Usually as a consequence of dilatory, oppressive tactics of a respondent in international arbitral proceedings – an arbitral panel may have to face *lis pendens* situations¹. In that case, a respondent in arbitration brings an action before a national court other than at the seat of the arbitration, claiming the invalidity of an arbitration agreement. Accordingly it deliberately chooses a foreign *forum* in order to frustrate its previous contractual bargain.

Eliminating the likelihood of parallel court and arbitral proceedings became an issue of utmost importance within the European Union. As unwanted consequences of a number of European Court of Justice decisions, frustrating arbitration proceedings became as possible as never before. That is why in latest revision of the Brussels I Regulation, the European Commission introduced a new mechanism tailored at eliminating the concurrent proceedings in the context of international arbitration.

The study aims to establish whether the principle of *lis pendens arbitralis* might emerge as a consequence of the Brussels I Regulation revision and whether such principle is actually needed.

The research will be divided into four parts. The first one will be devoted to explain legal paradigms that underline the principle of the exclusive jurisdiction of the arbitral tribunal (hence severability of arbitration agreement and the doctrine of competence-competence)

¹ The application of traditional *lis pendens* assumes the parallel proceedings before *fora* of equal status. In case of concurring court and arbitral proceedings it is not the case.

which essentially should prevent any parallel proceedings from occurring in the first place. Second and third part will introduce different national approaches with respect to the interface between the court and arbitration proceedings. As each legal system provides different legal features (e.g. anti-suit injunction, negative competence-competence, declaratory relief) facilitating interaction between *fora*, they will be analyzed subsequently. Final part aims to introduce the development of the Brussels Regime² which might call for elaborated mechanism of preventing concurrent proceedings as a consequence of the ECJ case law.

Use of comparative research is particularly important. In the first chapters it shows that the underlying principles are recognized universally both on international and national level. In the two following chapter it is reasonable to confront different legal features introduced in different legal systems. In the fourth and final chapter European and national approach has to be contrasted.

The analysis of the national legislation will be primarily based upon the English, French and German arbitration legal orders with some auxiliary use of the law from different jurisdiction. Consequently, from international perspective, the New York Convention (1958), Geneva Convention (1961) and Model Law (1985 and its update on 2006) will be analyzed. From the European point of view, the Brussels Regime should be studied. Additionally in order to assess the development of the Brussels Regime, the ECJ case law will be examined.

Author is aware of the fact that some of the terms used have in principle different meaning. Notwithstanding for the purpose of this research expressions like arbitration agreement and arbitration clause, or competence-competence and Kompetenz-Kompetenz and few others will be used interchangeably.

The research takes into account recent developments in area of arbitration law meaning: amended French Code of Civil Procedure, the review of the New York Convention offered by *A. van den Berg* as well as the European Commission proposal on reviewing Brussels I Regulation.

II. Establishing Arbitral Jurisdiction: principles reinforcing its exclusive character

Exclusive jurisdiction of arbitral tribunals is a legal paradigm established on the basis of two principles of international arbitration: severability of the arbitration agreement and the rule of competence-competence, which will be discussed respectively. In essence the doctrine of separability allows an arbitral tribunal to decide on the merits, whereas competence-competence doctrine empowers a tribunal to decide on its own jurisdiction³. When read together they allow an arbitral tribunal to decide on all disputes arising out

² The system established on Brussels Convention (1968), Lugano Convention (1988) and Brussels I Regulation designed to facilitate recognition and enforcement of state court decisions in civil and commercial matters in European Union.

³ (Lew, Mistelis, & Kroell, 2003) p. 102.

of the contract. Consequently – at least in theory – a conflict between two legal *fora* should not be possible. Nevertheless when the very existence of an arbitral agreement is in question, the arbitral mandate is not that evident. Considering that “any private mechanism of dispute resolution – whenever it falls on the spectrum running from consensual settlement all the way through binding arbitration – depends in the last resort on public sanctions and the public monopoly of force”⁴, it seems that a clash of power is inevitable. Therefore it is necessary to establish to what extent jurisdiction of the tribunal is in fact exclusive.

1. Autonomous character of the arbitration agreement⁵ and its consequences

It has been recognized that an arbitration agreement fulfills a number of functions of a jurisdictional character: it shows consent of the parties to resolve their disputes in arbitration, it establishes the jurisdiction and authority of arbitral tribunals and finally it is the basic source of the power of the arbitrators⁶.

Notwithstanding that such agreement usually stands amongst other contractual provisions it has been accepted to treat it individually as an autonomous contract. The concept of separability (or severability) of an arbitration clause allows it to survive the termination of the contract. In general, even joint termination of a contractual relationship by all parties is not extended to an arbitration agreement⁷. It rather retains its validity for all the disputes arising out of the terminated contract⁸. The logic behind an agreement to arbitrate is to establish a legal obligation for the parties to arbitrate⁹ and – as pointed out by *M. Hunter* – “Indeed, it would be entirely self-defeating if a breach of contract or a claim that the contract was voidable was sufficient to terminate the arbitration clause as well; this is one of the situations in which the arbitration clause is most needed”¹⁰. It also implies that an autonomous arbitration clause will be valid even if the underlying contract is void¹¹ or even argued as non-existent¹². Therefore the arbitration agreement is not automatically burdened with defects of the main contract. Nonetheless it is also stressed that “in reality, the arbitration clause remains closely connected to the parties’ main contract and has an interrelated, supportive function. While the arbitration agreement should generally be «separated» from the underlying contract for various purposes, it is never entirely or necessarily «autonomous» or «independent» from the underlying agreement”¹³ hence on a case-by-case an analysis arbitration clause might follow the destiny of the main contract¹⁴.

⁴ (Rau, 2010) p. 1.

⁵ Although arbitration agreement might be a separate document it is often included as one of the contract provisions. Therefore arbitration agreement and arbitration clause will be used interchangeably.

⁶ (Lew, Mistelis, & Kroell, 2003) p. 99.

⁷ (Böckstiegel & Kröll, 2007) p. 24 also (Delvolvé, Pointon, & Rouche, 2009) p. 57.

⁸ (Born, 2009) p. 351 also (Böckstiegel & Kröll, 2007) p. 24.

⁹ (Lew, Mistelis, & Kroell, 2003) p. 99.

¹⁰ (Hunter & Refern, 2004) p. 193.

¹¹ (Leboulanger, 2007) p. 4.

¹² (Delvolvé, Pointon, & Rouche, 2009) p. 55.

¹³ (Born, 2009) p. 315.

¹⁴ (Böckstiegel & Kröll, 2007) p. 248.

Accordingly independence of an arbitration agreement certainly facilitates its functioning. It is not however the main reason for an arbitral tribunal to have an exclusive power over the dispute¹⁵.

a. Direct consequences of the autonomy of the arbitration agreement

Two direct consequences of the legal autonomy of arbitral agreements are to be mentioned. Firstly, an agreement to arbitrate is not affected by the status of the main contract; secondly it might be governed by a different law than the *lex contractus*¹⁶. Nonetheless, in order to retain sufficient focus on the researched topic, attention will be given to the indirect effect of the independence of the arbitration clause rather the direct one¹⁷.

b. Indirect consequence(s) of the autonomy of the arbitration agreement

As offered by *E. Gaillard* “with any firmly established rule that is well formulated, the principle of the autonomy of arbitration agreements has often been relied upon as the basis for developments which go far beyond its initial *raison d’être*. These developments include the «competence-competence» rule”¹⁸. As the principle of competence-competence will be discussed below (under the section on the principle of competence-competence), due attention will now be paid on the correlation between those two concepts.

Treating the arbitration agreement as a separate contract is designed for convenience as a solution in a case when the main contract is invalid or even appears to never exist. If the underlying agreement and arbitration clause would be read jointly, then the basis for the tribunal to convene to decide on its own jurisdiction would not be so apparent¹⁹. It is reasonable to assume that the parties’ intention was quite the contrary – to allow an arbitral tribunal to examine all the questions as arising out of the contract²⁰. It leads to the conclusion that both the severability presumption and competence-competence serve the same objectives: to protect the arbitral tribunal’s mandate to decide on matters that are being disputed²¹, to prevent premature judicial intervention from obstructing the arbitration process and to eliminate loopholes for parties who intend to delay the arbitration²². Sometimes they are even addressed together²³ which incline

¹⁵ As it will be explained, the exclusive jurisdiction of an arbitral tribunal is granted according to the principle of competence-competence. In principle, an arbitral tribunal, before it accepts jurisdiction had to study an agreement to arbitrate in order to decide if claims are arbitrable and/or are in scope of an arbitration agreement. In case substantive requirements of an arbitration clause (i.e. a dispute matter is not arbitrable or falls outside the scope of an arbitration clause *etc.*) are not satisfied an arbitral tribunal should refrain from examining an underlying contract.

¹⁶ (Leboulanger, 2007) pp. 16–17, also (Gaillard & Savage, 1999) pp. 208–212.

¹⁷ (Gaillard & Savage, 1999) p. 208.

¹⁸ (Gaillard & Savage, 1999) p. 212.

¹⁹ (Hunter & Refern, 2004) pp. 298–299.

²⁰ (Born, 2009) p. 351.

²¹ (Gaillard & Savage, 1999) pp. 213–214, also (Born, 2009) pp. 403–404.

²² (Susler, 2009) p. 1.

²³ (Leboulanger, 2007) p. 17.

to some simplifications and confusion between them. Subsequently it is suggested that the principle of competence-competence is a corollary to the principle of the autonomy of the arbitration agreement²⁴. Therefore it is presumed that the examination of jurisdictional challenges depends on the independence of arbitral agreements. Nevertheless, the competence-competence rule has to be distinguished from the principle of autonomy of the arbitration agreement²⁵. As underlined by *William W. Park*: “Separability and competence-competence intersect only in the sense that arbitrators who rule on their own jurisdiction will look to the arbitration clause alone, not on to entirety of the contract”²⁶.

Although *G. Born* acknowledges a substantial relationship between the principles discussed, he stresses that “the competence-competence doctrine could very readily exist without a separability presumption and, conversely, the separability presumption could be accepted without also adopting a rule of competence-competence”²⁷. He also concludes that “The separability presumption enables the arbitrators to consider and resolve disputes about the existence, validity, legality and termination of the underlying contract, regardless whether the competence-competence doctrine is accepted, while requiring arbitration of disputes that concern only the existence, validity, or legality of the underlying contract (and not the arbitration agreement)”²⁸.

2. Principle of competence-competence

As discussed above an arbitration agreement serves as a separate contract between the parties. Notwithstanding that the arbitration clause does not follow the fate of the main contract in case of invalidity of the latter it does not mean that it cannot suffer its own flaws. Accordingly if validity or existence of arbitration agreement is questioned, then the essential power (to decide on disputes arising out of contract) stemming from the arbitral agreement has to be reconsidered as well. How can an arbitral tribunal carry out arbitral tribunal tasks properly if its mandate to examine the arbitration clause does not exist? One solution is to refer all the questions on tribunals jurisdiction (thus mostly existence or validity of the arbitration agreement²⁹) to the national courts. Alas it will give an opportunity to a respondent to frustrate arbitral proceedings or at least delay them by merely contesting the existence or validity of an arbitration agreement and seriously undermine the effectiveness of arbitration³⁰. Therefore a legal presumption in favor of arbitral tribunal competence has been designed specifically to avoid aforementioned drawbacks. Nowadays it is generally accepted that an arbitral tribunal is a competent forum to decide on its own jurisdiction

²⁴ (Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners*, 2004) p. 28 also (De Ly & Sheppard, 2006) p. 17 and mentioned in (however with remark that principles has to be distinguished) (Gaillard & Savage, 1999) pp. 212–214.

²⁵ (Gaillard & Savage, 1999) p. 212.

²⁶ (Park, *Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators*, 1997) p. 133.

²⁷ (Born, 2009) p. 403.

²⁸ (Born, 2009) p. 404.

²⁹ In case valid arbitration exists, but an arbitral tribunal accepts to decide on the issues that falls outside the arbitration agreement.

³⁰ (Lew, Mistelis, & Kroell, 2003) pp. 331–332.

and this is referred to as the competence-competence doctrine³¹. Nonetheless it does not mean that national courts are not included in the judicial process.

The principle of competence on competence is the core of the debate in international commercial arbitration as to the scope of judicial intervention this is to be allowed. *G. Born* states that “The competence-competence doctrine is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal’s jurisdiction”³².

The following considerations will be two-folded. First it will be shown that applying the principle of competence-competence expressly confers the power to decide jurisdiction on the arbitrators, often referred as the positive effect of arbitral agreement. Secondly elaboration on so called negative competence-competence will be offered which in principle shows that an arbitral tribunal should be the first to make a determination as to jurisdiction, and national courts should defer to the tribunal while reserving their right of review in setting aside procedure³³.

a. Arbitral Tribunal’s power to decide on its jurisdiction

The jurisdiction to decide on its own jurisdiction has two dimensions. Firstly it is a necessity for the tribunal to work properly, even though the tribunal’s decision on this issue might be cancelled by a court. Secondly it is duty of the arbitrators to express their opinion on the issue of validity of an arbitration agreement.

Although it is argued that positive effect of the herewith discussed principle is subject to national law³⁴, it is also indirectly reflected by Art. II (3) of the New York Convention³⁵ that reads: “the court of a Contracting State, when seized of an action in a matter in respect of which the parties made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”. On the other hand the European Convention on International Commercial Arbitration expressly provides that: “[s]ubject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with

³¹ (Hunter & Refern, 2004) pp. 299–302.

³² (Born, 2009) p. 852.

³³ (De Ly & Sheppard, 2006) p. 17.

³⁴ (Schramm, Geisinger, & Pinsolle, 2010) pp. 95–96.

³⁵ It is sometimes suggested that New York Convention does not deal with subject of competence-competence (Gaillard & Savage, 1999) p. 397 (“As the 1958 New York Convention only deals with the conditions for recognition and enforcement of awards, it does not cover the competence-competence principle”) it is however argued that notwithstanding clear indication of the competence-competence principle, the recognition of arbitral tribunal’s mandate to rule on its own jurisdiction is present in New York Convention respectively in Articles II(3), V(1)(a) and V(1)(c) (Born, 2009) p. 857 (“Nonetheless, it does not follow that the Convention is irrelevant to issues of competence-competence. Despite the absence of express language on the topic in the New York Convention, it is clear that Articles II(3) and V(1) of the Convention recognize that both arbitral tribunals and courts may consider and decide disputes about the arbitrators’ jurisdiction”).

the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part³⁶. Accordingly the principle of competence-competence is also established in Art. 16(1) of the Model Law that offers: “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of arbitration agreement [...]”. It is worth to mention that input of the Model Law in establishing the principle of competence-competence was significant even in non-model law jurisdiction³⁷.

As the arbitral tribunal acquires its power from the national *lex arbitri*, the analysis how it is established on selected national level will now be undertaken.

Not surprisingly, in Model Law jurisdictions the provisions is almost the same as Article 16 of the Model Law. According to section 1040(1) of the German Code of Civil Procedure, the arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Furthermore the Polish Code of Civil Procedure provides a similar provision³⁸ whereas the Irish Arbitration Act in its version from 2010 contains literally the content of the UNCITRAL Model Law with its 2006 amendments³⁹.

The English Arbitration Act adopted an analogous approach when enacted in 1996. It is provided in section 30 that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction. As explained substantive jurisdiction contains issues of the validity and the scope of the arbitration agreement (subsections a and c) and proper constitution of the arbitral tribunal (subsection b).

In France, the positive effect of the arbitration agreement is established in Article 1466 of the French Code of Civil Procedure. The rule that the arbitrator shall decide on the issue, if a party challenges the existence or scope of the arbitrator’s jurisdiction, is complemented by Article 1458 which provides the negative effect of arbitration agreement. At this point it is necessary to point out that as of 1 May 2011 new legislation on arbitration will be applicable in France. Nonetheless an arbitration tribunal’s mandate still remains strong⁴⁰.

Despite the fact that the underlined principle has been explained by examples of legislation of only a few states, it is safe to say that it has universal recognition. Nonetheless

³⁶ As the European Convention on International Commercial Arbitration also contains negative competence-competence it will be discussed under subsequent section of this paper. Notwithstanding abovementioned Article V(3) clearly gives the power to an arbitral tribunal to decide on its own jurisdiction.

³⁷ (Brekoulakis & Shore, 2010) p. 613.

³⁸ According to Article 1180 § 1 of the Polish Code of Civil Procedure an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence, validity or effectiveness of arbitration agreement (“Sąd polubowny może orzekać o swej właściwości, w tym o istnieniu, ważności albo skuteczności zapisu na sąd polubowny”). What is significantly different is to allow an arbitral tribunal to decide also on effectiveness of arbitration agreement thus if it is operative or not.

³⁹ As provided in section 6 of Arbitration Act 2010: “Subject to this Act, the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements”.

⁴⁰ Art. 1465 of the New French Code of Civil Procedure provides that an arbitral tribunal has exclusive jurisdiction to decide on any objectives in respect to its jurisdiction (“Le tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel”).

the doctrine of competence-competence in its modern meaning does not provide an arbitral tribunal with exclusive jurisdiction to decide on the question of its jurisdiction as the Kompetenz-Kompetenz doctrine was understood traditionally. As explained by *E. Gaillard*: “If one were to follow the traditional meaning of the expression in Germany, «Kompetenz-Kompetenz» would imply that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any court. Understood in such a way, the concept is rejected in Germany, just as it is elsewhere”⁴¹. It means that by conferring the power to decide on jurisdictional issues on the arbitral tribunal the principle is essential to reduce the level of the interference between an arbitral tribunal and domestic courts (and not to give an arbitral tribunal the first and the last word to rule on its jurisdiction⁴²).

b. Court’s obligation to refer the matter to arbitration

In the line with an arbitral tribunal’s power to render a decision on its own competence goes the duty of the domestic courts to respect the arbitration agreement and decline jurisdiction. Such consequence of the arbitration agreement is referred to as its negative effect and it is addressed to the state courts. As argued by *D. Angualia*: “Domestic courts play a big role in reinforcing party autonomy by requiring them to refer disputes to arbitration where they have a valid arbitration agreement which has not been mutually abandoned”⁴³. Needless to say any arbitration agreement has both positive and negative effect. However not every arbitration agreement results in negative competence-competence⁴⁴.

Negative competence-competence originates from France and has been established in Article 1458 of the French Code of Civil Procedure⁴⁵. It provides that if a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent. Similarly State court shall also declare itself incompetent even if the dispute is not yet before an arbitral tribunal, unless the arbitration agreement is manifestly null and void. Consequently negative competence-competence relies upon the assumption that an arbitral tribunal has a priority to rule on its own jurisdiction and that a national court has the right to conduct a complete review

⁴¹ (Gaillard & Savage, 1999) pp. 396–397 conversely it has been argued by (Born, 2009) p. 899 (“German authorities reason (wrongly) that, under Germany’s enactment of the Model Law, the traditional German conception of Kompetenz-Kompetenz has been abrogated and cannot be adopted even by express agreements granting arbitrators the power to make final determinations of their own jurisdiction. In contrast, English courts have interpreted England’s variation of the Model Law as permitting agreements that grant arbitral tribunals the power to make final jurisdictional decisions”).

⁴² Before 1998 reforms in Germany it was possible to contractually grant arbitrators a right to rule on their own authority in a final way. Such provisions were referred as the Kompetenz-Kompetenz Clauses mentioned above as traditional meaning of Kompetenz-Kompetenz Principle. More (Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, 2007) pp. 114–119 also (Born, 2009) pp. 854–855.

⁴³ (Angualia, 2010) p. 16.

⁴⁴ Negative competence-competence has to be provided by the *lex fori arbitri*.

⁴⁵ Articles 1458 together with Article 1466 of the French Code of Civil Procedure have been primarily designed for domestic arbitration. Then it became applicable to international arbitration.

only after an arbitral award is rendered. It also means that even when court proceedings have been commenced at a point in time when the dispute is not yet before an arbitral tribunal, the court still has to declare itself incompetent unless it finds that the arbitration agreement is manifestly void⁴⁶ or manifestly not applicable as stated in Article 1448 of the New French Code of Civil Procedure.

To establish that an arbitration agreement is manifestly void only *prima facie* review has to be undertaken. As explained by *O. Susler* it [*prima facie* review] only requires verifying that a valid arbitration agreement exists. It does not entail a full examination as to the existence and validity of the arbitration agreement⁴⁷. In fact a French court will be disallowed to carry out an in-depth examination of the arbitration agreement⁴⁸. *S. Brekoulakis* argues further that “in effect under French jurisprudence it would be enough for a clause to mention the word «arbitration» for the national court to refrain from examining whether this reference to arbitration is void or has any meaning at all⁴⁹.”

Empowering an arbitral tribunal with “primary jurisdiction” together with complete review only after an award is rendered is highly controversial. It has been disapproved by *A. Rau* who argues: “once put into play, though, the logic of the French regime is characteristically relentless. As has often been pointed out, even a claimant who does not believe that he is bound by an arbitration agreement must first institute an arbitration procedure and participate in the selection of the tribunal – all for the purpose of asking the arbitrators to declare that they may not hear the case⁵⁰.” Accordingly *S. Brekoulakis* contests negative competence-competence which should be dismissed “as an unjustified effort to unduly expand the arbitration domain at the expense of national courts⁵¹.”

Regardless the criticism, the French approach towards competence-competence was highly influential⁵² also with respect to draft of the European Convention on International Commercial Arbitration⁵³. Moreover it is sometimes suggested that the Model Law also offers *prima facie* review of the arbitral tribunal jurisdiction. Notwithstanding opting for or against negative competence-competence one has to accept that the system is very efficient as preventing abuse of process (i.e. dilatory tactics), strengthening the position of the arbitral tribunal and thus strengthening the effectiveness of the arbitration⁵⁴.

⁴⁶ (Schlosser, 2001) p. 25.

⁴⁷ (Susler, 2009) p. 3.

⁴⁸ (Bensaude, 2010) p. 881.

⁴⁹ (Brekoulakis S., The negative effect of competence-competence: the verdict has to be negative, 2009) p. 4.

⁵⁰ (Rau, 2010) p. 63.

⁵¹ (Brekoulakis S., The negative effect of competence-competence: the verdict has to be negative, 2009) p. 12.

⁵² Thus being followed by other jurisdiction e.g. Switzerland, India, Hong Kong, Canada (Born, 2009) p. 900 and also Egypt (De Ly & Sheppard, 2006) p. 20.

⁵³ Article VI(3) provides that: “Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator’s jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary”.

⁵⁴ See (Born, 2009) p. 902, also (Susler, 2009) p. 13.

In essence, even in case when negative competence-competence does not apply, a court should carefully choose when the interference of the arbitration process is appropriate⁵⁵. When following Article II (3) of the New York Convention, Court shall refer the parties to arbitration. It may rule otherwise only if it finds that agreement is null and void, inoperative or incapable of being performed. “It has been argued that the pro-arbitration nature of the New York Convention ought to encourage courts to provide a narrow reading to Article II (3)”⁵⁶. The above provision of the New York Convention has been respectively mirrored in thodel Law⁵⁷ and in the national arbitration statutes⁵⁸. It means that that exclusive jurisdiction has its limits. Nonetheless – as it will be explained at a later stage – the New York Convention does not give a clear answer what as to the scope of review by the domestic courts in sense that it depends on national systems when and to what extent exclusive jurisdiction of an arbitral tribunal is being disturbed.

3. Limits to exclusive jurisdiction

The starting point for any considerations is that exclusive jurisdiction of the arbitral tribunal is granted *ab initio*. Nonetheless it has only provisional character which means that it has to be enforced by national courts in case of a challenge. When legitimacy of the arbitral tribunal on the grounds related to existence, validity or the scope of the arbitration agreement is in question then an arbitral award might have limited recognition or might not be recognized at all. As the process of challenging jurisdiction of the arbitral tribunal will be explained in the subsequent chapter, for now it is only necessary to say that jurisdiction of the arbitral tribunal loses its exclusive character when an arbitration agreement is null and void, inoperative or incapable of being performed or (indirectly) when an arbitral tribunal disregards public policy of the applicable law.

III. Challenging the Arbitral Jurisdiction in the national court

Domestic court and the arbitral tribunal may interact with each other in two scenarios. In the first one, a party (usually the respondent in arbitral proceedings⁵⁹) will try to object to the arbitral tribunal’s mandate to reach a binding decision. In the second – which will be explained in the third chapter, one of the party requests the protection of the arbitral proceedings from domestic courts⁶⁰. In neither of case will it be easy

⁵⁵ Due to the fact that negative effect of arbitration agreement will be intact.

⁵⁶ (Susler, 2009) p. 17.

⁵⁷ Art. 8(1) of the Model Law.

⁵⁸ E.g. Article 1032(1) of the German Code of the Civil Procedure, Section 9(4) of the English Arbitration Act.

⁵⁹ Although it is plausible that different actor than respondent in arbitral proceedings can also raise the objections, in simplified model whereas only two parties are involved in dispute, logic dictates that it will be respondent (not claimant) in arbitral proceedings that challenges the arbitral tribunal jurisdiction.

⁶⁰ It is important to underline that in case of protection of arbitral proceedings the situation is far more complex due to the fact that at least three actors exist in this circumstances: the arbitral tribunal, national court summoned to protect the arbitral proceedings and finally another court and/or arbitral tribunal which finds himself competent to hear the case.

to establish the coordination mechanism for both arbitration tribunals and domestic courts. This raises two questions: first what are the grounds for the challenge of the arbitral tribunal's jurisdiction, second when can the objections be raised. A final point relates to the way a court can intervene.

1. Grounds for full challenge

By and large the New York Convention outlines what are the grounds for the challenge. They are consequently elaborated upon by national arbitration acts. It means that depending on the state, the legal system might be more or less demanding with respect to the circumstances under which the court might intervene with the arbitral proceedings. Not all of the objections that can be raised refer to the arbitration agreement (e.g. proper constitution of the arbitral tribunal which does not stem from the invalidity of the arbitration agreement). Therefore research will be narrowed to objections related to the existence or validity of the arbitration agreement which has been primarily offered by Article II (3) of the New York Convention which gives an opportunity for the national court to examine the validity of the arbitration clause when it assumes it is null and void, inoperative or incapable of being performed.

Such wording has been followed in the Model Law and a number of national arbitration statutes⁶¹ which provides a relatively consistent approach as to the grounds for challenge. Article 8 (1) of the Model Law reads that: "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed". Conversely some jurisdictions approached the issue a bit differently. For example, Article 1458 of the French Code of Civil Procedure accepts interference by the national court only in case when an arbitration agreement is manifestly void⁶². It is however important to underline that irrespectively of the national statutes the grounds provided in the New York Convention will always be applicable within the European Union borders⁶³. For that reason the main differences between the states will concern timing and character of intervention of the court and not the grounds for the challenge.

a. Null and void arbitration agreement

To establish the meaning of a "null and void" arbitration agreement one can adopt two techniques of interpretation. First one may follow an internationally established definition

⁶¹ Article 8(1) of the Model Law, Article 1032 (1) of German Code of the Civil Procedure, Section 9(4) of English Arbitration Act.

⁶² Or as indicated in the new Article 1448 of the French Code of Civil Procedure the court can accept the jurisdiction only when arbitral tribunal has not yet been vested to hear the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.

⁶³ All Member States of the European Union are respectively signatories of the New York Convention.

of null and void arbitration agreement. The second one determines such defect according to applicable national law⁶⁴. For the purpose of the research at hand the meaning of the wording of the New York Convention (null and void, inoperative and incapable of being performed) will be interpreted autonomously (from the international rather than national perspective)⁶⁵.

An arbitration agreement that is null and void is affected by some invalidity *ab initio*. It usually means that there was no meeting of minds due to misrepresentation, duress, fraud or undue influence⁶⁶. Additionally *J. Lew* provides a non-exhaustive list of examples of invalid arbitration clauses, mentioning the situation when such an agreement does not refer to a defined legal relationship or refers the dispute to an uncertain or non-existent arbitration institution⁶⁷.

A. van den Berg adds that the words “null and void” also apply to the issue of the capacity of the party under its personal law or other applicable law⁶⁸.

Finally, once again the importance of the principle of severability has to be mentioned. Invalidity of an arbitration agreement must be independently – as opposed to the contract containing arbitration agreement – determined by the court.

b. Inoperative arbitration agreement

An arbitration agreement will be inoperative if it ceased to have any effect by the time the court is asked to refer parties to arbitration. That means it was not invalid from the beginning, but in the meantime lost its effect. Thirty years ago *A. van den Berg* was assuming that the following reasons might correspond with the word “inoperative”: first of all parties might have implicitly or explicitly waived their right to arbitration⁶⁹, secondly the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata* and *ne bis in idem*). He also mentions that “an arbitration agreement may further be inoperative where the arbitration has shipwrecked for some reason, and for this reason, under the applicable law, the agreement ceases to have effect. Examples are the setting aside of the award, the stalemate of the votes of the arbitrators or the failure to render an award within

⁶⁴ Explained in details in (Schramm, Geisinger, & Pinsolle, 2010) pp. 103–104 indicating specific approaches within the techniques undertaken.

⁶⁵ Based upon argumentation offered by (Lew, Mistelis, & Kroell, 2003) p. 342 (“in the context of the New York Convention an autonomous interpretation should prevail which excludes national idiosyncrasies. Only such an autonomous interpretation can lead to the harmonization intended by the New York Convention”); also supported by (Schramm, Geisinger, & Pinsolle, 2010) pp. 104–105 (“the best of the above approaches is the uniform interpretation – or at a minimum the approach restricting the grounds for nullity to those that are generally recognized in international law. These approaches are the most consistent with the overall aims of the New York Convention”) and (Susler, 2009) p. 17 (“it has been argued that the pro-arbitration nature of the New York Convention ought to encourage courts to provide a narrow reading to Article II(3)”).

⁶⁶ (van den Berg, 1981).

⁶⁷ (Lew, Mistelis, & Kroell, 2003) p. 342.

⁶⁸ (van den Berg, 1981).

⁶⁹ Usually by active participation in court proceedings or by failing to invoke the arbitration agreement.

the time limit for arbitration”⁷⁰. Similarly a time limit might be given to initiate the arbitral proceedings which mean that parties wanted to be bound by arbitration agreement only during certain period after which they do not have intention to submit their dispute to arbitration.

Nonetheless mere existence of parallel proceedings is insufficient to determine the arbitration agreement to be inoperative⁷¹. Also use of permissive language (e.g. “matter may be submitted to arbitration”) will not necessarily make an agreement inoperative⁷².

c. Incapable of being performed arbitration agreement

The last valid reason that can be raised in order to allow the court to continue its proceedings is incapability of the arbitration clause to be performed. It means that it cannot effectively be set in motion. There will be a case when other terms of the contract shows that parties did not intend to refer the dispute to arbitration or the agreement is too vague to indicate that the parties want to arbitrate. Such clause will be deemed pathological beyond repair. Other examples provided by authors are: the arbitration tribunal cannot for whatever reason be constituted; the arbitration tribunal refuses to act despite a valid arbitration agreement; the arbitrator named in the arbitration agreement refuses to accept his nomination; the appointing authority designated in the agreement refuses to make the appointment of the arbitrator⁷³.

The question of utmost relevance arises when lack of sufficient funding will render arbitration agreement incapable of being performed or inoperative. *A. van den Berg* argues that: “The possibility of a lack of financial resources to satisfy an award must be deemed *not* to render an arbitration agreement incapable of being performed within the meaning of Article II (3)”⁷⁴. It seems that national courts take different approaches in that matter. English courts are reluctant to accept that lack of sufficient funding renders an agreement incapable of being performed unless it is due to breach of contract which is an issue in dispute. Conversely German courts held that lack of funding should be treated as enough reason to accept that the arbitration agreement is incapable of being performed⁷⁵. It has been reasoned that such an agreement might result in a denial of justice in case a party does not have the necessary funds to arbitrate.

Lastly one has to take into account the situation when multiparty dispute arise and not all parties are bound by the arbitration agreement. In that case it is rather accepted that parties that are bound by the arbitration agreement should be referred to arbitration and court proceedings can be continued with respect to the other parties⁷⁶.

⁷⁰ (van den Berg, 1981) to large extent the reasons have been reiterated in (Schramm, Geisinger, & Pinsolle, 2010) pp. 105–106 and (Lew, Mistelis, & Kroell, 2003) pp. 342–343.

⁷¹ (Schramm, Geisinger, & Pinsolle, 2010) pp. 105–106.

⁷² (Brekoulakis & Shore, 2010) p. 604.

⁷³ (Schramm, Geisinger, & Pinsolle, 2010) p. 108 and (van den Berg, 1981) also (Lew, Mistelis, & Kroell, 2003) pp. 343–344.

⁷⁴ (van den Berg, 1981).

⁷⁵ (Lew, Mistelis, & Kroell, 2003) pp. 344–345.

⁷⁶ (Schramm, Geisinger, & Pinsolle, 2010) p. 108 and (van den Berg, 1981).

d. Public Policy⁷⁷

Public policy cannot be a rationale why an arbitral tribunal will not be competent to decide on its own jurisdiction before or during arbitral proceedings. The reason for that lies in the nature of the objection of the violation of the public policy. It usually refers to the conduct of the arbitral proceedings (e.g. fair trial/due process, equal right to present the case *etc.*). It means that the party might challenge an arbitral award on grounds of breach of public policy after it was rendered. Therefore one might conclude that – although indirectly – it establishes limits for jurisdiction of the arbitral tribunal, but can be offered as grounds for challenge after an arbitral award is rendered⁷⁸.

e. Prospective grounds for challenge

In order to facilitate the use of the arbitration in international perspective, A. *van den Berg* proposed a review of the New York Convention which is also relevant when grounds for challenge are discussed.

The new Article II of the hypothetical convention states that a national court should not dismiss the case if the party against whom the arbitration agreement is invoked asserts and proves that: (a) the other party has requested the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings; or (b) there is *prima facie* no valid arbitration agreement under the law of the country where the award will be made; or (c) arbitration of the dispute would violate international public policy as prevailing in the country where the agreement is invoked.

At this point draft is open for a debate, nonetheless certain direction for prospective changes are drawn. Tentative provisions are clear-cut and might help with interface between national courts and the arbitral tribunal. First of all, subparagraph (a) defines *lis pendens* in arbitration when the other party decides to invoke the arbitration clause later than its first submission; secondly subparagraph (b), unambiguously explains that arbitration agreement shall be examined only with respect to manifest invalidity. Finally, in subparagraph (c) reference to the international public policy is made. It is important to underline that international public policy should prevail in the country where the agreement is invoked. It means that it might differ depending of the country. It also means that a successful challenge can be made only under abovementioned circumstances. As the changes are of revolutionary character they might not end up in the final draft of the hypothetical convention, even so they are worth mentioning⁷⁹.

⁷⁷The following considerations focus primarily on the procedural aspect of the public policy. One can argue that the substantive public policy (e.g. concerning arbitrability of a dispute) might be the reason why tribunal should not have a power to decide on a disputed issue (e.g. as it concerns illegal, criminal activity). Notwithstanding it is still not a valid reason for disallowing an arbitral tribunal to make an assessment on its own jurisdiction.

⁷⁸If award is not recognized or enforced due to violation of the public policy, consequently it would mean that an arbitral tribunal failed to fulfill its duty, thus failed to use its provisional exclusive jurisdiction to provide the parties with access to justice.

⁷⁹I.e. reference to the international public policy which might be difficult to define; consequently *prima facie* test of arbitration agreement might not be accepted within the countries which prefer wider control of arbitration.

2. Timing of raising jurisdiction issues

Timing of raising objections to the powers of the arbitral tribunal is relevant from the perspective what steps shall be undertaken respectively by domestic court and the arbitral tribunal. Despite the fact that concurrent court and arbitration proceedings might appear only after constitution of an arbitral tribunal and before an arbitration award is made, three scenarios shall be revised. In fact the first (thus before the constitution of the arbitral tribunal) and the third (hence after an arbitration award is rendered) are relatively connected and depend of the test (*prima facie* or full) that is being used to distinguish whether the arbitration agreement is valid or not. Consequently, depending on the test, exclusive jurisdiction may remain intact for longer. Needless to say, in each scenario it is assumed that a party invokes the existence of an agreement to arbitrate.

a. Before constitution of the Arbitral Tribunal

When an arbitral tribunal is not yet constituted, one party might turn to the court to decide its dispute. In that case – as mentioned above – it is probable that opposing party will raise an argument of valid arbitration clause. Consequences depend of the regime (*prima facie* or full test) used in a particular country.

It has already been explained that the *prima facie* test focuses on the mere existence of the arbitration clause. When it seems that nothing is wrong with the agreement then the court will wait until termination of the arbitral proceedings to fully examine the validity of an arbitration clause. Consequently a national court will decline its jurisdiction despite the fact that there is no other forum (yet) that can decide on the validity of an arbitration agreement⁸⁰. Although it is rather a theoretical concept, one can assume that a party who is determined to address the disputes on merits only in court (notwithstanding an arbitration agreement) and therefore does not refer to arbitration might be effectively deprived of access to the justice⁸¹. Accordingly, an exclusive jurisdiction of arbitral tribunal continues to be intact.

On the other hand, in case of a full test of an arbitration agreement, a court seized to hear the case will continue its proceedings on merits when it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. For example German law gives the court an opportunity prior to constitution to the arbitral tribunal to declare whether the arbitration is admissible or not⁸². Similarly, Courts in England

⁸⁰ E.g. Article 1458 of the French Code of Civil Procedure and Article 1448 of the New French Code of Civil Procedure as amended on 13 January 2011.

⁸¹ When arbitration agreement is not manifestly null and void then court will refrain from continue proceedings with merits. Consequently a party who asserts that there was no agreement to arbitrate but want to have a dispute resolved will be forced to arbitrate first. Otherwise it will risk that the other part will always invoke arbitration agreement.

⁸² Article 1032(2) provides that prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.

can render preliminary award on jurisdiction under certain circumstances⁸³. It leads to the conclusion that prospective tribunal might not even have a chance to hear the arguments with respect to the jurisdiction.

b. During arbitral proceedings

When an arbitral tribunal has already been constituted then one can ask whose power shall prevail: an arbitral tribunal's or national court's power. Consequences will again depend of the test that is used to establish the validity of an arbitration agreement. In essence an interference of parallel proceedings only appears at that stage and only on grounds established above.

New York Convention reads only that the court shall refer party to arbitration unless it finds that valid grounds for challenge arbitral tribunal jurisdiction have been presented⁸⁴. It means that the provision of the Convention allows both national court and arbitral tribunal to consider and decide jurisdictional disputes. It does not however give any guidelines as to allocation of powers⁸⁵ and to conduct of the *fora*. Therefore adopted approach differs throughout the countries.

For example in France court will automatically decline jurisdiction to hear the case and refer the parties to arbitration. When an arbitral tribunal has been already constituted then party will only have a right to review after an arbitral award is rendered. The primacy of an arbitral tribunal jurisdiction has been clearly expressed in new French Arbitration Act⁸⁶. It leads to conclusion that no jurisdictional challenge can be referred to court during arbitral proceedings.

In Model Law jurisdictions challenge has to be raised not later than when submitting first statement on the substance of the dispute⁸⁷. The rationale behind such provision is to prevent the parties from using dilatory tactics directed only to hamper an arbitral proceedings. It means that at point when tribunal is constituted all objections has to be raised as early as possible. Consequently any challenge made after first submission will not be admissible.

c. After Arbitral Award is rendered

As already noted, competence given to an arbitral tribunal is of provisional character. It means that any arbitral award on jurisdiction (either preliminary or final) can be challenged before domestic court. Post-award review is accepted in both regimes of control (*prima facie* and full test).

⁸³ Section 32(1) of English Arbitration Act.

⁸⁴ Article II(3) of the New York Convention.

⁸⁵ (Born, 2009) p. 858.

⁸⁶ Article 1465 of the New French Code of Civil Procedure.

⁸⁷ Article 8 of the Model Law; similarly Article 1032(1) of German Code of Civil Procedure ("prior to the beginning of the oral hearing on the substance of the dispute") and Section 31(1) of English Arbitration Act ("not later than the time he takes the first step in the proceedings to contest the merits").

Although such judicial review might lead to reversal of an arbitral award and in that sense limit jurisdiction of the arbitral tribunal, it does not have a direct effect on interference between court and an arbitral tribunal. Therefore it will not be discussed further.

3. Form of court intervention

There are exceptional mechanisms in court's discretion that might limit inconvenience of the concurrent proceedings. Certainly they do not cover all possible scenarios, especially when both *fora* find themselves competent to hear the case. Nonetheless they facilitate dispute resolution before only one judicial body. As already explained French system essentially allows a court intervention only after an arbitral award is rendered, therefore it will decline its jurisdiction and dismiss the case in its earlier stage. In Germany and England where full review of an arbitration agreement is allowed before an arbitral tribunal reaches its decision, courts may exercise declaratory judgment (in both selected jurisdictions) or injunctive relief (in England).

a. Negative declaratory reliefs

In Germany, as provided in Article 1032(2) of German Code of the Civil Procedure, party may request declaration from the court whether arbitration is admissible or not. Such application has to be done before constitution of an arbitral tribunal. Additionally party has to have legitimate interest in applying for declaratory judgment. As argued by *P. Huber* when declaratory judgment is rendered (and afterwards becomes final) then the arbitral tribunal is bound by it. It means that an arbitral tribunal should not decide on the merits when the arbitral proceedings are declared to be inadmissible. Consequently the arbitral tribunal should also follow court's decision when arbitral proceedings are to be found admissible. If the arbitral tribunal declines its jurisdiction despite the court's decision, the arbitral proceedings should be regarded as being incapable of being performed⁸⁸.

Similarly English Arbitration Act – in section 32 – gives opportunity for application on a preliminary point of jurisdiction under certain conditions. Timing of the challenge is not as essential as in Germany. Nonetheless court will consider objection only if all parties agreed on preliminary court's decision, or if the arbitral tribunal grants permission and a court finds that addressing the question is likely to produce substantial saving in costs.

b. Anti-suit injunctions against arbitration

Typically anti-suit injunctions are explained as court orders that oblige a party not to commence or continue a suit in another forum⁸⁹. They are issued in following

⁸⁸ (Böckstiegel & Kröll, 2007) pp. 154–155.

⁸⁹ Anti-suit injunctions originate from England and are accepted (although in slightly different situations) within common law jurisdictions. As the paper focuses on Europe, only English law will be given as an example.

cases: to prevent concurrent proceeding in a different forum, to prevent enforcement of an award issued by another forum or to avoid re-litigation of an issue that has been decided and become *res iudicata*⁹⁰. It means that court actively participates in protecting efficiency and legitimacy of forum. Indirectly, on the other hand, it constrains judicial proceedings in another sovereign country.

As explained by *M. Stacher* if a court decides to grant anti-suit injunction it has to establish “that: (i) England is the “natural forum” defined as the forum with which the action has the closest connection, (ii) the foreign proceedings prejudices the applicant and (iii) the anti-suit injunction does not deprive the claimant in the foreign court of a legitimate advantage of which it would be unjust to deprive him”⁹¹.

There is a huge discrepancy in opinion between scholars from common law and civil law systems whether anti-suit injunctions use is appropriate. It seems however that their views are aligned with respect to anti-arbitration injunctions⁹².

One can argue that in case of anti-suit injunction against a foreign arbitral tribunal (anti-arbitration injunction) the risk of violating sovereignty of any country does not exist. Nevertheless it is true that: “anti-arbitration injunctions also tamper with the principle of Kompetenz-Kompetenz since they prevent the arbitral tribunal from deciding on its own jurisdiction”⁹³. Consequently *J. Lew* purports that “anti-arbitration injunctions can rarely be justified; they are contrary to fundamental principles of international arbitration law, including the doctrines of competence-competence, separability, and party autonomy”⁹⁴.

It seems that anti-arbitration injunction will also violate requirements set under Art. II of the New York Convention obliging all contracting States to stay proceedings in favor of arbitration. For that reason an anti-arbitration injunction which aims to stop or interfere with an arbitration taking place in another jurisdiction cannot be justified⁹⁵.

IV. Seeking protection for the Arbitral Jurisdiction in the national court

The second case where an interface occurs is when party in arbitration seeks protection for an arbitration agreement and wants to prevent the other party from adjudicating the case before the court in different jurisdiction. Therefore it asks domestic court at the place of the seat of the arbitration to actively support arbitration agreement. In essence the steps that are to be undertaken does not differ from the procedure described in Chapter 2, hence

⁹⁰ (Stacher, 2005) pp. 641–642.

⁹¹ (Stacher, 2005) p. 643.

⁹² (Lew, Control of jurisdiction by injunctions issued by national courts, 2007) p. 207 (“on reviewing past cases, it is clear that anti-arbitration injunctions are used primarily as a tactical tool to stop or delay the arbitration process”) and (Karrer, 2007) p. 229, (Stacher, 2005) p. 654.

⁹³ (Stacher, 2005) p. 653.

⁹⁴ (Lew, Control of jurisdiction by injunctions issued by national courts, 2007) pp. 215–216.

⁹⁵ (Lew, Control of jurisdiction by injunctions issued by national courts, 2007) p. 217–218 also (Stacher, 2005) pp. 652–653.

when one wants to challenge the arbitral jurisdiction⁹⁶. That is why considerations will be mainly focused on anti-suit injunctions in support of arbitration agreement which is a bone of contention in establishing arbitration legal order in Europe⁹⁷.

1. Grounds for protection

Conversely to the ground for challenge a tribunal jurisdiction, party that seeks protection of the arbitral proceedings has to satisfy the court that valid arbitration agreement exist and actions brought in different jurisdiction are of oppressive character.

Depending of the form of the intervention different tests will be introduced in order to justify its use. Essentially rationale behind granting a protection is to serve procedural efficiency by preventing the delay and costs associated with concurrent litigations and contradicting judgments⁹⁸.

2. Time when protection is needed

Support of the court in the place of the seat of the arbitral panel might be required when respondent in arbitration brings the case before a foreign court (foreign to the seat of the arbitration) which might have a jurisdiction as if no arbitration agreement existed. In that case it seems that proceedings commenced in a foreign court will be in breach of contractual promise given by the parties to arbitrate the disputes⁹⁹. As explained by *R.Q. Duarte* “typically the party with the weaker right or no right at all would aim to escape the arbitration agreement by commencing parallel court proceedings in another jurisdiction”¹⁰⁰.

In that point the party adhering to the arbitration agreement might employ counter – measures provided in the place of the seat of arbitration together with challenging jurisdiction of the foreign court where the case was brought.

3. Form of protection

Within three main jurisdictions that are subject of this research only French system does not provide specific order designed for protecting arbitral proceedings. It is simply because legal system is tailored according to the principle of negative competence-competence¹⁰¹. Nonetheless, as argued by *J. Lew*: “it appears to be generally possible for French courts to order a party not to continue proceedings brought before a foreign court”¹⁰². On the other hand German and England provide particular mechanisms that might be used to support arbitration. Firstly, the less invasive declaratory relief will be introduced, secondly anti-suit injunction in support of arbitration.

⁹⁶ The main difference is the party who asks for a support of domestic court.

⁹⁷ Which will be further discussed in chapter IV.

⁹⁸ (Stacher, 2005) p. 641.

⁹⁹ (Fisher, 2010) p. 1.

¹⁰⁰ (Duarte, 2010) p. 1.

¹⁰¹ *Supra* pp. 136–144.

¹⁰² (Lew, Control of jurisdiction by injunctions issued by national courts, 2007) p. 195.

a. Positive declaratory reliefs

As already explained in Chapter II, declaratory relief can be ordered under German Code of Civil Procedure¹⁰³ as well as English Arbitration Act¹⁰⁴. They might be used to not only to challenge but also to ascertain that arbitral tribunal has jurisdiction. Worth to point out is that when arbitral proceedings are being declared admissible then such declaratory order becomes binding also on arbitral tribunal.

When party seeks protection by applying to the national court at the seat of the arbitration for positive declaratory judgments it means that other party either already commenced proceedings before foreign court or there is high chance it will do so. Unfortunately, anticipated effect of such decision might be however unsatisfactory. In international case such determination made by the court would have to be recognized by the court in different jurisdiction and in general the latter has no obligation to do so¹⁰⁵.

b. Anti-suit injunctions in support of an arbitration agreement

Briefly speaking, anti-suit injunctions oblige party not to adjudicate the dispute before other forum that it was agreed upon. Following *J.J. Barceló III*: “Anti-suit injunction constrains judicial proceedings in another sovereign country. It does so indirectly by controlling the actions of private parties. The enjoining court in one country (F1) orders a private litigant before it to suspend or terminate a legal proceeding in another country (F2) – on pain of sanctions that F1 will impose on the private party for disobedience”¹⁰⁶.

In English legal system, an arbitration agreement is treated as a contractual bargain and as *per se* its breach is sufficient to grant an anti-suit injunction. Consequently *G. Fisher* explains that “occasionally a judge may stigmatize a blatant breach of an arbitration agreement as vexatious or oppressive. But it is accepted that the breach does not have to meet any such standard for anti suit injunction to issue”¹⁰⁷.

The use of anti-suit injunctions remains highly controversial¹⁰⁸ to the extent that *S. Schwebel* described it as “one of the gravest problems of contemporary international commercial arbitration”. It seems that no consensus on the topic is to be reached. Whereas injunctions ordered against arbitration ignore the nature of the international arbitration¹⁰⁹

¹⁰³ Art. 1032(2) of German Code of Civil Procedure.

¹⁰⁴ Section 32 of English Arbitration Act.

¹⁰⁵ Further considerations will be made when discussing protection on European level in chapter IV. In a nutshell the question arises would positive declaratory judgment be recognized and enforced in another European Union Member State based on the principle of mutual trust in Brussels Regime?

¹⁰⁶ (*Barceló III, Anti-foreign-suit injunctions to enforce arbitration agreements, 2007*) p. 1.

¹⁰⁷ (*Fisher, 2010*) p. 5.

¹⁰⁸ E.g. (*Stacher, 2005*) p. 654 (“neither anti-arbitration injunctions nor antisuit injunctions in support of an arbitration should be issued”), (*Gaillard, Reflections on the use of anti-suit injunctions in international arbitration, 2006*) p. 215 (“national courts should ensure the lowest level of interference in the arbitration by limiting the possibility for the parties to resort to such devices as anti-suit injunctions”); conversely among others: (*Barceló III, Anti-foreign-suit injunctions to enforce arbitration agreements, 2007*) p. 9 (“in summary I have argued in favor of a pro-arbitration use of anti-foreign-suit injunction”).

¹⁰⁹ (*Lew, Control of jurisdiction by injunctions issued by national courts, 2007*) p. 215.

and that is why it seems sound to disallow it, an anti-suit remedy that protects arbitral proceedings will be sometimes defined as a compatible the system set up by the New York Convention.

Arguments that being raised in favor of the injunctions usually express that the injunctions are particularly effective way of giving force to a principal goal of the New York Convention – ensuring that international arbitration agreements are honored and enforced¹¹⁰. Accordingly *J.J. Barceló* argues that “The [New York] Convention seems either neutral, or, if anything, might be cited in support of a system effecting strong enforcement of an arbitration agreement – given that making arbitration agreement fully enforceable is one of the Conventions principal goals”¹¹¹.

Conversely, interference with foreign legal proceedings – though indirect – is considered as an offence against sovereignty. It does not mean, however, that the parties should not be held to their agreement. It only means that the both courts should be able to determine and enforce that arbitration agreement is valid. Arguably the mutual trust of the signatories of the New York Convention should prevent them from granting the anti-suit injunctions¹¹². Accordingly the domestic courts should refrain from accepting jurisdiction when an arbitration agreement exists. As argued by *E. Gaillard*: “at the stage of the arbitral proceeding, judicial self-restraint is the most appropriate standard [...]”¹¹³. As a consequence domestic court – before an arbitral panel reaches decisions – should only perform *prima facie* test of jurisdiction.

Issuing anti-suit injunctions within the European Union will be subject to further analysis in chapter IV with respect to the emerging principle of the arbitral *lis pendens*. Essentially it became questionable if the anti-suit injunctions in support of arbitration are compatible with the principles of the mutual trust between the national courts in the European single judicial area.

V. Avoiding interference within the European Union

One of the targets of the European Economic Community was to strengthen legal protection of persons therein established and facilitate the process of recognition and enforcement of foreign court decisions. That is why as early as 1968 six Contracting States¹¹⁴ decided to conclude the Convention on Jurisdiction and the Enforcement of Judgments

¹¹⁰ (Barceló III, Anti-foreign-suit injunctions to enforce arbitration agreements, 2007) p. 3.

¹¹¹ (Barceló III, Anti-foreign-suit injunctions to enforce arbitration agreements, 2007) p. 9.

¹¹² (Stacher, 2005) p. 654 (“Furthermore, anti-suit injunctions express (i) that the domestic forum does not believe the foreign forum to be able to decide a dispute fairly and (ii) that it deems the domestic solution to a legal issue to be superior to that of another sovereign. This undertone is particularly irritating in an area where a multilateral treaty, like the New York Convention, exists: Not only does an anti-suit injunction then express skepticism towards the foreign legal regime, but also towards its capacity to perform the treaty in good faith. Yet, as the above analysis has shown, it is rather the forum issuing an anti-suit injunction that interferes with the New York Convention: Such injunctions are not consistent with the way the Convention reflects the relationship among its signatories”).

¹¹³ (Gaillard, Reflections on the use of anti-suit injunctions in international arbitration, 2006) p. 214.

¹¹⁴ Six states being: Belgium, Netherlands, Luxembourg, France, Italy, Germany.

in Civil and Commercial Matters in Brussels (henceforth Brussels Convention). The process has been further continued when European transnational cooperation continued to grow. In consequence in 1988, another Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in Lugano has been introduced (hereafter: Lugano Convention). Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (thereafter: Brussels I Regulation) can be considered as a further step in providing a uniform judicial area within the European Union. The Conventions and Regulation above together establish the Brussels Regime, thus the set of rules regulating jurisdictional issues in European Union.

By the time of concluding the Brussels Convention, it was clear that recognition and enforcement of arbitral awards will be governed by the New York Convention or other international agreements on arbitration¹¹⁵. No one envisaged that interference in the arbitral proceedings might be possible despite the clear-cut exclusion of the arbitration in the text of the Brussels Convention.

In essence three things should be discussed: first, the rationale behind excluding arbitration from the scope of the Brussels Convention (and later Brussels I Regulation); second, the apparent inefficiency of the Brussels Convention (and later Brussels I Regulation) in the specific case of arbitration related domestic courts proceedings; and, finally, solutions for the problem in the latest review of the Brussels I Regulation.

1. Arbitration exception within the Brussels Regime

Article 220 of the Treaty Establishing European Community (thereafter EC Treaty)¹¹⁶ reads that the Member States shall enter into negotiation with a view to securing the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. One might argue that such provision ache for legal framework as Brussels Regime. Despite the above Article 1 of the Brussels Convention states that: this Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. Under Article 1(4) however one can read that The Convention shall not apply to arbitration.

According to Jenard's Report¹¹⁷ from 1968, arbitration should be left out of the scope of the convention for the following reasons: first of all, Council of Europe was working (at that time) on draft of the uniform European arbitration law; second of all, many international agreements on arbitration existed. Authors of the subsequent reports accompanying accession of the United Kingdom and Denmark (i.e. Schlosser Report)¹¹⁸ and Greece

¹¹⁵ (Jenard, 1968) p. 13.

¹¹⁶ It was replaced by Treaty of the European Union. Article 220 was then Art. 293. After Lisbon Treaty provision was repealed.

¹¹⁷ (Jenard, 1968) p. 13.

¹¹⁸ (Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1979) p. 22–23.

(i.e. Evrigenis/Kerameus Report)¹¹⁹ drew the same conclusions. It was decided that the New York Convention serves properly in the process of facilitating recognition and enforcement of the arbitral awards. It has been taken into account that all Member States has been already members of the New York Convention or were preparing to do so in the immediate future¹²⁰. Furthermore the existence of numerous multilateral international treaties in the area of international arbitration was again given as a reason of exclusion¹²¹.

As stated by *A. Savic*: “Right from the beginning, the opinion in Member States was divided on the how broadly the exception ought to be interpreted. While the English largely relied on the opinion that arbitration ought to be excluded in its entirety, the rest thought that only proceedings as part of arbitration should be so”¹²².

Each of the reports considered that the scope of the arbitration exception should include all proceedings concerning arbitration as a principal issue. It was explained by *K. Svobodova* that “Brussels Convention does not cover court proceedings which are ancillary to arbitration proceedings such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on question of substance. A judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings is not covered the Brussels Convention. Nor the Brussels Convention regulates proceedings and decisions concerning applications for the revocation, amendments, recognition and enforcement of arbitral awards. The arbitration exception also applies to court decisions incorporating arbitral awards”¹²³.

2. Unexpected clash(es)

It is important to respect the arbitration exception due to the fact it was designed to enhance the effectiveness of arbitration¹²⁴. Nevertheless it seems that some national measures (i.e. anti-suit injunctions) tailored in support of arbitration conflicts with the principle of mutual trust between the courts in Member States.

Subsequent case law of the ECJ illustrates the problems arising from the interface between the Brussels Regime and arbitration. The *West Tankers* case became a milestone showing the major deficiency of the functioning of the Brussels Regime.

What can be derived from the analysis below is that one had to weigh two principles: the effectiveness of arbitration and the principle of mutual trust between the courts.

¹¹⁹ (Evrigenis & Kerameus, 1986) p. 11.

¹²⁰ (Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1979) p. 22.

¹²¹ (Evrigenis & Kerameus, 1986) p. 11.

¹²² (Savin, 2010) p. 3.

¹²³ (Svobodova, 2008) p. 3.

¹²⁴ It has been argued that Article 71 of the Brussels I Regulation might serve as a safeguard in case when arbitration exception is abandoned (Art. II(3) of the New York Convention will supersede the Brussels I Regulation).

a. Before West Tankers

One of the tactics used in order to deliberately hamper arbitration proceedings – usually called as an “Italian torpedo” – involves deliberately seizing a court in a country well-known for slow proceedings in the hope that the delay and inconvenience, often measured in years, might persuade the other party back to the negotiating table¹²⁵. In that case national mechanisms preventing parallel proceedings might not suffice or might conflict with the Brussels Regime. Four cases (i.e. *Marc Rich*¹²⁶, *Van Uden*¹²⁷, *Erich Gasser*¹²⁸ and *Turner*¹²⁹) noticeably influenced the development of the arbitration system with respect to the parallel arbitration and court proceedings.

In the first case – *Marc Rich*¹³⁰ – the European Court of Justice had to decide a case where the existence of the arbitration agreement was treated as an incidental issue. *C. Ambrose* briefly summarizes the facts of the case as follows: “buyers of Iranian crude oil had commenced arbitration in London after the sellers had commenced proceedings in Italy for damages under the sale contract. The buyers asked the English court to appoint an arbitrator but the court’s power to do so depend on the existence of an arbitration agreement and there was a dispute as to whether an arbitration clause had been incorporated by an exchange of telexes”¹³¹.

The questions raised by English Court of Appeal concerned two issues. First, what is the scope of the arbitration exception (i.e. will it include also appointment of an arbitrator), second how should the court behave when arbitration exception does not apply in the case at hand (e.g. stay proceedings on the grounds that Italian court was first seized *etc.*).

In its decision ECJ concluded that “by excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation”¹³². Accordingly in order to decide which dispute falls within the scope of the Convention one has to examine the subject matter of underlying dispute¹³³.

¹²⁵ (Savin, 2010) p. 4.

¹²⁶ C-190/89 *March Rich & Co AG v. Società Italiana Impianti* [1991] ECR I-3855.

¹²⁷ C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091.

¹²⁸ C-116/02 *Gasser v. MISRAT* [2003] ECR I 1469.

¹²⁹ C-159/02 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565.

¹³⁰ C-190/89 *March Rich & Co AG v. Società Italiana Impianti* [1991] ECR I-3855.

¹³¹ (Ambrose, 2003) pp. 9–10.

¹³² C-190/89 *March Rich & Co AG v. Società Italiana Impianti* [1991] ECR I-3855.

¹³³ C-190/89 *March Rich & Co AG v. Società Italiana Impianti* [1991] ECR I-3855 para. 26.

Alas the ECJ did not address second issue raised by the English Court of Appeal in the *Marc Rich* case– the issue of the parallel proceedings. Nonetheless, as argued by A. Savin, *Marc Rich* case has important consequences for the torpedo action: “the fact that *Marc Rich* excludes arbitration from the scope of Regulation means that arbitration is, as eloquently put by Trevor Hartley, a “torpedo free zone”¹³⁴. Conversely, in consequence of the *Erich Gasser* case¹³⁵, “torpedoes are available in the Brussels I Regulation space”¹³⁶.

Before explaining the outcome of the *Erich Gasser* case, one have to take into account the *Van Uden* decision. In *Van Uden*, the ECJ reiterated its position from *Marc Rich* stating that arbitration should be entirely excluded from the scope of the Brussels Regime whenever the arbitration is primarily and directly a subject matter to the proceedings. Nevertheless if arbitration is only secondary issue of the proceedings, then such proceedings might fall within the scope of the Brussels Regime. It consequently means that not all proceedings which are parallel to the arbitration would be excluded from the scope of the Brussels Regulation¹³⁷. As argued by A. Savin “This may be also seen as the Court’s first attempt to shrink the scope of the exception”¹³⁸.

In *Erich Gasser*, the ECJ had to decide whether a court that has exclusive jurisdiction (arising out of a choice of court clause) but has been seized as a second forum could continue or should stay its proceedings according to Article 21 of the Brussels Convention. The latter Article refers to the principle of *lis pendens* which obliges the court first seized to continue its proceedings and all others to suspend its actions. According to A. Savin, the *lis pendens* rule in a European context is “blind to which court is really appropriate to hear the dispute”¹³⁹.

The ECJ decided that: “Article 21 of the Brussels Convention must be interpreted as meaning that a court second seized whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seized has declared that it has no jurisdiction”¹⁴⁰. What is more, the Court ruled that: “Article 21 of the Brussels I Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seized is established is excessively long”¹⁴¹. Therefore it might trigger torpedo actions that can easily frustrate arbitration proceedings. H. Seriki considers that “this ruling is likely to have a considerable impact throughout the EU because a litigant cannot simply rely on an exclusive jurisdiction clause to ensure a speedy resolution to a dispute and must now consider a pre-emptive strike by commencing proceedings first in a jurisdiction of choice”¹⁴².

¹³⁴ (Savin, 2010) p. 4.

¹³⁵ C-116/02 *Gasser v. MISRAT* [2003] ECR I-1469.

¹³⁶ (Savin, 2010) p. 4.

¹³⁷ (Magnus & Mankowski, 2007) p. 65.

¹³⁸ (Savin, 2010) p. 5.

¹³⁹ (Savin, 2010) p. 4.

¹⁴⁰ C-116/02 *Gasser v. MISRAT* [2003] ECR I-1469.

¹⁴¹ C-116/02 *Gasser v. MISRAT* [2003] ECR I-1469.

¹⁴² (Seriki, 2006) pp. 29–30.

The *Turner* case¹⁴³ – although it did not relate to arbitration¹⁴⁴ – was important to understand the ECJ approach towards anti-suit injunctions. The Court had to answer the question whether the Brussels Convention disallows granting an anti-suit injunction even when a party is acting in bad faith in order to frustrate existing proceedings.

H. Seriki explains that: “The ECJ finally gave a definitive ruling on anti-suit injunctions in *Turner*, holding that an anti-suit injunction was incompatible with the Convention. The ECJ noted that the Convention was based on mutual trust, and that granting an injunction, even if directed at the party commencing the proceedings, undermined the foreign court’s jurisdiction to determine the question”¹⁴⁵. In its decision, the ECJ stressed that an anti-suit injunction is prohibited “even where the party is acting in bad faith with a view to frustrating the existing proceedings”¹⁴⁶. Notwithstanding the ECJ findings, the English courts were still using an anti-suit injunction in support of the arbitration arguing that the consequences of the *Turner* case do not apply to arbitration (due to the arbitration exception)¹⁴⁷.

The ECJ took however a different approach in the famous *West Tankers* case¹⁴⁸.

b. West Tankers and its consequences

Briefly speaking the question brought before the ECJ in *West Tankers* case concerned – similarly as in *Turner* – an anti-suit injunction. The only difference was that in *West Tankers* the injunction was being granted in support of arbitration which – according to the House of Lords – should be covered by the arbitration exception.

In the view of the House of Lords principles set out in *Gasser* and *Turner* case cannot be extended to arbitration as it is excluded from the Brussels I Regulation. Consequently as all arbitration-related issues fall outside the scope of the Brussels I Regulation, the injunction restraining from proceeding before the other forum than arbitration cannot infringe the regulation. Moreover it has been argued that in order to establish mutual trust between the courts of the Member States, set of uniform Community rules has to be introduced – in case of arbitration such system does not exist¹⁴⁹.

The ECJ however ruled that anti-suit injunctions are incompatible with the Brussels regime¹⁵⁰ and in its reasoning concluded that even if proceedings for the grant of an anti-suit

¹⁴³ C-159/02 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565.

¹⁴⁴ As it concerned an exclusive jurisdiction clause and not an arbitration agreement.

¹⁴⁵ (*Seriki*, 2006) pp. 28–29.

¹⁴⁶ C-159/02 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565.

¹⁴⁷ (*Seriki*, 2006) pp. 35–37 also (*Savin*, 2010) p. 5 and (*Svobodova*, 2008) p. 11.

¹⁴⁸ C-185/07 *Allianz SpA v. West Tankers Inc.* [2009] ECR I-00663.

¹⁴⁹ C-185/07 *Allianz SpA v. West Tankers Inc.* [2009] ECR I-00663 paras. 15–17; In conclusion the House of Lords introduced argument that anti-suit injunction is “a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore”.

¹⁵⁰ C-185/07 *Allianz SpA v. West Tankers Inc.* [2009] ECR I-00663 para. 35.

injunction fall outside the scope of the Brussels I Regulation *per se*, foreign proceedings on the merits do not¹⁵¹. For that reason, it is irrelevant whether anti-suit proceedings are within the scope of the Brussels I Regulation as it is exclusively for the court seized in the matter falling within the scope of the Brussels I Regulation to decide on its own jurisdiction¹⁵².

The legal implications of this decision became particularly problematic in case of proceedings parallel to torpedo actions. As argued by *P. Santomauro*: “It is indeed perceived that «torpedoing» might have become more attractive after *West Tankers*. The result is that the existence of the arbitration agreement may be judged in parallel by two bodies, with possible implications at the enforcement stage”¹⁵³. This occurred in the *National Navigation* case¹⁵⁴. It appeared that by applying *West Tankers*’ reasoning in the stage of recognition of a declaratory judgment, a severe imbalance of power is possible: a positive declaratory judgment on the validity of an arbitration agreement made by the court at the seat of the arbitral tribunal will not benefit from the Brussels I Regulation recognition mechanism¹⁵⁵. Conversely, a negative decision in the same matter rendered by the court outside the seat will be binding on the court of the seat¹⁵⁶. As underlined by *M. Illmer*: “the lack of reciprocity in relation to recognition makes torpedo actions very attractive”. If the party aiming at frustrating the arbitration agreement manages to obtain an “early” decision on the validity of the arbitration agreement by the torpedo court before the seat court delivers its decision, as happened in *National Navigation* case, the seat court has to recognize the torpedo court decision”¹⁵⁷.

All in all, the present situation calls for change. The question arises what should be done to prevent parallel proceedings if the legal safeguards such as the exclusive arbitral jurisdiction are not respected and others such as the national countermeasures are disallowed or ineffective.

3. Emerging solution – review of the Brussels I Regulation

What can be derived from the analysis of abovementioned cases is that the ECJ had to weigh two principles: effectiveness of arbitration and the principle of mutual trust between the courts. Its choice is not surprising, but problematic¹⁵⁸.

As a result, arbitration system in Europe which worked accurately based on the principle of prevailing competence of the arbitral tribunal, now seems to ache for some form

¹⁵¹ C-185/07 Allianz SpA v. West Tankers Inc. [2009] ECR I-00663 paras. 23–24.

¹⁵² C-185/07 Allianz SpA v. West Tankers Inc. [2009] ECR I-00663 paras. 24–26.

¹⁵³ (Santomauro, 2010) p. 322.

¹⁵⁴ National Navigation Co. v. Endesa Generacion SA, [2009] EWCA (Civ) 1397.

¹⁵⁵ In that case court of the seat of the arbitral tribunal will be seized in order to decide that an arbitration agreement is valid. By recognizing validity of arbitration agreement such decision will automatically fall within the scope of arbitration exclusion. In consequence the foreign court (i.e. foreign to the seat of arbitration) will not be bound by the findings of the court in the seat.

¹⁵⁶ Action is brought before foreign court (i.e. foreign to the seat of arbitration) which frustrates contractual bargain to arbitrate. When foreign court declares that an arbitration agreement is invalid or did not exist, it will accordingly decide that dispute matter falls within the scope of Brussels I Regulation. It means that such ruling will be binding on court of the seat.

¹⁵⁷ (Illmer, 2011) p. 9.

¹⁵⁸ Some authors claim that application of the principle of the mutual trust was too rigid e.g. (Wolff, 2009).

of arbitral *lis pendens* which will prevent using oppressive but legitimate tactics based on the underlying principle of mutual trust.

Following remarks will be divided into three parts. First briefly explains conclusions arising out of the Heidelberg Report which called for dropping an arbitral exception in its entirety. Subsequent consist of the analysis of the Green Paper and Consultation process. Finally amended European Commission's Proposal will be scrutinized.

a. Heidelberg Report

Report on the application of Brussels I Regulation in the Members States was prepared on 2007 by the German scholars Hess, Pfeiffer and Schlosser at the request of the European Commission. It can be concluded from it that arbitration should be within the scope of the Brussels Regime¹⁵⁹. In that case all arbitration-related proceedings of the national court would be decided upon the spirit of the Brussels I Regulation. Consequently it means that the decisions in such proceedings would have been recognized and enforced throughout the European Union.

As far as the problem of parallel proceedings is concerned, the Reporters offered an additional head of jurisdiction in Article 22 of the Brussels I Regulation. Inspired by *H. van Houtte's* suggestions¹⁶⁰ it was decided that the court at the seat of the arbitral panel should have an exclusive jurisdiction over any ancillary proceedings. As argued: "The advantage of this proposal is to exclude the competition between different state courts in relation to the same arbitration proceedings. Accordingly, the sound exercise of judicial power within the European Judicial Area would be reinforced"¹⁶¹.

Additionally, all proceedings in other Members States shall be stayed whenever proceedings for a declaratory judgment regarding the validity of the arbitration agreement are instituted before the court in the place of the seat of the arbitral tribunal¹⁶². It means that in order to deal with oppressive tactics (i.e. torpedo actions), one has to bring the case before the court of the seat of the arbitral tribunal which then will have priority to examine the validity, even if not first seized.

b. Green Paper and consultation process

When drafting its own Report¹⁶³ and Green Paper¹⁶⁴ in 2009, the European Commission utilized conclusions of the Heidelberg Report. The report explains what areas are particularly problematic as far as interface between Brussels I Regulation and arbitration

¹⁵⁹ (Hess, Pfeiffer, & Schlosser, 2007) pp. 54–63; In that way Reporters disregarded recommendations arising out of the national reports which essentially found extension of jurisdiction undesirable (Hess, Pfeiffer, & Schlosser, 2007) pp. 52–54.

¹⁶⁰ (van Houtte, Why not include arbitration in the Brussels Jurisdiction Regulation, 2005) also (van Houtte, Towards a European Arbitration Regime?, 2007).

¹⁶¹ (Hess, Pfeiffer, & Schlosser, 2007) p. 59.

¹⁶² (Hess, Pfeiffer, & Schlosser, 2007) p. 58.

¹⁶³ (Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 2009).

¹⁶⁴ (Green Paper, 2009).

is concerned. Report summarizes that although the New York Convention operates satisfactorily, it does not prevent the parallel arbitration and court proceedings from occurring¹⁶⁵. The Commission repeated its reservation in Green Paper. Although it acknowledges satisfactory operation of the New York Convention, Report reads that: “This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings”¹⁶⁶. The Commission offered deleting (at least partially) the arbitration exception. It was argued that it will facilitate the interface of the proceedings. Additionally, “as a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties”¹⁶⁷. Consequently the Commission left the question open what action should be undertaken to ensure good coordination between judicial and arbitration proceedings at the Community level.

Deleting of the arbitration exception in total was by and large rejected in the consultation process as it may cause the Contracting States to be in breach of their obligations under the New York Convention¹⁶⁸. Opinions were not uniform, however with respect to the proposed partial deletion designed to prevent the parallel proceedings from occurring. On one hand Max Planck Institute researchers approved proposal of the mandatory stay of the proceedings on the merits before a Member State court once a court in the Member State at the place (or seat) of arbitration is seized for declaratory relief in respect of the existence, validity or scope of the arbitration agreement¹⁶⁹. Conversely *E. Gaillard* indicated that the European Commission proposal to give to the court in the seat of arbitration exclusive jurisdiction on deciding the existence, validity and scope of an arbitration agreement will make it a precondition for any arbitration proceedings in EU. Accordingly it will contradict the underlying principles of modern international arbitration¹⁷⁰.

¹⁶⁵ (Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 2009) p. 10.

¹⁶⁶ (Green Paper, 2009) p. 8.

¹⁶⁷ (Green Paper, 2009) pp. 8-9.

¹⁶⁸ (Submission of the Association for International Arbitration in relation to the Green Paper released in connection with the review of Regulation 44/2001, 2009) p. 2 also (Response to the issue raised in the Green Paper on the Regulation, 2009) p. 32 and (Gaillard, Comment on the observations and propositions made by the European Commission in its Green Paper, 2009) p. 3 amongst others.

¹⁶⁹ (Submission to the European Commission by Martin Illmer and Bern Steinbruck regarding the Green Paper COM (2009) 175 final, 2009) p. 6.

¹⁷⁰ (Gaillard, Comment on the observations and propositions made by the European Commission in its Green Paper, 2009) pp. 1-2: (The Green Paper suggestion to give “priority to the courts of the Member State where arbitration takes place to decide on the existence, validity and scope of an arbitration agreement is inopportune. It means that, in practice, applying to courts at the seat of arbitration will become prerequisite to any arbitration proceeding within the European Union. Any party initiating arbitration will need to seek a declaratory judgment at the seat of arbitration certifying the validity of the arbitration agreement – assuming such action is available, which is not the case in many EU Member States today, in order to preclude any parallel action from the defendant at the courts of its domicile”).

Including arbitration in any form to the Brussels Regime was also strongly opposed by the European Parliament in its resolution of 7 September 2010 on the implementation and review of the Brussels I Regulation¹⁷¹. Instead it has been suggested to restore the situation before *West Tankers*, to make the arbitration exception absolute. Essentially the European Parliament's intention was to ensure that all the national mechanisms remain at the parties' disposal. Consequently the European Commission continued to seek a solution for the deficiency surfaced in the *West Tankers*.

c. Brussels I Regulation Revisited

In 2010, The Commission decided to appoint a group of experts in order to solve the parallel proceedings problem. What was offered is an innovative but complex mechanism similar to *lis pendens*. The Commission in its explanatory memorandum clarifies that the modification will prevent parallel arbitration and court proceedings, and eliminate the incentive for abusive litigation tactics¹⁷².

Discussed provision – established under Article 29(4) of the reviewed Brussels I Regulation – reads that: “where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member state where the seat of the arbitration is located or the arbitral tribunal have been seized of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that agreement. This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes. Where the existence, validity or effects of the arbitration agreement are established, the court seized shall decline jurisdiction”.

As explained by one of the Commission's expert – *M. Illmer* – the mechanism is two-folded: first it requires the party to challenge jurisdiction of the court of another Member State (other than the court at the seat of the arbitration) on the basis of alleged arbitration agreement; secondly the party had to seize an arbitral tribunal or the court at the seat of the arbitration. When both prerequisites are fulfilled, then the *lis pendens* mechanism will be triggered¹⁷³. Consequently – regardless of timing – an arbitral tribunal or the court at the seat of arbitration will be exclusively competent to decide on the validity of the arbitration agreement and a court in another Member State will have to stay the proceedings or even decline jurisdiction when validity of an arbitration agreement is established.

At present it is difficult to assess the outcome of the emerging mechanism. What is considered to be problematic is the scenario when parties did not agree on the seat of the arbitration or whether the new definition of the seized arbitral tribunal suffices.

¹⁷¹ European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)).

¹⁷² (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, 2010) p. 9.

¹⁷³ (Illmer, Brussels I and Arbitration revisited – The European Commission's Proposal COM (2010) 748 final, 2011) p. 16.

Nonetheless, the simple fact of acknowledging the seizure of an arbitral tribunal as a trigger for the arbitral *lis pendens* mechanism makes the latest proposal more appropriate than the previous one as it preserves the principle of competence-competence.

VI. Concluding remarks

Analysis above gave the brief summary of the principles limiting interface between the court and arbitral proceedings. As a consequence of the exclusive jurisdiction of the arbitral tribunal concurrent proceedings should not occur. However if it does, national legal systems introduce exceptional legal features limiting interference with arbitration proceedings to the minimum. In that way they (i.e. legal systems) are able to compete with each other and attract the prospective clients of an arbitration industry.

All in all, the principle of the competence-competence either in its positive or negative version should prevail in order to enhance efficiency of the arbitration. It is very important for arbitration users to know that an exclusive jurisdiction of an arbitral tribunal is respected across the borders and the arbitral proceedings can be conducted without any frustration. As the fundamental principles of arbitration are established on national level and supported by the New York Convention, it seems unlikely to assure it again on the European level. Nonetheless it is clear that the process of harmonizing procedural law under the Brussels Regime influences arbitration, even if it is treated by the Member States as an external invasion against which national mechanism should be protected in order to work properly.

The implications of the *West Tankers* are very unfortunate. As rightly pointed out by C. Reghizzi, the ECJ in *West Tankers*, by upholding the principle of the mutual trust “added a further legal effect thereto: the national courts of a Member State have to trust the capacity of the courts of the other Member State to decide on their own jurisdiction, even when the latter is governed by rules coming from a source outside the Community (such as the New York Convention)”¹⁷⁴. Such consequences are so far reaching that introducing new mechanism in the Brussels Regime seems necessary.

The most recent proposal of the Brussels I Regulation constitutes definite improvement in comparison to its latter version (i.e. proposal from 2009). Its fundamental advantage is that it takes into account consultation process initiated by the European Commission in 2009. One of the European Commission experts argues that revisited Brussels I Regulation deserves strong support as it is problem oriented, enhances efficiency of an arbitration agreement, preserves parallel proceedings from occurring and yet leaves the place for the competition between the arbitration venues within the European Union¹⁷⁵. Others disagree¹⁷⁶. It is true however that it seeks for compromise that will pay due respect to the nature of the international commercial arbitration and the principles establishing single judicial area within the European Union.

¹⁷⁴ (Reghizzi, 2009) p. 446.

¹⁷⁵ (Illmer, Brussels I and Arbitration revisited – The European Commission’s Proposal COM (2010) 748 final, 2011) p. 26.

¹⁷⁶ (Dickinson, 2011) p. 285.

Essentially it should be concluded that European *lis pendens arbitralis* will emerge in order to keep up with the ECJ decisions and provide the parties with support to their choices in arbitration agreement. Designing an arbitral *lis pendens* is necessary only because of the development of the principle of mutual trust and its clash with the effectiveness of arbitration.

The new principle of the *lis pendens arbitralis* can be definitely characterized as a problem oriented. It is however not yet clear what its consequences will be. For example what would be the position of an arbitral tribunal within the Brussels Regime? Would it be obliged to establish its own jurisdiction within the certain time frame? What happens if a seat of the arbitration was not agreed upon? How duty to stay the proceedings according to Article 29(4) of the reviewed Brussels I Regulation interacts with duty to refer the parties to arbitration under Article II(3) of the New York Convention. This question among the others aches for further research.

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