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The New Brussels I Regime and Arbitration – Finding an Interface

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Abstract: As the revision process of Brussels I Regime has focused on the abolition of exequatur procedures, the interface between the Regulation and arbitration has been mostly a side note. Regardless of the fact that the systems of the Brussels I Regime and arbitration are two separate autonomous systems, overlapping issues arise. These interfaces have been discussed in the case-law of ECJ and later during the revision process. In the end, recitals elaborating the interface were added to the preamble of the Regulation, but no changes to the arbitration exclusion were introduced. The recital 12 aims to clarify how the arbitration exclusion adopted in the Regulation should be interpreted in the future. However, future case-law of ECJ is elemental to define the full meaning of the recitals.

KEYWORDS: • Brussels I • arbitration • New York Convention • lis pendens • parallel proceedings

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1 Introduction - best of both worlds?

1.1 Arbitration in Revision of Brussels I Regulation

The revision process of the Brussels I Regime has been a multifaceted legislative project. The revision has focused on the abolition of *exequatur*, facilitation of prorogation agreements, and change of *lis pendens* effects in situations of exclusive jurisdiction to address the issue of “Italian torpedoes”. In addition to these, the Brussels I Regulation (Recast) (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) has sought to clarify several provisions in the Brussels I Regime. One of the side notes of this extensive project was to alleviate the difficulties caused by the interface between the Brussels I Regime and the system of arbitration.

Originally, arbitration was excluded from the scope of the 1968 Brussels Convention (Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters). This exclusion was adopted later on in the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter: old) as the exclusion had not been deemed problematic. In the field of international procedural law, this starting point could be considered almost self-evident as systems of civil procedure and arbitration are perceived distinctively separate and independent from each other. Both systems have similar objectives of alleviating dispute resolution, recognition and enforcement of decisions in civil and commercial disputes, but the evolution of these regimes, the separate doctrines and instruments have led to a division of labour between the two systems which have been regarded unproblematic for the most part.

However, the exclusion of arbitration from the scope of the Brussels I Regime turned out to be less explicit than originally expected as collisions between the two systems started to emerge in case-law. Thus, the different options for addressing these interface issues were discussed in the revision process of the new Brussels Regulation. It should be noted that the starting point for the revision process was specifically to address the interface, not to diminish the role of arbitration within the EU.

This article strives for giving a general view how the interface between civil procedure and arbitration got to be a controversial issue in the revision process and how the European legislator sought to address problems arising from this interface. First, the two systems and their main characteristics are discussed in order to depict how the systems overlap and in which areas collisions first started to emerge. Second, attention is drawn to the case-law of the CJEU, which further elaborated the extent of the exclusion and its legal effects. Third, we focus on the revision process and how interface issues were recognized and discussed during the legislative process and what solutions were suggested to be implemented in the Brussels I Regulation (Recast). Finally, we will offer some concluding remarks on the newly emerging legal *status quo*

concerning the interface between civil procedure and arbitration and briefly address the question what remains to be resolved.

1.2 Systems of civil procedure and arbitration

As stated above, arbitration and European civil procedure are two separate and autonomous systems for independent fields of dispute resolution. The European system of recognition and enforcement is a system of coordination between various state courts whereas international arbitration is a private system of dispute resolution operating with the support of various state courts. These starting points are obviously essential to the nature of the systems.

Despite their differences, as systems of recognition and enforcement, they have a lot in common, too, especially on a general level of objectives. The European system of recognition and enforcement of decisions in civil and commercial disputes enhances, or better, enables the free movement of court decisions and free circulation of judgments in the European area. So the key to understanding it is the idea of trust in courts of other Member States. As in any system of recognition, trust is the key element also in the New York Convention¹ and the system of international recognition and enforcement of arbitral awards created by the convention. In addition to the pure duty to recognize and enforce, the New York Convention also sets the framework for key elements of arbitration doctrine and especially the key elements of due process in arbitration (Kurkela, Turunen, 2010: 3–12). Once these key elements have been guaranteed, the states, respectively, agree to recognize and enforce arbitral awards made in another contracting state, and the enforcement can only be rejected on the grounds set in the Convention. So both systems, the New York Convention and the Brussels I Regime are built around the trust in the system of another state to lead to a result which can be recognized by the national system of the country in question.

However, despite having the idea of trust in common, the history, purpose and territorial scope of the two systems is different. The system of arbitration created by the New York Convention is global and based on an autonomous Convention, whereas the European system is built on the European Union and the EU legal system. The Brussels I Regime is clearly a part of the European project whereas the New York Convention and the system of recognition and enforcement of arbitral awards is a project of the international commercial and arbitration communities. The Brussels I Regime works within the state court system and the bigger European idea to provide for a European judicial area whereas the New York Convention is basically securing the autonomy of private dispute resolution (see also Knuts, 2010: 457–458; Bertoli, 2014: 277–278).

The starting point for coordinating the coexistence of these two systems is, as already stated above that arbitration is excluded from the scope of the Brussels I Regime. The rationale is said to be that recognition and enforcement is governed by the New York Convention and all Member States are parties to that convention (See Mourre, A. and Vagenheim, 2009: 75). This sounds simple but the two parallel systems lead to problems. If the systems could be completely autonomous, there would probably be less

friction. However, arbitration and the system of arbitration relies on the support of state courts, in many issues during the procedure but also eventually in the execution of awards. Also, at times it needs to be decided in which system the parties have to solve their disputes and how the results, awards and judgments are then handled.

1.3 Intersections and collision between the systems

The interfaces between the systems are, firstly, evident in questions of jurisdiction of a state court in cases where there is an arbitration agreement. Secondly, intersections become visible in questions concerning arbitration-related ancillary issues in courts, such as the appointment of arbitrators and the validity or existence of an arbitration agreement and also protective measures. Thirdly, the overlapping systems have to be dealt with in cases of recognition and enforcement of awards and judgments when they relate to the same issues as well as decisions concerning setting aside the arbitral award.

Chronologically the first area of overlap is the validity and existence of an arbitration agreement, which may come up even before any arbitration proceedings have been commenced. Concretely, this happens when proceedings are initiated in a state court and the respondent claims that the claim is covered by an arbitration agreement. The jurisdiction of courts in matters concerning the validity of the arbitration agreement is not regulated in the Brussels I Regime. Also, there are no common rules governing the validity of arbitration agreements which easily leads to conflicting decisions on the validity due to different applicable laws. Depending on the interpretation of the Brussels I Regime there might be situations in which a court has investigated and decided a case despite a jurisdictional claim based on an arbitration agreement or declined jurisdiction due to a claim that the issue falls under an arbitration agreement resulting in conflicting judgments - which may or may not circulate. It is clear, however, that due to the arbitration exception judgments purely on the validity or enforceability of arbitration agreements do not fall under the Brussels I Regulation if the question is not merely an incidental question (see Bertoli, 2014: 281).

Arbitration does not function without court support. The national courts are needed for various measures ancillary to arbitration. These include measures relating to the appointment, dismissal and replacement of arbitrators, measures related to receiving evidence and the granting of protective measures. The jurisdiction regarding ancillary measures is not regulated in the Brussels I Regime but interface problems do occur (see Bertoli, 2014: 281).

The most obvious collisions are created by circulating judgments in cases in which there is an arbitration agreement or possibly even an arbitral award. Also, challenging arbitral awards is not governed by the Brussels I Regime. Further, there are no rules governing the *lis pendens* between arbitration and parallel court proceedings relating to the validity or enforceability of arbitration agreements or to the substance of the dispute. Thus, the Brussels I Regime is not able to prevent parallel proceedings relating to arbitration agreements or to the substance of the dispute, or to solve the problem of conflicts of decisions rendered in parallel court and arbitral proceedings at the

enforcement stage (see Bertoli, 2014: 281).

2 Addressing collisions in case-law

2.1 From exclusion to interface

The case-law of the Court of Justice of the European Union (before Court of Justice; hereinafter: CJEU) addresses points of collision that have arisen in the application of the Brussels I Regime. Although a part of the cases originates from the time the Brussels Convention was still in force, the doctrines developed have been upheld in the interpretation of the Brussels I Regulation (old). Most of the case-law deals with so-called torpedo actions.² It is typical for these cases that the jurisdiction of an arbitral tribunal located in one Member State of the European Union is challenged before the national court of another Member State of the European Union on the grounds that no valid arbitration agreement exists. The respondent in the arbitration proceedings typically files an action with a national court and disputes the validity of the arbitration agreement. Such action, if successful, may “sink” the seat of arbitration and therefore work as a torpedo to the seat of arbitration. But the significance goes beyond this. The case-law developed challenges the principle of competence-competence of the arbitral tribunal. The question that arises in this context is, whether and to what extent this is possible?

In the following, four different cases will be reviewed. The first three cases give an account of the doctrine developed by the CJEU in relation to arbitration. In the cases *Marc Rich*³ and *Van Uden*⁴ the ECJ specifies the scope of the exclusion and sets the basis for its groundbreaking decision in *West Tankers*.⁵ The fourth case shows how this doctrine has been applied by the courts of England.

Marc Rich concerned a dispute regarding the contamination of crude oil purchased by the Swiss company Marc Rich and Co. AG. The Italian company Società Italiana Impianti PA, the seller of the crude oil, initiated proceedings in Italy for a declaration that the company was not liable to Marc Rich and Co. AG. At the same time, Marc Rich initiated arbitration proceedings in London, in which Impianti refused to take part. As a consequence, Marc Rich commenced proceedings in the English Commercial Court for the appointment of an arbitrator. Impianti disputed the validity of the arbitration agreement before the Commercial Court, while Marc Rich relying on the arbitration agreement challenged the jurisdiction of the Italian court. Impianti contended that the real dispute between the parties concerned the question whether or not the contract contained an arbitration clause, and that the dispute, therefore, fell within the scope of the Convention and, thus, was to be adjudicated in Italy. It argued further that the arbitration exclusion of the Brussels Convention would only apply to the arbitration proceedings as such, and not to related proceedings before the national courts. Marc Rich, on the other hand, took the view that the dispute fell outside the scope of the Brussels Convention in virtue of its exclusion regarding arbitration. The Court of Appeal of England and Wales referred the question of whether or not the proceedings in England came within the scope of the Brussels Convention to the CJEU.

The CJEU first examined whether the exclusion of arbitration from the scope of the Brussels Convention also extended to arbitration-related proceedings before national courts such as the appointment of an arbitrator. It found that the appointment of an arbitrator by a national court was part of the process of commencing arbitration proceedings and therefore caught by the exclusion. Adopting a broad definition of arbitration the CJEU held that not only the arbitration proceedings as such but arbitration in its entirety was excluded from the scope of application of the Brussels Convention.

The CJEU further examined, whether the dispute regarding the validity of the arbitration agreement brought the dispute within the scope of the Convention. The CJEU held that regard must be had to the subject matter of the main dispute. If by virtue of its subject matter, such as the appointment of an arbitrator, a dispute fell outside the scope of the Convention, the existence of a preliminary question did not justify the application of the Convention. The court noted that it would be contrary to the principle of legal certainty, if the exclusion varied according to the existence of a preliminary issue, such as the validity of an arbitration agreement.⁶ It found that arbitration in its entirety, including legal proceedings before national courts, was exempt from the application of the Convention if the main subject-matter was arbitration.

The case *Van Uden* concerned protective measures and the question whether a national court had jurisdiction to order interim measures if the dispute regarding the substance of the case was subject to arbitration. The question was raised in the context of a dispute between Van Uden Maritime BV and the German Company (Deco Line) regarding the payment of debts. Van Uden had initiated arbitration proceedings in the Netherlands regarding the payment of invoices. Van Uden also applied to the District Court in Rotterdam for interim relief and requested an order against Deco-Line. Deco Line did not dispute the validity of the arbitration agreement, but contested the jurisdiction of the Netherland Court to grant interim relief. It claimed that it could only be sued in Germany, where it had its seat. The Netherland Court referred the case to the CJEU in order to determine, whether the state court had jurisdiction to issue protective measures, even though an arbitral tribunal had jurisdiction as to the substance of the matter.

The CJEU noted that a court having jurisdiction in the substance of the case had in general also jurisdiction to order provisional or protective measures. In addition, a state court might order interim measures under Article 24⁷ of the Convention. This provision added a jurisdiction in respect of provisional or protective measures, where the court of another Member State had jurisdiction as to the substance of the case. As there was an arbitration agreement, there was no state court that had jurisdiction as regards the substance of the dispute. Consequently, only Article 24 would confer a state court the jurisdiction to grant interim measures. The defendant contended that interim measures fell outside the scope of the Convention as they were bound to the subject matter and ancillary to arbitration. The claimant argued that the existence of an arbitration clause did not have the effect of excluding an application for interim measures from the scope of the Brussels Convention.

The CJEU held that interim measures were not ancillary to arbitration, but ordered in parallel to such proceedings. These measures did not concern arbitration as such, but served the protection of wider rights. Their place in the Convention was thus “determined not by their own nature but by the nature of the rights which they serve to protect.”⁸ The CJEU upheld its doctrine regarding the subject matter of the dispute. It held that the Convention was applicable, where the subject matter of an application for provisional measures fell within the scope *ratione materiae* of the Convention. Article 24 of the Convention, therefore, conferred jurisdiction on the court hearing the application even where the proceedings regarding the substance of the case were to be conducted before arbitrators.

This doctrine - that the application of the subject matter determined the applicability of the Brussels I Regime - was confirmed in the *West Tankers* case. This case concerned a dispute regarding damages caused by a vessel owned by West Tankers and chartered by Erg Petroli. The charter-party provided for arbitration in London. Erg obtained compensation from its insurers up to the insured limit and initiated arbitration against West Tankers for the excess. The insurers initiated proceedings before the state court (Tribunale de Siracusa) in Italy for recovery of the sums paid to Erg. West Tankers disputed the jurisdiction of the Tribunale de Siracusa on the basis of the existence of the arbitration agreement. In addition, West Tankers initiated parallel proceedings before the English Commercial Court requesting a) declaration that the dispute between West Tankers and the insurers was to be settled by arbitration and b) an anti-suit injunction order that would prevent the insurers from pursuing proceedings in Italy.⁹ On appeal, the House of Lords referred the case to the ECJ for a preliminary ruling.

The question submitted to the CJEU in *West Tankers* was whether it was compatible with the old Brussels I Regulation to issue anti-suit injunctions to battle parallel proceedings or whether these injunctions were incompatible with EU law. According to the doctrine of mutual trust that had been developed by the CJEU in the case *Gasser*¹⁰ and *Turner*¹¹ anti-suit injunction that restrained the parties from initiating proceedings in another Member State were not compatible with the system established by the Brussels I Regime – at least in cases where two state courts were involved. This was because the Brussels I Regime set out a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States and the national courts must trust each other that these rules would be applied correctly by the court of another Member State. The question was, whether this reasoning applied also to arbitration, which was exempted from the application of the Brussels I Regulation (old).

The CJEU reiterated that the subject matter of the dispute and more specifically the nature of the rights which the proceedings in question served to protect determined the applicability of the Brussels Regulation. If the subject-matter of the dispute came within the scope of the Brussels I Regulation also a preliminary issue concerning the applicability, including the validity and existence of an arbitration agreement fell within the scope of the Brussels I Regulation. The court held that the proceedings, such as those in the main proceedings, which led to the making of the anti-suit injunction, could, therefore, not come within the scope of the old Brussels I Regulation. However,

these proceedings might have consequences that undermine the effectiveness of the Brussels I Regulation. This is the case where “*such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it [by the Brussels I Regulation]*”.¹² The CJEU found that the subject matter of the proceedings before the Italian court concerned a claim for damages and fell therefore within the scope of the Regulation. As a consequence also the preliminary issue concerning the applicability of an arbitration agreement, including its validity fell within the scope of the Regulation. The granting of an anti-suit injunction would prevent a court that would normally have jurisdiction from ruling on its own jurisdiction under the Brussels Regulation. Referring to the cases in *Gasser* and *Turner* and the principle of trust, the CJEU held that once seized the Italian court had the power to determine whether it had jurisdiction to resolve the dispute and to decide on the application of an arbitration agreement as a preliminary question. It added that anti-suit injunctions would deprive the plaintiff who considered the arbitration agreement invalid of his right to access to justice. In the substance, the CJEU decided that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State that had jurisdiction under the regulation was incompatible with the system established by the old Brussels I Regulation.

After the judgment in *West Tankers* it became clear that the issuing of anti-suit injunctions was contrary to the Brussels I Regulation if it prevented the national court of a Member State from determining its own jurisdiction in respect of a subject matter falling within the scope of the Brussels Regulation. It remained, however, open, whether a decision of a national court on the validity of an arbitration agreement was a judgment within the Brussels I Regime and enforceable as such.¹³

This question was addressed by English courts in the case *National Navigation Co v Endesa Generacion SA*.¹⁴ In this case, the Court of Appeal of England and Wales considered whether a judgment of another Member State that fell within the Brussels I Regime must be recognized in English Court proceedings which themselves fell outside the regime by virtue of the arbitration exception. The case illustrates how *West Tankers* was interpreted and its application extended by the national courts.

The main facts of the case were as follows: National Navigation Co, an English company, signed a bill of lading with Endesa Generación S.A. (“Endesa”), a Spanish company pertaining to the delivery of a cargo of coal onboard a vessel *Wadi Sudr*. The delivery of the coal was delayed and a dispute arose. Endesa initiated court proceedings before the Mercantile Court of Almería, Spain, seeking damages for late delivery under the bill of lading. National Navigation initiated proceedings in the English Commercial Court, seeking a declaration of non-liability. National Navigation objected to the jurisdiction of the Spanish court, relying on, *inter alia*, an arbitration clause contained in a charter-party that it alleged was incorporated into the bill of lading. Endesa denied that it was bound by the charter-party and the arbitration clause.

The Almeria court held that no arbitration clause was incorporated into the contract and refused to decline jurisdiction on that basis. National Navigation initiated arbitration proceedings in London seeking a declaration that the arbitration clause was

incorporated and the granting of an anti-suit injunction. Endesa asserted in the Commercial Court proceedings that the court was bound by the decision of the Spanish court. The Commercial Court dismissed the application for an anti-suit injunction. It also accepted that the judgment of the Spanish Court was a regulation judgment, but found that it was not binding in proceedings which were, themselves, excluded from the scope of the Brussels Regulation by virtue of the arbitration exception. However, this view was not maintained by the Court of Appeal. The Court of Appeal found that the decision of the Spanish court was *res judicata* in England, with respect to both court proceedings and arbitral proceedings. Therefore, the English courts could not re-examine the issue of applicability of the arbitration clause. The National Navigation case, therefore, demonstrated that a judgment ruling on the preliminary issue of the validity and existence of an arbitration agreement rendered by the court of one Member State was – under English law - recognized and enforced under the rules of the Brussels Regulation.

The development of the case-law and in particular the judgment in the National Navigation case showed that the two regimes were interwoven despite the explicit arbitration exclusion of the Brussels I Regulation. The development gave rise to uncertainty on the meaning and effect of the arbitration exclusion. It was feared that the case-law would trigger a rush to the courts, parallel proceedings and contradictory judgments. The arbitration community saw the European arbitration market endangered.¹⁵

3 Debate on revision

The debate whether and how the interface should be addressed has been mostly a balancing act between preserving the *status quo* and solving the emerged overlap areas. To put it concretely, the discussion has focused on the question whether new provisions for this purpose should be introduced or not.

3.1 The Heidelberg Report

The discussion on possible needs for revision of the interface between the Brussels I Regime and arbitration began in 2007 when the so-called Heidelberg Report was introduced.¹⁶ The work on the report began already in 2005, and the report was finalised before the decision in the West Tankers case in the CJEU.

The extensive report took notice of the collision points between the systems and depicted the overall picture of the *status quo*. The report highlighted that the New York Convention was considered to be a well-functioning international instrument which was also adopted as a starting point when the Brussels Convention was first negotiated in the 1960s. Although the EC Treaty of 1958 explicitly enabled regulating arbitration, for these historical reasons the arbitration exclusion was included in the convention (Heidelberg Report, 2007: 50.). In addition to this, the exclusion followed also from the European Council's consideration that a European parallel instrument for arbitral

awards could be introduced to further facilitate free movement of awards within the EU. However, such instrument was never adopted.

As the Heidelberg Report points out, the national reports showed that the exclusion of arbitration from the scope of the Regulation was the predominant opinion. According to the UK national report, an extension of the scope could undermine the functioning of the New York Convention. Also, the national report of France concluded that an extension would not further facilitate the enforcement of arbitral awards. Other national reports voiced similar opinions (Heidelberg Report, 2007: 51–54).

The Heidelberg Report recognized several overlap areas where the Brussels I Regime and arbitration regime collided. These collisions include a) enforcement of a void or valid arbitration agreement including declaratory judgments on the validity or arbitration clause, b) ancillary measures, c) inconsistent recognition of judgments as in some Member States judgments on merits are recognized under the Regulation and some are not, and d) conflicting arbitral awards and judgments and the open question whether an arbitration agreement or pending arbitration should have *lis pendens* effect although the old Brussels I Regulation states that it should not be applied. The Heidelberg Report also points out that in some Member States judgments endorsing arbitral awards are recognized under the Regulation (Heidelberg Report, 2007: 55–56). Based on this, unpredictability and inconsistent application of the Regulation to issues related to arbitration is one of the key factors in interface collisions.

During the whole revision process related to the interface, the importance of the New York Convention has been highlighted. The starting point for the revision has been to respect the regime created by the convention and possible solutions to the interface issues have circled around finding guiding principles to clarify how the two regimes could more effectively coexist and cooperate. Already in the Heidelberg Report it was stated that the “regulation should not address issues dealt with by the New York Convention”. Thus, no directly overlapping articles should be included in the revised Regulation. However, it is pointed out that additional and supporting provisions would not undermine the arbitration regime (Heidelberg Report, 2007: 54). The discussion how the deletion of the arbitration exclusion would affect the coexistence of the two systems is valuable. The work conducted in drafting the report is particularly important as it has – and still is- enabled fruitful discussion on the interface. In legal literature Azzali and de Santis have highlighted in a similar vein that “[a]t the European level, there is no uniform application of the New York Convention, because each Member State interprets its rules differently. --- On the other hand, such a situation gives rise to some anomalies in the functioning of the system, such as parallel proceedings, with conflicting decisions, which undermine the certainty and the stability of commercial relations in the EU internal market.” (see Azzali, de Santis, 2012: 74).

In addition to this, the report proposes that recognizing a judgment from another Member State should be barred if said judgment sets aside the arbitration agreement, in other words, non-respect of arbitration agreement would prevent the enforcement through Brussels I Regime. A crucial issue related to this is the question whether an

arbitral award can be assimilated to a judgment and the importance of residual control of procedural fairness necessary as awards are heterogeneous. Based on this, the report concludes that no such inclusion should be introduced. However, a specific instrument for the interface would be advisable where exclusive jurisdiction for recognition of arbitral awards would be with the courts where the award was given and that such decision would be enforced in other Member States “without any additional formality” (Heidelberg Report, 2007: 63).

Possible options for the recast were discussed in the Heidelberg Report. One option was to leave the whole interface issue as it was and not to extend the scope of the new regulation to include provisions on arbitration. The report emphasizes that no fundamental changes should be introduced but at the same time points out that the present *status quo* is not satisfactory. Following this, it is suggested that an exclusive jurisdiction in arbitration-related cases would be granted to the courts of the place of arbitration, and, to further facilitate the determination of this court of jurisdiction, a guideline stipulating uniform rules for the determination would be introduced (Heidelberg Report, 2007: 59–60).

To conclude, the Heidelberg Report provided for measures to overcome the interface issues either through the deletion of the arbitration exclusion and emphasizing the prevalence of New York Convention, or through provisions clarifying the interface. In any case, changes to the old *status quo* were recommended. This second “positive and more comprehensive” approach would be reached through provisions in granting exclusive jurisdiction in ancillary measures and in recognizing the arbitral award to courts of the place of arbitration (Heidelberg Report, 2007: 64 – 65).

As Advocate General Wahelet points out in his opinion on the *Gazprom* case,¹⁷ the Heidelberg Report was given before the *West Tankers* judgment. In *West Tankers* the General Advocate Kokott had stated that as there were no means of coordinating jurisdiction of arbitral tribunals with jurisdiction of courts and hence, “only the inclusion of arbitration in the scheme of the old Brussels I Regulation could remedy the situation”,¹⁸ an opinion upon which the CJEU agreed.

3.2 The Commission’s Green Paper 2009 and Public Consultation

In spring 2009, the Commission adopted a Report and a Green Paper on the application and review of the old Brussels I Regulation.¹⁹ Both of these instruments renewed the conclusions reached in the Heidelberg Report and therefore the Commission proposed a partial deletion of the arbitration exclusion. The Green Paper emphasized that the New York Convention was important and its role should not be undermined through the revision of the Brussels I Regulation, but, the emerged interface issues should be addressed. The Commission stated in the Green Paper that:

“In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. 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.”²⁰

In addition, the Commission considered that such deletion could further facilitate arbitration as clear jurisdiction rules on provisional measures would be introduced. Also, the Commission addressed the difficult issue of parallel proceedings in the courts and arbitration by claiming that the deletion might ensure the recognition of a judgment setting the arbitral award aside in situations where the arbitration agreement is held valid in one Member State and invalid in another.²¹

The public consultation opened asked for opinions regarding the interface and actions that would be appropriate to strengthen the effectiveness of arbitration agreements, ensure good coordination between parallel court and arbitration proceedings and enhance the effectiveness of arbitral awards.

In the Commission’s report, parallel proceedings and the inconsistent practice of recognition in the Member States were addressed. According to the report, the New York Convention usually functions adequately, but, interface issues arise e.g. when an arbitration agreement is held valid by the arbitration tribunal but not by the court. It is also pointed out that the recognition and enforcement of judgments on the validity of the arbitration agreement is uncertain.²² According to the report, the pain spots of the *status quo* included 1) parallel proceedings, 2) national laws strengthening arbitration which are incompatible with the Regulation, and 3) the lack of uniform allocation of jurisdiction in ancillary or supportive proceedings. In addition, it was pointed out that the recognition of a judgment was uncertain if such judgment disregarded an arbitration clause. Also, it is pointed out in the report that “the recognition and enforcement of arbitral awards, governed by the New York Convention, is considered less swift and efficient than the recognition and enforcement of judgments”.²³

The public consultation launched by the Green Paper on the interface between the Brussels I Regime and arbitration provided opinions from several experts, stakeholders, arbitration institutes and others.²⁴ Most of the stakeholders adopted a negative stance towards a partial deletion of the arbitration exclusion.²⁵ As a result, the public consultation provided divergent opinions on which would be the best way forward to battle parallel proceedings and enhance arbitration within the European Judicial Area. However, most stakeholders considered the New York Convention to be a satisfactory instrument within the EU and its role should not, therefore, be diminished through the Brussels I Regime.

3.3 Commission's Proposal for Brussels I (Recast) and the Parliamentary process

The Commission noted the opinions received through the public consultation in its impact assessment and pointed out that the three possibilities concerning arbitration where either 1) to uphold the *status quo*, which would not prevent abusive litigation tactics, 2) to extend the exclusion also to proceedings where the validity or arbitration agreement was contested, so that such judgments would not be governed by the Brussels I Regulation (Recast), or 3) to improve the effectiveness of arbitration through staying the proceedings in a court in cases concerning arbitration if an arbitral tribunal or court of the seat of arbitration was seized.²⁶

The Commission chose the third policy option to enhance the effectiveness of arbitration by partial deletion of the arbitration exclusion. The Commission's proposal for Brussels I Regulation (Recast) included a specific rule which would have aimed at improving the interface between the two systems and to prevent parallel proceedings in the courts and arbitration tribunals. The specific rule in Article 29 would have obligated the courts to stay its proceedings if its jurisdiction would be contested on the basis of an arbitration agreement. According to the Commission's proposal, such provision would "eliminate the incentive for abusive litigation tactics".²⁷ Also, the proposal included recitals which would address abusive litigation tactics, place of arbitration, proceedings pending before courts of third States and protective measures. It should be pointed out that online arbitration was not discussed in the proposal, although its importance is increasing also in the EU.²⁸

During the parliamentary process different opinions were discussed. During the public consultation many opinions voiced that the partial inclusion of arbitration into the Brussels I Regime was not supported.²⁹ The European Employment and Social Committee adopted on December 16, 2009 a relatively positive position towards a partial inclusion of arbitration as it considered this to "safeguard measures to support arbitration, allow for the recognition of judgments on the validity of an arbitration agreement and, facilitate the recognition and enforcement of judgments involving an arbitration award."³⁰ The Legal Affairs Committee adopted the stance of maintaining the exclusion and facilitating the interface issue through recitals in its report on 29.6.2010.³¹ The European Parliament adopted on September 7, 2010, an oppositional stance to the Commission's proposal of partial inclusion.³² In its note June 1, 2012, the Council adopted a negative stance towards a partial inclusion and suggested that the Commission's proposal should be rejected.³³

In the end, the arbitration exclusion was upheld and new recitals were included and, after the Council had accepted the wording, the European Parliament adopted the legislative resolution on November 20, 2012.

However, no provisions on the exclusive jurisdiction or on parallel proceedings were accepted. It is clear that the result was mainly a compromise.³⁴ Recasting the Brussels I Regulation is a politically significant feat and its main objective was abolishing the

exequatur procedure. While considering the objectives behind the whole revision process, it becomes evident that the interface between the Regulation and arbitration, although a significant and complicated question in itself, was mainly a side note. In the end, no significant changes were made, but, the status of the new recitals and how they will affect the future case-law is still unknown.

4 Changes to the old *status quo*

As a result of the revision debate, the preamble 12 was included in the Brussels I Regulation (Recast). The objective of the recitals is two-fold: on the one hand, they confirm the existing doctrine and the *status quo* defined by the CJEU, on the other hand, they aim at further clarifying and guide the future case-law. Advocate General has in the *Gazprom* case considered the recital to “---somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted”.³⁵

In addition to the new recital, the arbitration exclusion in Article 1 (2) was maintained. Also, a new article 73 was introduced which provides for the relation between the Regulation and the New York Convention. According to the article 73 (2), “this Regulation shall not affect the application of the 1958 New York Convention.” It is uncertain how the article will be applied in the future *acquis*, but the provision should be understood to emphasize the precedence of the New York Convention when applicable. This principle has been the starting point already in the Heidelberg Report and has been renewed several times also during the legislative process.

There are four paragraphs in the new recital first of which confirms the existing doctrine based on the negative effect of the Kompetenz-Kompetenz principle. The first recital provides that “This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.” Similarly, the paragraph 4 excludes also ancillary proceedings related to arbitration which follows from the CJEU case-law (See also Hauberg Wilhelmsen, 2014: 169).

However, paragraphs 2 and 3 of the recital strive for further clarifications of the existing *status quo*. Paragraph 2 seeks to avoid the controversy of the *West Tankers* and *National Navigation* cases.

According to paragraph 2 of the recital 12, “A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.” According to the Advocate General Wahelet in *Gazprom* case, paragraph 2 of recital 12 closely resembles the

policy option 2 of the Commission’s proposal, i.e. extension of the arbitration exclusion to all disputes where the validity of arbitration agreement was contested.³⁶

Paragraph 3 of the recital 12 provides for the continuation of circulation of judgments on the merits. Based on this, enforcing an arbitral award despite judgment on the merits is not a breach of Member States’ obligations. Paragraph 3 provides that “On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognized or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.”

In any case, it is apparent that the new recital does not provide a solution for the problem of parallel proceedings. As stated above, the revision process itself sheds light on the reasons why this key issue was not addressed, as during the public consultation and the EP legislative process many concerns were voiced that partial inclusion would only confuse the issue further and could prove to be detrimental to the dispute resolution market.

It should be noted that, the full meaning of the recital remains open. However, a first indication of the impact of the recital was given shortly after the Brussels I Regulation (Recast) entered into force by the ECJ in its ruling in the case C-536/13 *Gazprom OAO* on the interpretation of the old Brussels I Regulation. The Brussels I Regulation (Recast) entered into force on January 10, 2015, but the ECJ’s judgment on the interpretation of the earlier regulation (44/2001) in the *Gazprom* case was rendered on May 13, 2015.³⁷

The facts of the *Gazprom* case are as follows. The Lithuanian company *Lietuvos dujos* (LD) bought gas from *Gazprom* in Russia for distribution in Lithuania. The company’s main shareholders were a German company *E.ON Ruhrgas International GmbH* (38,91 %), *Gazprom* (37.1 %) and the state of Lithuania (17.7. %). In 2004 the main shareholders had concluded a shareholders’ agreement, which included an arbitration clause. In 2011 the Lithuanian government initiated proceedings concerning LD and its general manager in Lithuania. *Gazprom* stated that these proceedings were in breach of the shareholders’ agreement and commenced arbitration proceedings in Stockholm. In 2012 the arbitral tribunal declared that there had been a partial breach of the agreement and ordered the Lithuanian government to withdraw the proceedings in Lithuania. After this *Gazprom* sought to have the arbitral award recognised and enforced in Lithuania, which the Lithuanian Court of Appeal refused on the basis of public policy. After *Gazprom*’s appeal, the Supreme Court of Lithuania evaluated the award to include an anti-suit injunction and made a reference to ECJ for a preliminary ruling.

The case revived the question, whether anti-suit injunctions issued not by a national court but by an arbitral tribunal situated in another Member State were contradictory to the Brussels I Regime.

In the opinion of the Advocate General the recitals of the Brussels I Regulation (recast) should be taken into consideration in deciding the case, which started as a request for a preliminary ruling on the interpretation of the old Regulation. According to the Advocate General, the recitals formulate a clear rejection by the legislator of the principles established in *West Tankers*³⁸, especially when seen in the context of the legislative history.³⁹ Thus the Advocate General suggests to re-establish the interpretation that has been prevalent in the *Marc Rich* case. The arbitration exclusion must in his view be interpreted widely and anti-suit injunctions would therefore not be contrary to the Brussels I Regime (Recast). Hence, the recognition and enforcement of arbitral awards should be exclusively governed by the New York Convention and the Brussels I Regime must be interpreted as not requiring the court of a Member State to refuse to recognize and enforce an anti-suit injunction issued by an arbitral tribunal. In addition the Advocate General stated that the fact that arbitral award included an anti-suit injunction was not a sufficient ground for refusing to recognize the award on the basis of the New York Convention. The question after the Advocate General's opinion was whether the court would follow it or come to some alternative conclusion.

In its judgment, CJEU stated that the old Brussels I Regulation should be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State. The court reasoned that this followed from the scope of the old regulation, as it does not govern the recognition and enforcement of an arbitral award issued by an arbitral tribunal in another Member State. In other words, the CJEU lined itself to some extent along the Advocate General's opinion that anti-suit injunctions were not contrary to the Brussels I Regime. However, this position of the CJEU does not reverse the impact of the *West Tankers* case, as in the *Gazprom* case the award in question was *not* an anti-suit injunction within the meaning of *West Tankers* case. The proceedings for the recognition and enforcement of an arbitral award are governed by the applicable national and international law applicable in the Member State where enforcement is sought.

The judgment has been widely discussed in legal literature. A focal question is the relationship between the *Gazprom* and *West Tankers* judgments. Carlos González-Bueno and Laura Lozano argue that the judgment failed to address the ban on anti-suit injunctions established in *West Tankers* on the basis of the old Brussels I Regulation, although anti-suit injunctions could be used to prevent parallel proceedings. However, the authors predict that the CJEU will address the issue in further detail in further preliminary rulings on the interpretation of the Brussels I Regulation (recast) and the role of the Regulation's recitals (González-Bueno, Lozano, 2015: 85–97). Maximilian Sattler, in turn, argues that the CJEU's reasoning in the *Gazprom* judgment is surprisingly short and that “the CJEU's conclusion – that the *recognition* and *enforcement* of the award do not violate Regulation 44/2001 (paras 39 and 41) – comes

somewhat out of the blue”. The only ground given for the conclusion is the arbitration exclusion, which, in fact, has been established already in *West Tankers* (Sattler, 2016: 342–354). According to both Sattler and Trevor Hartley, the *Gazprom* judgment does not reverse the *West Tankers* judgment (Sattler, 2016: 342–354; Hartley, 2015: 965–975). In addition, Hartley points out that the CJEU changed the basis of the anti-suit prohibition in the *Gazprom* judgment from the sole wording of the Brussels I Regulation to “the general principle which emerges from the case-law of the Court”, using the court’s own formulation. Hartley considers that this shift to a broader case-law-based prohibition of anti-suit injunctions gives the court more room to manoeuvre in future decisions (Hartley, 2015: 965–975).

This leads us to the following. The CJEU’s *Gazprom* judgment did not completely meet the expectations placed on. The judgment does not overturn the court’s findings in the *West Tankers* case but neither does it provide further clarifications on the prohibition of anti-suit injunctions.

5 Conclusion

This article depicts a shift in the relation between the Brussels I Regime and arbitration. As the ideological starting point highlighting total independence of civil procedure and arbitration has at least partly failed, the discussion on finding an interface between the two systems has proved to be useful already in itself. It has become clear that preserving the autonomy of both systems is not sufficient in itself but instead, further attention should be paid to addressing the interface. To put it concretely, this discussion has resulted in an attempt to reconcile the overlap areas through a compromise.

The new Brussels Regulation (Recast) preserves the old *status quo* but with some clarifications. No new Articles were introduced. However, the Brussels I Regulation (Recast) includes recital 12 which clarifies the content of the preserved *status quo* and the content of legal exclusion of arbitration from the scope of the Regulation. As is apparent from the discussion in the revision process, the new recitals in the Regulation have not solved the interface issues. In the end, no comprehensive solutions were found to overcome the problem of parallel proceedings in arbitration and cross-border civil procedure.

Already the case-law concerning the old Brussels Convention and the Brussels I Regulation pointed out how the exclusion of arbitration from the scope of the Brussels I Regime was considered unproblematic and self-evident in theory but, in practice, several legally unclear issues ensued from it regardless. This unpredictability is the unavoidable consequence of regulating recognition and enforcement on a cross-border level between two partly overlapping, heterogeneous and complicated systems. As both arbitration and enforcing arbitral awards through New York Convention and Brussels I Regime rely on national systems for application, neither of the systems operates in a vacuum and complexity is largely endogenous.

The CJEU has a significant role in formulating the future *acquis* on the collision of systems in practice. The relevance given to the new recitals is still open and needs to be addressed. Taking that into consideration, it is unclear how the National Navigation case would be solved in accordance with the new Brussels I Regime. In the light of recital 12, paragraph 2 it may be assumed that the English courts would not have considered to be bound by a decision of a court of another Member State on the preliminary question of the validity of the arbitration agreement.

The CJEU's judgment in the *Gazprom* case addressed two issues, arbitration exclusion and the prohibition of anti-suit injunctions, although the judgment falls short of the vast expectations laid on it. The *Gazprom* decision does not reverse the doctrine established in *West Tankers* and the role of anti-suit injunctions within the EU remains to some extent unclear. However, the formulation of the CJEU's wording suggests that the issue of anti-suit injunctions as a means to battle parallel proceedings is not yet exhausted. In any case, the parallel proceedings are not the only interface problem between the systems of civil procedure and arbitration but instead the preservation of this systemic coexistence will likely call for further clarifications in the future.

Notes

¹ The New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958) United Nations Treaty Series, vol. 330, No. 4739.

² See discussion in Carducci, 2011:176.

³ Case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] E.C.R. I-03855.

⁴ Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] E.C.R. I-7091.

⁵ Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R. I-663.

⁶ Case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] E.C.R. I-03855, paragraph 27.

⁷ Article 24 of the Brussels Convention corresponds with Article 31 of the Brussels I Regulation (old) and with Article 35 of the Brussels I Regulation (recast).

⁸ Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] E.C.R. I-7091, paragraph 33.

⁹ Generally speaking, anti-suit injunctions refer to court orders that forbid a party to initiating or continuing proceedings in another jurisdiction by imposing sanctions for such actions. On anti-suit actions in the EU in general see, e.g. Sattler, 2016: 342–354.

¹⁰ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

¹¹ Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565.

¹² Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R. I-663, paragraph 24.

¹³ Some authors conceive the recognition and enforceability of the judgment as a natural consequence of the predominant interpretation of *West Tankers*. See Hauberg Wilhelmsen, 2014: 178.

¹⁴ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397.

¹⁵ See for example Mourre, Vagenheim, 2009: 83; and Knuts, 2010: 457–458.

¹⁶ See Hess, B., Pfeiffer, T. and Schlosser, P. (2007) Report on the Application of Regulation Brussels I in the Member States. Study JLS/C4/2005/03. Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht (Heidelberg Report).

¹⁷ See Case C-536/13 Gazprom, Opinion of the Advocate General Wathelet, delivered on 4.12.2014, ECLI:EU:C:2014:2414, paragraph 96.

¹⁸ “Within the scope of application of the Regulation irreconcilable decisions in two Member States should be avoided as far as possible. In cases of conflict of jurisdiction between the national courts of two Member States, Articles 27 and 28 of Regulation No 44/2001 ensure that there is coordination, as particularly noted by the French Government. However, since arbitration does not come within the scope of the Regulation, at present there is no mechanism to coordinate its jurisdiction with the jurisdiction of the national courts.” See Case C-185/07 Allianz SpA (formerly Riunione Adriatica Di Sicurtà SpA) and Others v West Tankers Inc., Opinion of the Advocate General Kokott, delivered on 4 September 2008, ECLI:EU:C:2008:466, paragraphs 71–73.

¹⁹ See Commission of the European Communities, Report on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 174 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0174&rid=1/> retrieved 24.10.2016. See also Commission of the European Communities, Green Paper on the Review of Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM (2009) 175 final, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282009%290175_/com_com%282009%290175_en.pdf retrieved 24.10.2016.

²⁰ Green Paper, p. 9.

²¹ *ibid.*

²² Commission of the European Communities, Report on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 174 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0174&rid=1/> retrieved 24.10.2016, p. 9.

²³ *ibid.*

²⁴ See for example: Hauberg Wilhelmsen, 2014: 169.

²⁵ Association for International Arbitration, submission in relation to the Green Paper released in connection with the review of Regulation 44/2001, available at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academi_cs_others/association_for_international_arbitration_en.pdf retrieved 16.10.2016.

²⁶ European Commission, Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC (2010) 1547 final, available at: http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf/ retrieved 24.10.2016, p. 36-37.

²⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) COM (2010) 748 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF> retrieved 24.10.2016.

²⁸ UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014). Available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html/ retrieved 19.12.2014. On due process in online arbitration see, Kaufmann-Kohler, G. and Schultz,

T. (2004) *Online Dispute Resolution. Challenges for Contemporary Justice*. The Hague: Kluwer Law, p. 197.

²⁹ See Consultations on the Report and Green Paper on the Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at: http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm retrieved 19.12.2014.

Also, Hauberg Wilhelmssen, 2014: 169.

³⁰ European Economic and Social Committee, Opinion on the Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009) 175 (final) 2009, available at: https://dm.eesc.europa.eu/eesc/2009/_layouts/WordViewer.aspx?id=/eesc/2009/10001999/1931/ces1931-2009_ac/ces1931-2009_ac_en.doc&DefaultItemOpen=1&Source=http%3A%2F%2Fdm%2Eeesc%2Eeuropa%2Eeu%2FEESCdocumentSearch%2FPages%2Fopinionsresults%2Easpx%3Fk%3D44%252F2001%26r%3Ddocumentlanguage%253D%2522AQJFThABZG9jdW1lbnRsYW5ndWFnZQEBXgEk%2522/ retrieved 19.12.2014.

³¹ See European Parliament, Report 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)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0219+0+DOC+XML+V0//EN>, retrieved 24.10.2016. See, Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)) 15.12.2012.

³² 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)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0304+0+DOC+XML+V0//EN>, retrieved 24.10.2016.

³³ Council of European Union, addendum to note no. 10609/12 JUSTCIV 209 CODEC 1495 ADD 1, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010609%202012%20ADD%201>, retrieved 24.10.2016.

³⁴ “Compromise” was the word used in the debate at the European Parliament. European Parliament, Minutes of the meeting on Monday, 19 November 2012, Strasbourg, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20121119&secondRef=ITEM-017&language=EN&ring=A7-2012-0320/> retrieved 24.10.2016.

³⁵ See Case C-536/13 *Gazprom*, Opinion of the Advocate General Wathelet, delivered on 4.12.2014, ECLI:EU:C:2014:2414, paragraph 91.

³⁶ Case C-536/13 *Gazprom*, Opinion of the Advocate General Wathelet, delivered on 4.12.2014, ECLI:EU:C:2014:2414, paragraph 125.

³⁷ Case C-536/13 *Gazprom OAO v Lietuvos Respublika* [2015]. EU:C:2015:316.

³⁸ Case C-536/13 *Gazprom*, Opinion of the Advocate General Wathelet, delivered on 4.12.2014, ECLI:EU:C:2014:2414.

³⁹ This view is shared by some authors (see, Bollée, 2013: 982).

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